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Vulnerability and the Protection of Vulnerable Groups in International and European Human Rights Law

Nóra Jakab

ABSTRACT

The concept of vulnerability has become pivotal in understanding inequality and exclusion in contemporary human rights law. It is not inherent but shaped by intersecting social, economic, biological, and political conditions. International frameworks – such as those developed by the UN, the European Court of Human Rights (ECtHR), and the European Union – have incorporated this concept to offer enhanced protections for groups at higher risk of discrimination, such as women, children, persons with disabilities, ethnic minorities, and refugees. These frameworks adopt both hard and soft law instruments to ensure substantive equality, moving beyond formal declarations of equal treatment. From international conventions such as Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and onvention on the Rights of Persons with Disabilities (CRPD) to European Union (EU) directives and ECtHR jurisprudence, a common thread emerges: vulnerability requires differentiated legal responses tailored to context. The recognition of intersectional discrimination and the evolution of positive state obligations demonstrate a shift toward a more responsive, empowerment-oriented understanding of human rights.

KEYWORDS

vulnerability, human rights, discrimination, intersectionality, European Court of Human Rights, United Nations, European Union, substantive equality, marginalised groups, legal protection, empowerment, positive obligations

The concept of vulnerability has come to play a crucial role in the study of inequality, exclusion, and disadvantage in the context of contemporary human rights law. Vulnerable groups are those whose susceptibility to discrimination, exclusion, and danger is increased by social, economic, biological, or political factors. This includes women, children, people with disabilities, older people, ethnic and religious minorities, migrants, migrant workers, and refugees, to mention a few. The vulnerabilities of these groups are not inherent but are often a consequence of historical inequalities.

In response to these elevated risks, a range of international and regional legal instruments have been developed to address the special needs of vulnerable individuals and groups. At the international level, the United Nations (UN) system has developed specific instruments – namely the Convention on the Elimination of All

Nóra Jakab (2026) 'Introduction – Vulnerability and the Protection of Vulnerable Groups in International and European Human Rights Law' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 15–72. https://doi.org/10.71009/2026.nj.hrpovg_0

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Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities – to address not only the prohibition against discrimination but also the adoption of affirmative action strategies to promote substantive equality and empowerment. These instruments represent a transition from the concept of equality to a more responsive approach to human rights.

Similarly, the European Court of Human Rights (ECtHR) has also incorporated the notion of vulnerability in its practice, especially in cases related to the right to life and non-discrimination within the framework of the European Convention on Human Rights (ECHR). Although the ECHR does not have a separate concept of vulnerability defined in the Convention itself, the Court has repeatedly emphasised the need for special protection for vulnerable applicants in cases where lack of action by the state or institutional bias aggravates the vulnerability of applicants to harm. Indeed, in the most prominent cases involving victims of domestic violence, asylum seekers, persons with disabilities, and members of the Roma community before the ECtHR, the Court has developed a nuanced concept of vulnerability to inform the dynamic application of the positive obligations of states under the Convention. The Court has also recognised the need for differential treatment in promoting substantive equality in these cases.

At the EU level, vulnerability has been addressed in primary law, such as in the Charter of Fundamental Rights of the European Union, as well as in secondary legislation in the form of a series of directives focusing on discrimination, violence, and inequality. The EU has adopted an integrated approach to vulnerability, using hard law tools such as anti-discrimination directives, the Violence Against Women Directive, or the Work-Life Balance Directive, in combination with soft law strategies focusing on gender mainstreaming, intersectional analysis, or social inclusion. The EU has also adopted the concept of multiple or intersectional discrimination, which has special relevance to persons who experience disadvantage on two or more grounds, for example, based on race and gender, or disability and socioeconomic status. The Pay Transparency Directive 2023/970/EU has specifically recognised intersectional discrimination as a cumulative form of inequality.

Cumulatively, the frameworks of the UN, the ECtHR, and the EU are all committed to the same approach that vulnerability is not just a position of weakness but one that demands heightened legal consideration and appropriate remediation based on context. Through the incorporation of vulnerability into their legal discourse, all these frameworks have gone beyond the declaration of the ideal of equality and have instead subscribed to a substantive approach that is better equipped to address the practical disadvantages that the most marginalised groups face.

The book has seven chapters, each of which deals with the protection of a vulnerable group in the context of the UN, the ECtHR, and the EU. The chapters focus specifically on a given vulnerable group and were prepared by a working group of specialists. Within each working group, a lead author was appointed to oversee the process of writing each chapter in order to ensure its internal consistency. The pattern of each chapter is similar in that each chapter is divided into three parts, comparing

the legal protection and standards of a given group in all three regimes mentioned above. The role of each lead author has been instrumental in ensuring thematic and terminological consistency in each of the three sub-chapters.

1. Children

1.1. The UN's Role in the Protection of Children

Children are among the most vulnerable members of society, but their vulnerability is not uniform. It varies by age, maturity, health conditions, cognitive abilities, and social circumstances. While all children require protection, certain groups face increased risks, such as children with disabilities, those in state care or detention, those from minority or indigenous backgrounds, those affected by poverty, conflict, displacement, or exploitation, and those living on the streets. Recognising and addressing these layered vulnerabilities is central to the international child protection framework.

The modern history of children's rights in international law began with the *1924 Geneva Declaration on the Rights of the Child*, adopted by the League of Nations. Drafted by Eglantyne Jebb of Save the Children, this declaration laid out five fundamental principles: ensuring children's development, providing help to the sick, hungry, or orphaned, prioritising children in emergencies, protecting them from exploitation, and educating them to serve humanity. These principles laid the moral and ideological groundwork for later legal instruments.[1]

In 1959, the United Nations (UN) adopted the *Declaration of the Rights of the Child*, which expanded the Geneva Declaration into ten principles. These included the child's right to equality, protection, identity, development, special care in case of disabilities, family support, free education, protection from abuse, and upbringing in an atmosphere of peace and tolerance. Though not legally binding, this declaration was a major step toward formalising children's rights and setting global standards for child welfare.[2]

The most comprehensive and legally binding instrument to date is the *1989 United Nations Convention on the Rights of the Child (UNCRC)*. Ratified by nearly all countries, it enshrines civil, political, economic, social, and cultural rights for children. It is based on four core principles: non-discrimination, the best interests of the child, the right to life, survival, and development, as well as respect for the views of the child.[3]

The principle of non-discrimination (Article 2) guarantees that all rights apply equally to every child, regardless of race, gender, language, religion, or any other status. States must protect children not only from direct discrimination but also from harm caused by the status or beliefs of their parents or guardians.

1 Hrabar, 2024, pp. 28, 32–34.
2 Declaration of the Rights of the Child.
3 United Nations Convention on the Rights of the Child.

The best interests of the child (Article 3) must be a primary consideration in all actions concerning children. It functions on three levels: as a substantive right that prevails in conflicts of interest, as an interpretative tool that guides the understanding of legal provisions in favour of children, and as a procedural rule ensuring that all child-related processes prioritise children's well-being.

The right to life, survival, and development (Article 6) recognises life as an inherent right of every child. States must ensure not only a child's survival but also their full physical, mental, moral, and social development, especially for children in vulnerable situations such as those with disabilities or living in conflict zones.

Participation rights are reflected in Article 12, which ensures children have the right to freely express their views in all matters affecting them and have those views given due weight according to their age and maturity. This includes the right to be heard in judicial and administrative proceedings either directly or through a representative.

These rights are often categorised under the "3 Ps": Provision, Protection, and Participation. Provision rights include access to essential services like healthcare, education, and social welfare. Protection rights focus on shielding children from all forms of abuse, neglect, exploitation, and violence. Participation rights ensure children can engage in decisions that affect their lives and be active members of society.[4]

To reinforce specific areas of child protection, the UNCRC includes three *Optional Protocols*. The Optional Protocol on the Involvement of Children in Armed Conflict (2000) raises the minimum age for direct participation in hostilities to 18 and imposes strict conditions on the voluntary recruitment of minors aged 16–17. It aims to eliminate the use of child soldiers, though challenges remain due to difficulties in verifying age and socioeconomic pressures in conflict zones. The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography addresses growing concerns about child trafficking and sexual exploitation, especially in the context of the internet and global sex tourism. It calls for comprehensive, integrated responses to these issues, including legal reforms, prevention strategies, and increased public awareness. The third, Optional Protocol on a Communications Procedure, enables children or their representatives to file complaints directly with the UN Committee on the Rights of the Child when domestic remedies have been exhausted. This strengthens accountability and gives children a voice in international human rights proceedings.[5]

The *Committee on the Rights of the Child*, established under Article 43 of the Convention, is the treaty-monitoring body responsible for overseeing the implementation of the UNCRC. Comprising 18 independent experts, the Committee reviews periodic

4 See Márta Benyusz and Josipa Kokic's chapter.

5 The Optional Protocol on the Involvement of Children in Armed Conflict; The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography; Optional Protocol on a Communications Procedure.

reports from states, issues concluding observations, and provides general comments to clarify the interpretation of child rights norms.[6]

The role of UNICEF is also central in the global child protection framework. Established in 1946 as an emergency fund for children affected by World War II, UNICEF has evolved into a permanent agency supporting child welfare in over 190 countries. It focuses on health, education, nutrition, emergency relief, and policy advocacy, and plays a vital role in promoting the Convention's principles.[7]

Non-Governmental Organisations (NGOs) and National Human Rights Institutions (NHRIs) have also played a pivotal role in both the drafting and ongoing implementation of the Convention. NGOs were instrumental in early advocacy and drafting efforts, and they continue to support monitoring, reporting, and holding governments accountable.

In conclusion, the international framework for children's rights has evolved significantly over the past century – from moral appeals to legally binding obligations. At its core is the recognition that children are not merely passive recipients of adult care but are rights-holders. This shift toward recognising children as active participants in society demands that all actors – governments, institutions, communities, and individuals – ensure that children's rights are respected, protected, and fulfilled.

1.2. The Role of the European Court of Human Rights in Safeguarding Children's Rights

The European Court of Human Rights (ECtHR) serves as the principal judicial body in Europe for upholding children's rights, primarily through the interpretation of the European Convention on Human Rights (ECHR), the Universal Declaration of Human Rights, and the UN Convention on the Rights of the Child (UNCRC). The protection of children's rights operates within a hierarchical structure, where international standards guide regional instruments, which in turn inform national laws. At the top of this hierarchy stands the UNCRC, the most comprehensive global instrument dedicated to the rights of the child.

Although the ECHR does not focus solely on children, it has significantly influenced child rights jurisprudence. The ECtHR applies the ECHR to children by interpreting provisions such as the right to private and family life, protection from inhumane treatment, and the right to education. The ECHR contains two subsystems of rights: inherent rights applicable to all individuals, such as life and liberty, and rights acquired with maturity, such as the right to a fair trial or marriage. It also includes enforceable bans against discrimination, torture, and forced labour, which apply to all, including children. Despite limited child-specific provisions in the ECHR, the ECtHR has repeatedly emphasised its applicability to children and drawn upon broader frameworks like the UNCRC to interpret rights in child-centred cases. Article 1 of the ECHR obliges member states to guarantee the rights enshrined in the

6 Ibid.
7 See more *UNICEF*, no date.

Convention to all persons within their jurisdiction, including children. While children can, in theory, file applications to the ECtHR independently, practical barriers such as lack of legal knowledge, financial means, or procedural support often prevent direct access. Consequently, most applications involving children are submitted by parents or guardians, often citing violations of their own rights that indirectly affect the child. Despite these limitations, the ECtHR has consistently demonstrated its role as the protector of children's rights in Europe, frequently referencing the UNCRC and invoking the "best interests of the child" principle in its judgments.[8]

The evolution of the ECtHR's engagement with children's rights can be divided into three key phases: Foundation and Early Interpretation (Pre-UNCRC Era): Even before the UNCRC's adoption, the ECtHR interpreted the ECHR in a way that implicitly protected children. In *Tyrer v. the United Kingdom* (1978), the Court found that corporal punishment violated Article 3, establishing a dynamic "living instrument" approach, adapting the Convention to contemporary human rights standards. This early phase laid the groundwork for future child-specific jurisprudence.[9]

Consolidation and Integration of UNCRC Standards (Post-1989): Following the widespread ratification of the UNCRC, the ECtHR began explicitly referencing its provisions. The Court's reliance on the "best interests" principle became more prominent, and its judgments reflected a growing alignment with international child rights norms. However, children continued to face practical challenges in accessing the Court directly, with most cases still initiated by adults on their behalf.[10]

Expansion and Specialisation (21st Century–Present): In recent years, the ECtHR has refined its focus on children, particularly in terms of non-discrimination. Landmark rulings such as *D.H. and Others v. the Czech Republic* (2010) condemned the segregation of Roma children in education, identifying this as a violation of Article 14 (discrimination) in conjunction with the right to education. In *Fabrice v. France* (2013), the Court challenged discriminatory inheritance laws affecting children born out of wedlock, reinforcing that all children deserve equal treatment, regardless of their parents' marital status. These cases demonstrate the Court's growing sensitivity to children's rights within family, education, and privacy contexts.[11]

Despite these advancements, structural challenges persist. The ECtHR cannot overrule national law in the way domestic courts can, but it can identify legal gaps and promote remedies consistent with ECHR standards. Based on current practice, several improvements have been proposed to better serve children's rights:

Direct Participation Mechanisms: The ECtHR and national systems should implement child-friendly procedures allowing children to participate meaningfully in

8 See the chapter written by S. Buletsa.

9 Case of *Tyrer v. The United Kingdom*, (Application No. 5856/72), Judgment, Strasbourg, 25 April 1978.

10 Daly, Ruxton and Schuurman, 2015, p. 39.

11 Case of *D.H. And Others v. The Czech Republic*, (Application No. 57325/00), Judgment, Strasbourg, 7 February 2006; Case of *Fabris v. France*, (Application No. 16574/08), Judgment (just satisfaction and striking out), Strasbourg, 28 June 2013.

court cases, considering their age and maturity. For instance, in *Saviny v. Ukraine*, the Court criticised the lack of child involvement in decisions to remove them from parental care.[12]

Procedural Safeguards and Best Interests Assessments: National authorities, under ECtHR oversight, must ensure that decisions affecting children are based on individual best-interest assessments, as emphasised in cases like *Mahamed Jama v. Malta*, particularly when errors in age determination can lead to rights violations.[13]

Addressing Discrimination and Systemic Threats: Member states must actively combat discrimination, support inclusive education, provide accessible services for children with disabilities, and regulate exploitative practices such as unethical surrogacy arrangements, especially across borders.

Balancing Anonymity and Identity in Assisted Reproduction: In cases such as *Mennesson v. France* and *K.K. and Others v. Denmark*,[14] the ECtHR underscored children's right to know their origins while ensuring data privacy. Legal frameworks must balance these interests, preventing statelessness and clarifying identity in surrogacy.

Media Responsibility: The portrayal of children in the media, especially those from vulnerable groups (e.g., migrants, minorities), must emphasise their agency and potential, rather than framing them solely as victims.[15]

Systemic Reform: Finally, effective protection of children's rights requires eliminating systemic barriers such as legal ambiguity, corruption, lack of resources, and outdated legislation. States must invest in judicial training and cross-sectoral collaboration among judges, social workers, police, and mediators, all guided by the best-interests principle.

In conclusion, while the ECtHR has made significant strides in protecting children's rights, continued development and reform are necessary to ensure that all children can access justice, enjoy equal protection, and grow up in environments that support their dignity, security, and potential.

1.3. EU's Framework for the Protection and Promotion of Children's Rights

The European Union (EU) has progressively solidified its role in safeguarding children's rights through a robust combination of strategies, binding legislation, non-binding recommendations, and institutional coordination. This commitment began to significantly strengthen in 2006 with the introduction of the document "*Towards*

12 Case of *Saviny v. Ukraine,* (Application No. 39948/06), Judgment, Strasbourg, 18 December 2008.

13 Case of *Mahamed Jama v. Malta*, (Application No. 10290/13), Judgment, Strasbourg, 26 November 2015.

14 Case of *Mennesson v. France*, (Application No. 65192/11), Judgment, Strasbourg, 26 June 2014; Case of *K.K. and Others v. Denmark*, (Application No. 25212/21), Judgment, Strasbourg, 6 December 2022.

15 Case of *N.Š. v. Croatia*, (Application No. 36908/13), Judgment, Strasbourg, 10 December 2020.

a Strategy on the Rights of the Child" (Strategy 2006),[16] which emphasised the need for an EU-wide framework to ensure that children's rights are consistently respected, protected, and promoted. It recognised children's rights as a distinct category within human rights, calling for specific policies addressing children's unique needs.

In 2011, the *EU Agenda for the Rights of the Child* (Agenda 2011) was adopted as a formal policy framework for 2011–2014. It reaffirmed the EU's and Member States' obligations under the UNCRC and reinforced the goal of making children's rights a central part of all EU policies.[17]

Central to the EU's legal framework is the *Charter of Fundamental Rights of the European Union (CFREU)*, particularly Article 24, which outlines three key child-specific rights: the right to protection and care, the right to express views freely and have them taken seriously, and the right to maintain regular contact with both parents. Importantly, the Charter reiterates the principle of the *best interests of the child* as a guiding principle in all child-related decisions. This principle applies vertically (in state actions) and horizontally (in family and societal relationships).

The EU supports this legal foundation with several regulations: Regulation 2019/1111 governs cross-border disputes in family law, including child custody, guardianship, and placement. It ensures swift and child-centred judicial proceedings.

Regulation 606/2013 facilitates mutual recognition of civil protection measures across Member States, including those safeguarding children from abuse.

Dublin Regulation III (Regulation 604/2013) addresses asylum applications and includes provisions on unaccompanied minors, emphasising their best interests.

GDPR (Regulation 2016/679) includes specific safeguards for children's data, acknowledging their limited capacity to fully understand digital risks.

Regulation 4/2009 (Maintenance Regulation) and Regulation 650/2012 (Succession Regulation) both provide enforceable rights for children in maintenance and inheritance matters.

In addition to regulations, directives strengthen children's legal protections:

- Directive 2013/33/EU requires the appointment of legal representatives for unaccompanied minors.
- Directive 2011/93/EU combats child sexual abuse and pornography with clear definitions, penalties, and victim protection measures.
- Directive 2011/36/EU targets human trafficking, offering specific protections for child victims.
- Directive 2016/800/EU ensures procedural safeguards for children in criminal proceedings, including access to legal counsel and parental presence.
- Directive 2003/86/EC regulates family reunification with provisions for unaccompanied minors, highlighting the importance of rapid and child-focused processes.

16 European Commission, 2006.
17 European Commission, 2021a.

- Directive 94/33/EC protects young people at work, prohibiting child labour except under strict conditions.
- Directive 2009/48/EC sets safety standards for toys, ensuring products marketed to children do not harm their health.
- Directive 2012/29/EU establishes rights and support services for child victims of crime, such as shelter, psychological support, and legal assistance.

Additional milestones include the EU's accession to the Hague Convention of 1993 on intercountry adoption, and its endorsement of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in 2009, which includes Article 7 – guaranteeing full rights for children with disabilities.

In 2021, the EU launched a new, non-binding political framework: the EU Strategy on the Rights of the Child (Strategy 2021)[18] and the European Child Guarantee (Guarantee 2021).[19] While not legislation, these documents set strategic goals to combat child poverty, prevent discrimination, and ensure access to essential services such as education, nutrition, and healthcare. Guarantee 2021 specifically urges Member States to ensure effective and free access to education, at least one healthy meal per school day, medical care, adequate housing, and nutritious food for children in need.

Support structures are also institutionalised. The EU Coordinator for the Rights of the Child[20] plays a key role in overseeing implementation, acting as a central contact point for child-related policies, cross-border mediation, and support in parental child abduction cases.

Recommendations play a crucial complementary role:
The 2013 Recommendation "Investing in Children" (2013/112/EU) introduced a holistic framework to break the cycle of disadvantage through access to resources, quality services, and child participation.

The 2021 Council Recommendation (2021/1004) established the European Child Guarantee, focusing on fighting child poverty and ensuring that every child has equal access to essential services.

Taken together, the EU's multifaceted approach – through treaties, binding laws, strategic policy instruments, and institutional roles – demonstrates an increasingly integrated effort to place children at the heart of human rights, welfare, and justice systems. The emphasis on the child's best interests, participation, and protection from exploitation is embedded across legal, social, and procedural frameworks. However, continued political will, cross-border coordination, and monitoring are essential to ensure that these commitments result in tangible improvements in children's lives across the EU.

18 Ibid.
19 Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee.
20 European Parliament, no date.

2. Disabled people

2.1. Historical, Legal, and Policy Perspectives on Disability Rights and Inclusion

The perception and treatment of people with disabilities have evolved significantly from ancient civilizations to modern international legal frameworks. Scholars such as Kálmán and Könczei argue that prejudice toward people with disabilities stems less from great civilizations and more from ancient fears, religious superstitions, and societal norms. While cultures like ancient Greece and Rome valued physical strength and health, they also showed rudimentary recognition of disability. In Sparta, physical imperfection was rejected, yet those disabled by war or labour were not deemed worthless. In Rome, people with mental or communication disabilities were assigned guardians, though often marginalised. Dwarfism and intellectual disability were commodified as entertainment for elites.[21]

The Middle Ages were characterised by fear, superstition, and religious interpretations of disability. Disability was often seen as divine punishment or demonic possession. Treatment was rare, and isolation was the norm. Disability was viewed as less than human, evident in practices such as the abandonment of disabled children.[22]

The 20th century marked a pivotal shift. After two world wars, institutional care expanded, and the first rehabilitation laws were passed, notably in the United States. The Nazi regime's eugenics programs, including forced sterilisation and murder under the "life unworthy of life" ideology, represent the darkest period of modern disability history. In response, the disability rights movement emerged, demanding autonomy, integration, and self-determination. The Independent Living Movement, led by activists like Ed Roberts, helped redefine disability as a civil rights issue. This momentum culminated in landmark legislation, including the Americans with Disabilities Act.[23]

Internationally, the United Nations (UN) has adopted a rights-based approach to disability. The 2018 UN Disability Inclusion Strategy called for mainstreaming disability rights across all activities, aligning with the Sustainable Development Goals (SDGs), particularly Goals 4 (education), 10 (reduced inequalities), and 11 (inclusive cities). Initiatives such as the International Day of Persons with Disabilities and the Global Disability Summit promote awareness and global cooperation. The 1982 World Programme of Action concerning Disabled Persons provided a strategic framework for equal opportunity, rehabilitation, and prevention. This was further reinforced by the World Health Organization (WHO)'s work on disability, the United Nations Development Programme (UNDP)'s mainstreaming efforts, and the UN's Standard Rules on the Equalisation of Opportunities.[24]

21 Kálmán and Könczei, 2002, pp. 31–32. Braddock and Parish, 2001, p. 15.
22 Ibid., p. 21.
23 Kálmán and Könczei, 2002, pp. 58–62.
24 United Nations, no date.

The Convention on the Rights of Persons with Disabilities (CRPD),[25] adopted in 2006, represents the most comprehensive legal framework for disability rights. Hungary signed and ratified the Convention in 2007, committing to respect, protect, and fulfil the rights of persons with disabilities. The Convention shifts the paradigm from a medical to a human rights model. It affirms that disability results from interaction between impairments and societal barriers. Thus, inclusion, accessibility, and autonomy are central.[26]

The Convention recognises the evolving and diverse nature of disability, emphasising empowerment and the principle of diversity. Disability is not a personal tragedy but a part of human diversity. This is reflected in Articles 1–5, which cover general obligations, equality, and non-discrimination. Article 3 outlines core principles, including dignity, autonomy, inclusion, and accessibility.

Special attention is given to:

- Women with disabilities (Article 6), who face multiple forms of discrimination, with cross-references in Articles 3, 8, 16, 23, 25, and 28.
- Children with disabilities (Article 7), with supporting provisions across the Convention that emphasise inclusive education (Article 24), family rights (Article 23), and protection from violence (Article 16).
- Self-determination, particularly through legal capacity (Article 12), independent living (Article 19), and private/family life (Articles 22–23).
- Participation and accessibility (Articles 9, 13, 18, 20, 29, 30), ensuring full civic, political, and cultural engagement.
- Solidarity rights, including health (Article 25), work (Article 27), and adequate living standards (Article 28).

The Convention includes a unique provision on international cooperation (Article 32), underlining the need for global support in implementing disability rights. It also defines disability (Article 1) and disability-based discrimination (Article 2), encompassing both direct and indirect forms and requiring reasonable accommodation.

Oversight is provided by the Committee on the Rights of Persons with Disabilities, composed of 18 independent experts. State parties must submit regular implementation reports. The Committee can issue recommendations and, under the Optional Protocol, consider individual complaints and conduct inquiries into systemic violations.

The European Union's role is also pivotal. As a party to the CRPD, European Union (EU) law must align with the Convention. This mixed agreement divides competence between the EU and its Member States. The Court of Justice of the European Union (CJEU) ensures interpretation in accordance with international obligations. Although

25 Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007; Optional Protocol to the Convention on the Rights of Persons with Disabilities, UN Doc. A/Res/61/106, 24 January 2007. On the genesis of the Convention, see also Rothfritz, 2010, pp. 103–120.

26 Dhanda, 2008, p. 44; Degener, 2006, p. 104; Degener, 2009, p. 34; Lachwitz, 2008, p. 143.

questions remain about whether the Convention forms part of EU constitutional law, the CFREU – especially Articles 21 (non-discrimination) and 26 (integration of persons with disabilities) – is interpreted in light of the CRPD, extending its influence across the legal system.[27]

The Convention integrates civil, political, economic, social, and cultural rights in one legal instrument. It treats persons with disabilities as full rights-holders and promotes inclusive policies across all life domains. Its rights are enforceable through a blend of national and international mechanisms, reflecting the continued evolution of disability from marginalisation to empowerment, from exclusion to full societal participation.

2.2. The ECHR and the CRPD – Disability Rights Jurisprudence and Evolving Standards

The European Court of Human Rights (ECtHR) has increasingly relied on the UN Convention on the Rights of Persons with Disabilities (CRPD) to guide its case law involving persons with disabilities. In addition to the CRPD, the ECtHR references other international instruments such as the Convention on Human Rights and Biomedicine, the Convention Against Torture (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Council of Europe recommendations. These instruments, when read together, have expanded the Court's interpretive approach, enriching its understanding of disability-related human rights.

A striking example is the case of *N. v. Romania (No. 2)*, where Romanian legislation only recognised full legal incapacity without consideration for individualised, proportionate alternatives. While Article 8 of the ECHR does not explicitly cover legal capacity, the ECtHR filled this normative gap by invoking Article 12(4) of the CRPD. The Court ruled that Romanian law violated Article 8 of the ECHR, showing how the CRPD's influence can enhance Convention protections.[28]

Another notable case, *Béláné Nagy v. Hungary* concerned eligibility for disability pensions. Here, the ECtHR referred to ILO Conventions and the European Code of Social Security to define the state's obligations under Article 1 of Protocol No. 1, despite the respondent state's objections. This underscores the Court's authority to interpret the ECHR with reference to international social security and disability standards.[29]

Further, the ECtHR frequently incorporates interpretive guidance from treaty-monitoring bodies. In *Blokhin v. Russia*, concerning the detention of a mentally disabled child, the Court cited the Council of Europe's child-friendly justice guidelines, Article 23 of the CRC, and General Comment No. 9 of the CRC Committee. Likewise,

27 On the role of mixed agreements see Karayigit, 2006, pp. 445–469; Heliskoski, 2001; Leal-Arcas, 2001, pp. 483–513.

28 Case of *N. v. Romania (No. 2)*, (Application No. 38048/18), Judgment, Strasbourg, 16 November 2021.

29 Case of *Béláné Nagy v. Hungary*, (Application No. 53080/13), Judgment, Strasbourg, 13 December 2016.

in *Guberina v. Croatia*, the CRPD provided a basis to examine indirect discrimination under Croatian tax law concerning a parent of a disabled child.[30]

However, not all interactions between the CRPD and ECHR are harmonious. For example, Article 5(1)(e) of the ECHR permits the deprivation of liberty for "persons of unsound mind", in contrast with Article 14(1)(b) of the CRPD, which prohibits deprivation based on disability. Additionally, voting rights under Article 29 of the CRPD have not been fully reflected in ECtHR judgments, despite strong support from CRPD institutions and human rights bodies.

Although the ECtHR is not formally bound by precedent, it values legal certainty and grounds for reinterpretation. This is evident in the Court's self-understanding of the ECHR as a "living instrument" that must adapt over time.

A major turning point was the *Centre for Legal Resources (CLR) v. Romania* case, where an NGO was permitted to represent Valentin Câmpeanu – a young man with severe intellectual disability and HIV who died under grossly negligent state care. Despite the lack of legal representation or family, the ECtHR recognised CLR's standing, breaking new ground under Article 34 of the Convention. This set an exceptional precedent for third-party representation in cases involving especially vulnerable individuals.[31]

This line of reasoning was further extended in *L.R. v. North Macedonia*, in which the Helsinki Committee for Human Rights was allowed to file on behalf of an 8-year-old child with disabilities in state care. Even though the child had formal parental and guardian representation, their ineffectiveness prompted the Court to accept third-party representation, reinforcing the ECtHR's adaptive approach to access to justice.[32]

In contrast, *Lambert v. France* demonstrates the limitations of this approach. Here, the Court refused to infer the presumed will of a man in a vegetative state regarding litigation, due to a lack of evidence. This case reveals the Court's nuanced and context-dependent interpretation of procedural capacity and representation in disability-related cases.[33]

As for defining disability, the CRPD provides a broad, flexible concept, covering long-term impairments that interact with societal barriers. The ECtHR, however, allows states a wide margin of appreciation in determining disability status and mental capacity. Nonetheless, the Court retains supervisory authority to prevent discriminatory or arbitrary decisions. For example, in *D.H. and Others v. Czech Republic*, the Court condemned discriminatory educational testing practices against Roma

30 Case of *Blokhin v. Russia*, (Application No. 47152/06), Judgment, Strasbourg, 23 March 2016. Case of *Guberina v. Croatia*, (Application No. 23682/13), Judgment, Strasbourg, 22 March 2016.
31 Case of *Centre For Legal Resources On Behalf Of Valentin Câmpeanu v. Romania*, (Application No. 47848/08), Judgment, Strasbourg, 17 July 2014.
32 Case of *L.R. v. North Macedonia*, (Application No. 38067/15), Judgment, Strasbourg, 23 May 2020.
33 Case of *Lambert and Others v. France*, (Application No. 46043/14), Judgment, Strasbourg, 5 June 2015.

children, highlighting its willingness to intervene in national determinations when necessary.[34]

The doctrine of the margin of appreciation remains central. While the ECtHR generally allows states leeway in implementing the ECHR, this discretion narrows in cases involving vulnerable groups, including persons with disabilities. In voting rights cases under Protocol No. 1, Article 3, the Court emphasised that historical exclusion warrants heightened scrutiny and narrower state discretion. This was also underlined in judgments where any restriction affecting historically marginalised populations demanded a stronger justification.

In contrast, in socio-economic domains – such as healthcare, welfare, and social security – the Court tends to afford states a broader margin. The *Sentges* case exemplifies this, where the applicant sought state-funded robotic arm support for muscular dystrophy. The Court sided with the state's resource-based justification, while dissenting judges warned that rights under Articles 2 and 8 should play a more prominent role in such assessments. Even so, the Court maintains that budgetary concerns cannot be used to justify failure to uphold core Convention rights.[35]

The ECtHR has held that social protection reforms must meet minimum standards of fairness and legal certainty. Modifications in benefit schemes cannot lead to retrogressive outcomes or violate the essence of the rights protected by the Convention.

In summary, the ECtHR has gradually shifted toward a rights-based understanding of disability in alignment with the CRPD. The Court increasingly considers disability not just as a medical condition but as a social and legal construct influenced by systemic barriers. Through key cases, evolving procedural flexibility, and dynamic interpretation, it fosters a more inclusive and accessible human rights framework for persons with disabilities in Europe.

2.3. EU Disability Law and Policy

The European Union (EU) is committed to eliminating all forms of discrimination, including discrimination based on disability. This principle is embedded in various legal instruments and policies that collectively aim to ensure the full inclusion, participation, and equal treatment of persons with disabilities across the EU.

At the foundational level, Article 10 of the Treaty on the Functioning of the European Union (TFEU) expresses the EU's resolve to combat discrimination on any ground, including disability. Complementing this, Article 19 of the TFEU authorises the Council, with the European Parliament's consent, to adopt measures combating discrimination based on disability, among other grounds.

The Charter of Fundamental Rights of the EU further enshrines these principles. Article 1 of the Charter asserts that human dignity is inviolable, and Article 21

34 Case of *D.H. and Others v. Czech Republic*, (Application No. 57325/00), Judgment, Strasbourg, 13 November 2007.

35 Decision as to the Admissibility of Application No. 27677/02 by Nikky Sentges against the Netherlands, 3 July 2003.

prohibits any discrimination, including on the grounds of disability. Additionally, Article 26 emphasises the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community.

Directive 2000/78/EC: Equal Treatment in Employment and Occupation isa key legislative tool in the EU's disability rights regime, which establishes a general framework for equal treatment in employment. Article 5 of the Directive introduces the concept of reasonable accommodation, requiring employers to make necessary and appropriate modifications to enable persons with disabilities to work, unless such measures impose a disproportionate burden. While the Directive aligns closely with the UN Convention on the Rights of Persons with Disabilities (CRPD), it notably does not define the failure to provide reasonable accommodation as a form of discrimination per se, unlike the CRPD.

2.3.1. Accessibility Legislation

Several directives complement this framework by enhancing accessibility across various sectors:

European Accessibility Act (Directive (EU) 2019/882) mandates that key products and services – such as smartphones, ATMs, banking services, and e-commerce – be accessible.

Web Accessibility Directive (Directive (EU) 2016/2102) requires public sector websites and mobile applications to be accessible to people with disabilities.

European Disability Card and Parking Card: The European Disability Card initiative is designed to ensure mutual recognition of disability status across EU Member States. It facilitates access to benefits and preferential treatment in travel, culture, and public services. The European Parking Card similarly allows people with disabilities to access parking benefits EU-wide. The relevant 2023 directive mandates both hard and digital versions of the cards, ensuring seamless mobility and equal access to services.

Recent Directives on Equality Bodies (2024/1499 & 2024/1500): These directives aim to strengthen national equality bodies and extend their remit across more grounds of discrimination, including disability, gender, religion, age, and sexual orientation. Member States must incorporate these into national law by 19 June 2026. The updated directives ensure independence, accessibility, and efficiency of these bodies, particularly in enforcing anti-discrimination protections in both employment and broader societal contexts.

The Anti-Discrimination Directive (Proposed): Still under discussion, this proposed directive aims to prohibit discrimination on all grounds – including disability – beyond employment, extending protections to healthcare, education, housing, and access to goods and services. Its adoption would significantly broaden the scope of anti-discrimination law across the EU.

Core CJEU Case Law on Disability Rights

Several landmark rulings by the Court of Justice of the European Union (CJEU) have shaped the interpretation of disability rights:

- Chacón Navas (Case C-13/05) clarified that disability involves long-term physical, mental, or psychological impairments that hinder participation in professional life. Illness alone does not equate to disability under Directive 2000/78.
- Coleman (Case C-303/06) extended protection to individuals discriminated against due to their association with a disabled person (her child), confirming that indirect discrimination and harassment also apply under the Directive.
- HK Danmark (Ring and Werge) (Case C-335-11) confirmed that chronic conditions causing long-term impairments can qualify as disabilities and that reduced working hours may constitute a reasonable accommodation.
- Kaltoft (Case C 354/13) and Ruiz Conejero (Case C-270/16)dealt with obesity-related claims. While obesity is not a protected ground itself, it can be considered a disability if it causes long-term limitations in participation. Termination based on such conditions may constitute indirect disability discrimination.
- Tartu Vangla (Case C-795/19) addressed discriminatory job qualification standards in Estonia. The CJEU found that barring a candidate with hearing loss from employment – without allowing hearing aids – was contrary to the Directive's requirement to provide reasonable accommodation.

Non-Binding Frameworks and Policy Documents

In addition to binding legislation, the EU promotes inclusion through soft law instruments:

The European Pillar of Social Rights (2017) includes Principle 17, affirming the right of persons with disabilities to support that enables full participation in society and access to employment.

The Action Plan for the Pillar outlines implementation measures to be achieved by 2030, targeting access to education, employment, healthcare, housing, and social services for persons with disabilities.

The European Disability Strategy 2010–2020 laid the foundation for policy on accessibility, participation, education, employment, and combating poverty.

The updated Strategy for the Rights of Persons with Disabilities 2021–2030 builds on the previous plan. It expands focus to independent living, access to justice, political participation, and the EU's global leadership in advancing disability rights.

The 2021–2030 Strategy also supports full enforcement of the CRPD, to which the EU is a signatory. It focuses on empowering persons with disabilities, removing barriers, and promoting their rights within and beyond the EU.

The EU's approach to disability rights is holistic, combining binding legislation (like Directive 2000/78/EC, the European Accessibility Act, and new equality directives) with non-binding strategies to promote inclusion, autonomy, and full societal participation for persons with disabilities. EU case law, particularly from the CJEU, plays a critical role in interpreting and expanding the legal definitions and obligations

related to disability. Through the integration of international standards like the CRPD, the EU continues to evolve toward a more inclusive and accessible society for all.

3. Elderly

3.1. Role of the United Nations in Safeguarding the Rights of Elderly

Defining the relationship between society and the elderly requires first establishing a meaningful definition of old age – a task that proves challenging due to the fluid and transitional nature of aging. Just as "growing up" represents a series of developmental milestones – from legal adulthood to full societal participation – so too does "growing old" involve gradual changes rather than a definitive status. Unlike youth, which is defined by gaining rights, old age is often marked by a loss of economic activity, typically retirement. However, with increased life expectancy and healthier lifestyles, many older individuals continue to remain active beyond traditional retirement age, contributing significantly to society in various roles.

Scholars such as Peng & Chan note that the term "older workers" varies in definition depending on the context – ranging from age 40 to 65 and above. In the United States, the Age Discrimination in Employment Act (ADEA) identifies 45 and above as a threshold age due to perceptions of outdated skills and knowledge. In practice, many studies categorise older workers as those aged 50 and above. These individuals often face significant challenges in the labour market, including age-based discrimination, despite still having much to offer in terms of experience and expertise.[36]

Labor market statistics confirm the growing participation of older workers. In 2022, labour force participation among those aged 55–64 in Europe and Central Asia reached 61.4%, with men at 69.9% and women at 53.8%. Even those aged 65 and above showed participation, albeit lower, at 7.6%. These trends suggest an ongoing shift in workforce demographics, with older adults playing an increasingly important role. By 2070, projections suggest that participation rates among 55–64-year-olds will rise to over 75%, underlining the continuing economic importance of this group.[37]

The legal and human rights foundation for elderly protection is rooted in the Universal Declaration of Human Rights (UDHR). Article 1 asserts the inherent dignity and equal rights of all people, while Article 2 ensures that these rights apply without discrimination. The UDHR divides human rights into four broad categories: personal rights, civil and political rights, economic and social rights, and cultural rights. While aging is not mentioned explicitly in the document, the rights outlined are universal and extend to older persons by implication.

The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, provides specific protections that are directly relevant to elderly individuals. Article 6

36 Peng and Chan, 2019, p. 163.
37 World Health Organization, 2025; OECD, 2019. See also European Commission, 2021b, p. 2; United Nations, 2024.

protects the right to life, obligating states to shield older persons from life-threatening conditions such as inadequate healthcare. Article 7 prohibits torture and cruel treatment, with particular relevance for elders in care facilities. Article 9 safeguards against arbitrary detention and abuse, reinforcing protections in both domestic and institutional settings. Article 26 emphasises equality before the law, underscoring that seniors must have equal access to all rights and services.

The companion treaty – the International Covenant on Economic, Social and Cultural Rights (ICESCR) – addresses economic security, healthcare, and participation in cultural life. Article 9 enshrines the right to social security, which forms the bedrock of elderly welfare through pensions, disability payments, and other assistance. Article 11 guarantees adequate living standards, including housing, food, and clothing – critical for elderly individuals often living on fixed incomes. Article 12 affirms the right to health care, which is especially important for seniors who may face chronic illness or disability. Articles 13 and 15 assert the right to education and cultural participation, supporting lifelong learning and social inclusion.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) further enhances protections for elderly women. Adopted in 1979, CEDAW calls on governments to ensure equal access to healthcare, employment, education, and public life for women of all ages. Articles 11 and 12 are especially pertinent: the former addresses employment rights including retirement and pensions, while the latter ensures access to medical services, vital for aging women. Articles 7 and 8 demand equal political participation, supporting older women's involvement in governance and decision-making.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force in 1984, also provides vital protections for seniors – particularly those in vulnerable institutional settings. States must ensure independent monitoring and provide victims of mistreatment with access to justice and compensation, as outlined in Articles 13 and 14.

Equally important is the Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006. While focused on persons with disabilities, the CRPD holds enormous relevance for the elderly, many of whom live with age-related impairments. Article 3 affirms autonomy and individual control over decisions. Article 5 prohibits discrimination and obliges states to promote equality across all spheres, including employment, education, and social participation. Article 9 mandates accessibility of public spaces, transportation, and communication. Article 16 demands protection from exploitation and abuse. Article 19 affirms the right to live independently and be included in the community – goals aligned with modern approaches to aging in place and inclusive care.

Beyond legal conventions, the international community has developed numerous policy frameworks to promote dignity and inclusion for older people. The Vienna International Plan of Action on Ageing (1982) was the first global agreement focusing on elderly issues. This was followed in 1991 by the UN Principles for Older Persons, which introduced five key domains: independence (ensuring access to income,

employment, and services); participation (in civic, cultural, and decision-making activities); care (access to healthcare and supportive services); self-fulfilment (lifelong learning and cultural engagement); and dignity (freedom from abuse and recognition of intrinsic worth).

The Madrid International Plan of Action on Ageing (2002)[38] represents a more comprehensive framework. It focuses on three priorities: 1) integrating aging into development; 2) promoting health and well-being in old age; and 3) creating enabling environments. These recommendations call on governments, NGOs, and international bodies to align policies with the changing demographic landscape and promote a rights-based approach to aging.

To ensure compliance and continued progress, the UN Human Rights Council[39] established the position of Independent Expert on the enjoyment of all human rights by older persons in 2013. This role involves reviewing implementation efforts by states, offering guidance, and reporting on violations or gaps. The mandate was renewed in 2022, signalling the ongoing global commitment to addressing the rights of older people.

In sum, as the global population ages, the legal and policy infrastructure supporting older adults is expanding and evolving. From labour force participation and anti-discrimination protections to social security and healthcare rights, the elderly are increasingly recognised as integral contributors to society – deserving of respect, autonomy, and full access to the rights guaranteed to all. International treaties, regional initiatives, and national strategies must now work together to transform these principles into tangible realities for older generations. Only through such comprehensive action can we ensure that aging is met not with exclusion or vulnerability, but with dignity and opportunity.

3.2. Elderly Rights in ECtHR Jurisprudence

As Europe's population ages, the protection of the rights of elderly individuals – particularly in healthcare and institutional settings – has gained significant legal attention, especially through the case law of the European Court of Human Rights (ECtHR). The Court emphasises that elderly people must have access to healthcare and support that respects their dignity, independence, and legal rights. A key element in this protection is the state's positive obligation under Article 2 of the European Convention on Human Rights, which guarantees the right to life. This obligation requires both public and private healthcare and residential care facilities to meet essential standards. States must also ensure that independent mechanisms exist to investigate deaths or mistreatment in such institutions.

In addition to residential care, many elderly people prefer to remain in their own homes. To support this, appropriate in-home care must be made available. Denial of such care may constitute a breach of human rights. The *McDonald v. United Kingdom*

38 United Nations, 2002.
39 *United Nations Human Rights Council*, no date.

case illustrates this point. Glenda McDonald, born in 1943, relied on seventy hours of care per week due to mobility issues, especially at night. Her care allowance was cut drastically, and the local authority argued that she could use incontinence pads at night, even though she was not incontinent. McDonald felt humiliated and claimed a violation of Article 8, which protects the right to private life. The Court agreed, holding that this interference was disproportionate and not respectful of her dignity or autonomy.[40]

A more complex and far-reaching case was *Stanev v. Bulgaria*, which addressed forced institutionalisation and poor living conditions in state care. Georgi Stanev, declared legally incapacitated, was placed in a social care home for adults with mental disorders. He had no say in the decision and was moved without consent or proper legal safeguards. Once institutionalised, he lost access to his identity documents and had limited freedom of movement, requiring permission to leave. Conditions in the institution were substandard: poor food, unsanitary toilets, cold communal spaces, and virtually no social or cultural activities. These factors deeply impacted his well-being and autonomy.[41] Stanev's case revealed multiple legal failures. The Bulgarian system did not allow him to challenge the decision to institutionalise him or to restore his legal capacity. Even after an independent psychiatrist found no signs of schizophrenia and warned against the psychological effects of long-term institutionalisation, authorities refused to reconsider his case. The ECtHR found violations of several articles of the Convention: Article 5 (unlawful deprivation of liberty), Article 3 (inhuman and degrading treatment), Article 6 (denial of a fair trial), Article 13 (lack of effective remedies), and Article 8 (violation of private life).

These two cases underscore critical principles. First, elderly people cannot be treated merely as passive recipients of care – they are rights-holders entitled to dignity and legal protection. Institutionalisation must not be forced and must always follow due legal process with opportunities for review. Second, living conditions in care institutions must meet basic standards of human dignity. Denying proper food, hygiene, privacy, and autonomy violates core human rights. Finally, decisions regarding care – whether institutional or in-home – must be made with the individual's preferences, needs, and dignity in mind.

The ECtHR's rulings have thus advanced a broader understanding of the rights of the elderly. They highlight the importance of balancing care with autonomy and ensuring that legal systems do not strip individuals of their ability to make decisions or challenge violations. As demographic changes increase the proportion of elderly people in society, the Court's case law provides a strong legal foundation to ensure that aging with dignity is not just a social goal, but a legal guarantee.

40 Case of *McDonald v. United Kingdom*, (Application No. 4241/12), Judgment, Strasbourg, 20 May 2014.

41 Case of *Stanev v. Bulgaria*, (Application No. 36760/06), Judgment, Strasbourg, 17 January 2012.

3.3. Elderly Rights in the EU

The European Union (EU) legal framework places significant emphasis on the principle of equal treatment, anchored primarily in the Treaty on the Functioning of the European Union (TFEU) through Articles 8, 10, 19, 153, and 157. These provisions collectively reflect the Union's commitment to eliminate discrimination and promote equality, especially within the labour market and broader social context. Additionally, this commitment is reinforced by foundational documents such as the Community Charter of the Fundamental Social Rights of Workers, the EU Charter of Fundamental Rights, and the European Pillar of Social Rights.

Articles 8 and 10 TFEU underscore the EU's value orientation, requiring the Union to eliminate gender-based inequalities and combat discrimination on various grounds, including age, disability, religion, and sexual orientation. Article 153 supports member state actions in ensuring gender equality in the labour market and fighting social exclusion. Importantly, Article 157 distinguishes between equal opportunities and equal treatment: equal opportunities relate to access and career development, while equal treatment encompasses conduct throughout the employment relationship and possibly beyond.

Directive 2000/78/EC establishes a framework for equal treatment in employment and occupation, explicitly prohibiting discrimination based on religion, belief, disability, age, and sexual orientation. While exceptions for age-based differential treatment are permitted under specific circumstances – such as promoting youth employment or establishing service-based conditions for retirement – such differences must be objectively justified by legitimate labour policies and must meet the principle of proportionality.

The directive defines key concepts such as direct and indirect discrimination and harassment. Though its scope is limited to employment, occupation, and vocational training, a draft directive sought to broaden the application of equal treatment to areas such as healthcare, education, and social protection. However, due to lack of consensus in the EU Council, this broader directive remains unadopted.

The EU Court of Justice has played a pivotal role in clarifying and reinforcing the principle of non-discrimination, particularly regarding age. The landmark case *Mangold* (Case *C-144/04)* recognised age discrimination as a general principle of EU law. In this case, even before the full implementation of Directive 2000/78/EC in Germany, the Court ruled that national legislation could not allow unjustified age discrimination. Although groundbreaking, the ruling attracted criticism for implying horizontal effect and infringing upon national autonomy.

Further jurisprudence has refined the Court's position. For example, in the *Age Concern England* case (Case C-388/07), the Court emphasised that differential treatment based on age is permissible only if it pursues a legitimate aim and is proportionate. This concept of objective justification has become a central test in age discrimination cases.

The *Félix Palacios de Villa* (Case *C-411/05)* case further tested this principle. Mr. Palacios's employment was terminated upon reaching Spain's statutory retirement

age of 65, as permitted by a collective agreement. He challenged this on the grounds of age discrimination under Directive 2000/78/EC. The Court concluded that while the law did create differential treatment based on age, it did not constitute discrimination if the treatment was objectively and reasonably justified by legitimate aims, such as labour market regulation or reducing unemployment. Additionally, the fact that the affected individuals were entitled to a pension further justified the measure. Therefore, the Court upheld the retirement rule as lawful under EU law.

Another notable case, *Prigge (Case C-477/09)*, concerned mandatory retirement for airline pilots. The Court ruled that while setting age limits may be permissible, employers must show that such policies are justified by legitimate aims, like safety, and that they are proportionate. Blanket age limits, without such justification, would violate the principle of equal treatment.

Overall, the EU legal framework – through both primary and secondary law – creates a robust system to prohibit unjustified discrimination, especially in employment. The Court of Justice has consistently reinforced that while differences in treatment may sometimes be allowed, they must always be carefully examined for objective justification and proportionality. This nuanced approach ensures that equality and non-discrimination remain central to the EU's social and legal order, while still allowing for flexibility in labour market policies where justified.

4. Migrants

4.1. Role of the UN in the Protection of Migrants

The 2024 World Migration Report, published by the International Organization for Migration (IOM), emphasises the positive economic and social contributions that migration can bring to host countries. In particular, migration acts as a vital source of human capital, especially for countries facing declining population sizes. It not only boosts domestic income and living standards but also helps fill labour shortages in various sectors, both high-skilled and low-skilled, easing mismatches in the domestic labour market and enhancing overall productivity.

However, migration and employment are also complex phenomena tied to human rights and labour standards, which led to the development of a comprehensive international legal framework for protecting migrant workers. This framework began with the founding of the International Labour Organization (ILO) in 1919, the first global attempt to protect workers' rights.

In 1948, the Universal Declaration of Human Rights (UDHR) laid a critical foundation by affirming the right to work, social security, and freedom from discrimination. These rights guided later international instruments. A year later, the ILO adopted Convention No. 97, which regulates labour migration and influenced national legislation to improve migrant treatment.

The 1950s and 1960s saw further progress, notably with the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as the 1954 Convention on

Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These addressed the rights of refugees and stateless persons, including access to employment and education.

In 1965, the United Nations (UN) adopted the International Convention on the Elimination of All Forms of Racial Discrimination, promoting legal equality for all and improving migrant access to employment and public services. These protections were extended further with the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, which compel states to uphold rights to health, education, fair working conditions, and judicial access regardless of nationality.

Throughout the 1970s and 1980s, the international community expanded protections further. The 1974 SOLAS Convention improved maritime safety, and the 1975 ILO Convention No. 143 emphasised fair labour conditions and the fight against irregular migration. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ensured women's access to employment, healthcare, and education irrespective of their status.

Later developments included the 1982 Law of the Sea, which improved maritime protections, and the 1984 Convention Against Torture, reinforcing the global commitment to protect all individuals, including migrants, from violence and mistreatment. By the late 1980s, children and migrant families gained additional attention, with the 1989 Convention on the Rights of the Child ensuring child welfare across borders.

A major milestone was the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). This landmark treaty provides a comprehensive set of protections for migrants and their families, including access to education, healthcare, and safeguards from exploitation.

The early 2000s saw a focus on combatting trafficking and smuggling, particularly of women and children, with the 2000 Protocols on human trafficking and migrant smuggling. In 2006, two significant conventions were adopted: the Convention on the Rights of Persons with Disabilities, which guarantees equal access to employment and services for all, including migrant workers with disabilities; and the Convention on the Protection of All Persons from Enforced Disappearance, which ensures protection against state-led disappearances.

The 2011 Domestic Workers Convention further enhanced rights for a vulnerable group – often made up of migrants – by affirming fair wages, decent working conditions, and protection from abuse.

Today, the ICMW, in force since 2003, remains central to the UN's approach to migrant rights. Oversight is provided by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). The Committee, comprised of independent experts, reviews state reports, raises inquiries, and makes recommendations for improved compliance. It can consider individual or inter-state complaints, provided that the states involved have accepted its jurisdiction under Article 76 of the Convention.

However, the Committee's power is limited to those states that have explicitly accepted its authority. It cannot hear complaints against states that have not submitted a notification of acceptance.

In conclusion, international migration has far-reaching economic and social benefits, particularly for aging or shrinking labour markets. But it also necessitates strong legal protections for migrants. Over the past century, the international community has developed a robust framework to protect the rights, dignity, and welfare of migrant workers, ensuring they are treated fairly, irrespective of their origin or status. The work of institutions such as the ILO, UN, and CMW continues to play a pivotal role in ensuring equity and justice for migrants worldwide.

4.2. Migrant Rights Under ECtHR Jurisprudence

The Council of Europe (CoE) plays a critical role in protecting the rights of migrants and migrant workers throughout Europe. Migrants – individuals who move from their habitual place of residence for reasons such as work, education, natural disasters, conflict, or persecution – are entitled to fundamental human rights regardless of legal status. Nonetheless, irregular migrants frequently face discrimination, exclusion, and deportation, revealing a gap between international legal frameworks and their implementation.

The European Convention on Human Rights (ECHR), while not explicitly addressing migration, applies universally to all individuals within the jurisdiction of CoE member states. Key provisions of the ECHR have been instrumental in migrant-related rulings by the European Court of Human Rights (ECtHR). Articles such as Article 3 (prohibition of torture), Article 5 (liberty and security), Article 8 (respect for private and family life), Article 13 (right to an effective remedy), and Article 14 (prohibition of discrimination) are particularly relevant to migrant rights. The ECtHR has interpreted these provisions to address issues like deportation, residence, detention, and access to family life.

The ECtHR has built an extensive body of case law involving migrants. In *Berrehab v. Netherlands*, the Court protected family life against deportation. In *Chowdury and Others v. Greece*, it ruled that undocumented Bangladeshi workers subjected to forced labour on a Greek strawberry farm were victims of human trafficking, violating Article 4 of the ECHR. The Court emphasised the workers' vulnerability, exacerbated by their legal status and fear of deportation, as a factor increasing their susceptibility to exploitation. This case clarified state obligations to prevent and respond to forced labour and trafficking. Cases such as *Gaygusuz v. Austria* and *Andrejeva v. Latvia* addressed discrimination in access to social security and pensions for non-citizens. In *Gaygusuz*, the ECtHR ruled that denying emergency social assistance to a legally resident non-citizen based solely on nationality was unjustified. In *Andrejeva*, Latvia was found to have discriminated against a non-citizen by not recognising her Soviet-era employment for pension purposes. However, in *Savickis v. Latvia*, the Court accepted Latvia's right to treat citizens and non-citizens differently due to historical

and constitutional reasons, showing that state sovereignty still heavily influences outcomes.[42]

The European Social Charter (ESC) and the European Convention on the Legal Status of Migrant Workers complement the ECHR by providing targeted protections. The ESC guarantees rights to work, fair remuneration, collective bargaining, and family support, particularly under Articles 1, 4, 6, and 19. However, these protections are mostly limited to legally employed nationals of contracting states, leaving irregular migrants outside their scope. The Convention on the Legal Status of Migrant Workers defines migrant workers as legally authorised individuals who move for paid employment – excluding groups such as seasonal workers, students, and undocumented labourers.

The ECtHR recognises migrant workers as a potentially vulnerable group, especially in contexts of exploitation or inadequate legal protection. Its use of the vulnerability concept, as in *Chowdury,* adds a nuanced understanding of how legal status, economic need, and lack of safeguards can increase migrants' exposure to rights violations. However, critics argue the Court has either overstepped in some cases or failed to fully challenge discriminatory migration laws in others. Its focus tends to be legalistic and narrowly framed, often lacking in broader analysis of systemic issues.

In summary, while the CoE does not offer fully comprehensive protections for all migrant groups – especially undocumented migrants – its legal instruments and the evolving case law of the ECtHR have made important strides in safeguarding rights. Migrants' access to justice through the ECtHR has led to landmark decisions that challenge state practices and affirm key principles such as non-discrimination, family unity, and protection from exploitation. However, ongoing challenges, particularly concerning irregular migrants, signal the need for further legal development and more inclusive standards across Europe.

4.3. Migrant Rights in the EU

The European Union (EU) faces a dual challenge in its migration policy: ensuring adequate protection for vulnerable individuals while managing migration to contribute positively to growth, innovation, and social development. However, the EU's vulnerability-based approach remains fragmented, particularly within the Common European Asylum System (CEAS). Though EU law is grounded in the principle of equality before the law (enshrined in Article 2 TEU and Article 20 of the Charter of Fundamental Rights), this principle is not consistently implemented across legislation concerning migration and asylum.

Migration in the EU is divided into internal and external categories. Internal migration involves free movement within the EU/EFTA framework, while external

42 Case of *Berrehab v. Netherlands*, (Application No. 10730/84), Judgment, Strasbourg, 21 June 1988; Case of *Chowdury and Others v. Greece*, (Application No. 21884/15), Judgment, Strasbourg, 30 March 2017; Case of *Gaygusuz v. Austria*, (Application No. 17371/90), Judgment, Strasbourg, 16 September 1996; Case of *Andrejeva*, (Application No. 55707/00), Judgment, Strasbourg, 18 February 2009; Case of *Savickis v. Latvia*, (Application No. 49270/11), Judgment, Strasbourg, 9 June 2022.

migration refers to movement across state borders for over 12 months, whether voluntary or not. Migrant workers are a specific subgroup, regulated by international and EU legal frameworks. Although there is no universally agreed definition of labour migration, the International Labour Organization broadly defines migrant workers as individuals engaged in paid work in a country where they are not nationals. These workers vary widely in skills – from high-skilled professionals (e.g., IT experts, healthcare workers) to low-skilled workers (e.g., agricultural or domestic workers).[43]

Originally, labour mobility in the EU was an economic mechanism under the principle of free movement of workers, which gradually evolved into a core citizenship right through successive treaties, including the Maastricht Treaty. While this evolution supports economic goals, it has also contributed to challenges such as brain drain. In response to aging populations and labour shortages, the EU has increasingly promoted legal labour migration, focusing on both economic benefits and the integration of third-country nationals.[44]

Gyenei's analysis suggests that to enhance integration and labour market flexibility, the EU has gradually extended rights to third-country nationals (TCNs). This trend reflects the EU's commitment to social inclusion and international competitiveness. Measures have included bilateral treaties and legislative initiatives under Title V TFEU, covering TCNs' entry, residence, and employment rights. Still, member states often resist harmonising labour migration policies due to sovereignty concerns, making this area one of the most difficult for consensus.[45]

Legislative initiatives like the Blue Card Directive (2009, recast recently)[46] regulate the entry and residence of highly qualified TCNs. The Blue Card offers professional opportunities and family rights but excludes certain categories (e.g., asylum seekers, long-term residents, and researchers). The Single Permit Directive (2011)[47] streamlined application procedures but allowed member states significant discretion. It excludes various groups, including posted workers and au pairs, reflecting ongoing policy fragmentation.

The Seasonal Workers Directive (2014)[48] targeted low-skilled TCNs for temporary employment. It defined rights and limits (e.g., maximum stays of five to nine months) and ensured basic protections, such as non-discrimination in work conditions and

43 European Commission, no date.
44 See Magdolna Vallasek's chapter.
45 See Magdolna Vallasek's chapter.
46 Directive (EU) 2021/1883 – conditions of entry to and residence in the European Union of non-EU nationals for the purpose of highly qualified employment.
47 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.
48 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

limited access to social rights. However, certain benefits, such as unemployment aid or education grants, may be restricted.

Similarly, the Intra-Corporate Transferee Directive[49] targets high-skilled temporary transfers of personnel within companies, imposing limits on stay duration but allowing mobility between member states. Unlike the Blue Card's economic framing, the 2020 New Pact on Migration and Asylum marked a shift toward a human rights-based narrative. Introduced after the Moria refugee camp fire, the Pact emphasised solidarity and humanitarian responses to migration crises, recognising the EU's previous policy failures.

Despite its non-programmatic nature, the New Pact – alongside Regulation (EU) 2024/1351 – aims for a more unified migration and asylum system, balancing internal and external dimensions. However, significant challenges remain in practice. Research by the International Labour Organization (ILO) and the IndustriAll European Trade Union highlights a persistent gap in collective labour rights for migrant workers. These include barriers to unionisation, poor working conditions, unpaid wages, and health and safety violations, particularly in sectors like construction, hospitality, and transport.

Although the EU has made legislative strides, enforcement lags. Over 100 inspections by the European Labour Authority since 2019 have uncovered widespread exploitation affecting both EU and third-country migrant workers. These findings stress the urgency of improving labour protections, harmonising rights across member states, and ensuring fair treatment for all workers – irrespective of origin.

In conclusion, while the EU recognises the economic and social contributions of migrant labour, especially in light of demographic shifts, its labour migration policy remains fragmented. The tension between national sovereignty and collective EU interests continues to hamper unified legislation. Although recent developments suggest a growing emphasis on rights-based frameworks, significant work remains to ensure consistent protections and humane treatment for all migrant workers in the EU.

5. Minorities

5.1. Safeguarding Cultural Identity: The Evolving Protection of National Minorities in International Law

The protection of national minorities is a fundamental human rights issue rooted in the need to shield vulnerable populations from discrimination and preserve their cultural identities. Persons belonging to national minorities often face systemic challenges in areas such as employment, education, and political participation.

49 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

This discrimination not only impedes their full integration into society but also threatens their language, religion, and traditions – key components of cultural identity. Therefore, robust legal protection is essential to ensure that national minorities can exercise their rights while preserving their heritage.

Though there is no universally accepted definition of a "national minority" in international law, several criteria are commonly used. According to Capotorti's influential definition, national minorities are non-dominant groups numerically smaller than the majority population, characterised by distinct ethnic, religious, or linguistic features. Importantly, they possess a shared sense of solidarity and the desire to maintain their cultural traditions. This definition, which aligns with the jurisprudence of the Permanent Court of International Justice, reflects both objective (demographic, linguistic, and religious differences) and subjective (self-identification and cultural attachment) elements.[50]

A contentious issue in international law is whether minority protection applies solely to citizens or also to non-citizens such as migrant workers. While traditional legal literature emphasises historical ties to a region, the United Nations Human Rights Committee (UNHRC) has adopted a broader interpretation, asserting that cultural rights should extend to all residents, regardless of citizenship or permanent status. This position challenges the restrictive definition of minority status, especially with the rise of so-called "new" minorities in multicultural societies.[51]

The rights of indigenous peoples are often discussed alongside national minorities. Over the past 40 years, indigenous groups have made significant strides in securing international legal recognition, often surpassing the progress made by national minorities over the past six decades. Both groups share the central goal of preserving cultural identity, which lies at the heart of minority rights protection. Cultural rights – such as language use, freedom of religion, and access to education in one's native language – are essential to maintaining group identity and are recognised as second-generation human rights under the Universal Declaration of Human Rights (1948).[52]

A major debate in minority rights discourse is whether such rights are collective or individual in nature. While the interwar League of Nations system focused on collective protection, the post-WWII human rights framework emphasises individual rights. Minority rights today are primarily understood as individual rights exercised within a collective context. Thus, safeguarding the rights of individuals belonging to minorities indirectly contributes to the preservation of the group's cultural identity.[53]

After WWII, the protection of minority rights shifted under the broader umbrella of universal human rights, emphasising equality and non-discrimination. This new ideology differed markedly from the earlier League of Nations framework and was

50 Capotorti, 1979, para. 568.
51 *United Nations Human Rights Council*, no date, para. 5.2.
52 United Nations. Economic and Social Council, 2005, para. 17.
53 Sándor-Szalay, 2022, p. 164.

not initially included in the UN Charter or the 1948 Universal Declaration. However, in 1960, United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the first international convention protecting minority rights – focusing on educational non-discrimination. The 1966 International Covenant on Civil and Political Rights (ICCPR) established Article 27, which explicitly protects the rights of minorities to enjoy their culture, religion, and language.

The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities reinvigorated the focus on minority rights. Additional UN bodies and mechanisms, such as the Human Rights Council (HRC), the UN Forum on Minority Issues, and the Office of the Special Rapporteur on Minority Issues, have developed further tools for oversight, reporting, and engagement with governments. The HRC, through the first Optional Protocol to the ICCPR, can receive individual complaints, contributing to a growing body of quasi-jurisprudence around Article 27.

Notable cases, such as *Lubicon Lake Band v. Canada*, have expanded the understanding of cultural rights to include land use and natural resources when essential to a group's culture. Similarly, in *Ivan Kitok v. Sweden*, the HRC acknowledged the centrality of reindeer herding to Sami culture and applied Article 27 accordingly. These cases underscore the importance of considering cultural and economic practices as integral to cultural identity.[54]

In Central and Eastern Europe, HRC activity has been more limited but not absent. Cases have focused on issues such as minority language use and official name recognition. For example, in *Raihman v. Latvia*, the alteration of a minority individual's name by the state raised serious concerns regarding privacy, non-discrimination, and cultural identity under Articles 17, 26, and 27 of the ICCPR. Although the changes may appear bureaucratic, such acts can alienate individuals from their cultural identity, further emphasising the need for sensitive and respectful minority policies.[55]

In conclusion, the international protection of national minorities continues to evolve within the broader human rights paradigm. While the modern framework primarily emphasises individual rights, it simultaneously recognises the importance of collective cultural identity. Minority protection today is a balancing act between universal legal standards and the unique historical and cultural realities of minority groups. As global migration and multicultural societies grow, so too does the urgency of ensuring legal frameworks that protect both the individual and the collective essence of national minorities.

54 HRC, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, decision of 26 March 1990, communication No. 167/1984; HRC *Ivan Kitok v. Sweden*, decision of 27 July 1988, communication No. 197/1985.

55 HRC, *Raihman v. Latvia*, decision of 30 November 2010, communication No. 1621/2007.

5.2. Minority Rights under the European Convention on Human Rights: Between Individual Protections and Collective Realities

The European Convention on Human Rights (ECHR) provides a foundational legal framework for the protection of human rights in Europe. However, it offers limited explicit protections for national, ethnic, or religious minorities. The Convention does not include detailed obligations for State Parties concerning the legal status or specific rights of minorities. Instead, minority rights are only indirectly addressed, notably through Article 14 and Protocol 12, which prohibit discrimination in the enjoyment of other substantive rights enshrined in the Convention.

The ECHR primarily protects individual rights, rather than collective or group-specific rights. As such, minority groups cannot claim group-based protections unless the rights in question can be construed as individual rights. This poses a challenge for the comprehensive protection of minority identities, which are often inherently communal and cultural.[56]

Article 14 and the Limits of Non-Discrimination

Article 14, frequently labelled the "Cinderella" of the Convention, has been criticised for its secondary and dependent nature. It is not a standalone right but rather applies only in conjunction with another substantive right under the Convention. The European Court of Human Rights (ECtHR) has confirmed that discrimination claims under Article 14 must be linked to the enjoyment of a right protected by another provision of the ECHR. Importantly, a violation of the substantive right is not necessary for Article 14 to be invoked; it suffices that the situation falls within its scope. This has significant implications for minorities. Even when states provide additional or voluntary benefits – such as religious instruction in schools or agreements with religious communities – those benefits must be applied in a non-discriminatory way. If not, the unequal treatment can be challenged under Article 14, even if the underlying right is not directly breached. This flexible interpretation is crucial for national, ethnic, and religious minorities, as it safeguards them from arbitrary state action, especially in areas where states offer benefits beyond what the Convention strictly requires.[57]

Religious Minorities and Article 9: Freedom of Religion

Religious minorities are not explicitly mentioned in the ECHR. Article 9 protects the freedom of thought, conscience, and religion, but its application to minority religions is often complex. Many ECtHR cases involve individuals or subgroups practicing non-dominant or minority forms of religion. However, the Court often avoids addressing the broader minority context, focusing narrowly on individual claimants and specific religious practices. The margin of appreciation doctrine – where states are granted flexibility in balancing rights within their own legal and cultural contexts – has led to ambiguities in how the Court treats religion as a suspect ground. Although a wide

56 See the Chapter of Dalibor Đukić.
57 O'Connell, 2009, p. 211.

margin is given in Article 9 cases, this contradicts the stricter scrutiny that would normally apply if religion were treated as a suspect classification under Article 14.[58]

Despite this tension, two key areas of Article 9 jurisprudence are particularly important for religious minorities:

- The Right to Manifest Religion: The Court has clarified that manifestation of religion is not confined to practices that are strictly required by religious doctrine. Religious expression includes personal practices and beliefs, even when not formally mandated. This interpretation respects the diversity within religious traditions and prevents state authorities from acting as arbiters of theological doctrine.[59]
- Legal Personality of Religious Associations: The ECtHR has affirmed that the legal recognition of religious groups is central to religious freedom. Registration as legal entities allows religious communities to function, own property, and organise religious life. Denying such status – particularly to minority or dissenting factions – can constitute a violation of Article 9. The Court has also rejected the idea that mere tolerance or informal recognition by the state is an acceptable substitute for legal personality.[60]

Ethnic Minorities and the Roma: The Challenge of Vulnerability

Ethnic minorities, especially the Roma, have appeared frequently before the ECtHR. In these cases, the Court has found violations of a wide array of rights, including the right to life, freedom from inhuman treatment, non-discriminatory access to education, and protection from forced sterilisation and arbitrary expulsion. Yet, despite this jurisprudence, the Court has sometimes fallen short in emphasising the structural vulnerability of such groups. While acknowledging discriminatory treatment, the Court has avoided labelling ethnicity as a suspect classification in Article 14 terms, thereby not always triggering the strict scrutiny required in such cases. In Central and Eastern Europe, where ethnic and religious identities often overlap, the protection of minorities is especially delicate. The Court has approached these cases cautiously, focusing on the rights of individuals rather than minority groups as such. For example, refusals to register religious organisations linked to specific ethnicities have been treated as violations of individual rights, rather than framed as broader issues of minority protection.[61]

58 Harris et al., 2023, p. 810.
59 Case of *Kokkinakis v. Greece*, (Application No. 14307/88), Judgment, Strasbourg, 25 May 1993, para. 31.
60 Case of *Gorzelik and Others v. Poland*, (Application No. 44158/98), Judgment, Strasbourg, 17 February 2004.
61 Case of *Sejdić and Finci v. Bosnia and Herzegovina*, (Applications Nos. 27996/06 and 34836/06), Judgment of 22 December 2009, para. 48. Council of Europe. Human Rights Commissioner, 2012, p. 11.

A Call for a More Holistic Approach

The current ECtHR jurisprudence, while offering important protections, often sidesteps the communal dimension of minority identities. The lack of explicit group rights, combined with the Court's cautious approach to politically sensitive issues, has led to fragmented protection for minorities. A more holistic approach is necessary – one that recognises the interconnectedness of individual and group identity, particularly in the context of religious and ethnic minorities. Discrimination, marginalisation, and lack of legal recognition impact not only individuals but entire communities.[62]

While the ECHR does not explicitly provide for the rights of national, ethnic, or religious minorities, its non-discrimination and religious freedom provisions, particularly Articles 14 and 9, form the core of minority protection under the Convention. However, these protections remain limited by a focus on individual rights, the dependent nature of Article 14, and the Court's cautious interpretation of religion and ethnicity as suspect grounds. As Europe becomes increasingly diverse, the ECtHR faces the challenge of ensuring that minority rights are not only acknowledged but meaningfully protected through a more integrated and community-sensitive approach.

5.3. Minority Rights in the European Union: Between Commitments and Competences

The EU's engagement with the protection of minority rights has developed gradually over the past few decades, shaped by political transitions, treaty reforms, and evolving societal awareness of discrimination and inequality. Despite growing recognition of the importance of these rights, their protection within the EU remains fragmented, limited, and often subordinated to other priorities in the broader legal and political framework.

Throughout the 1980s and 1990s, the European Parliament adopted numerous resolutions drawing attention to minority issues, but these initiatives lacked concrete enforcement mechanisms. The Maastricht Treaty of 1993 included only vague references to fundamental rights and the respect for national identities – with no specific focus on minorities. It was during the EU's enlargement process in the 1990sparticularly in response to the instability and ethnic tensions in Central and Eastern Europe following the collapse of Communism – that minority rights gained greater prominence. The 1993 Copenhagen Criteria required candidate countries to demonstrate respect for and protection of minorities as a condition for EU membership. However, this commitment to minority rights remained confined to external relations, and no parallel standards were developed for existing Member States, giving rise to accusations of double standards.

This inconsistency became more apparent with the Treaty of Amsterdam in 1999, which failed to extend minority protection obligations internally. While the Treaty incorporated the Copenhagen Criteria into Article 6(1) TEU, it notably excluded the

62 Case of *Sidiropoulos and Others v. Greece*, (Application No. 26695/95), Judgment, Strasbourg, 10 July 1998, para. 40.

minority protection clause. Nevertheless, the Amsterdam Treaty introduced Article 13 TEC (now Article 19 TFEU), which granted the EU the authority to combat discrimination based on ethnic origin, religion, and other grounds – marking the birth of the EU's anti-discrimination law. This new legal competence led to the adoption of the Racial Equality Directive (RED)[63] and the Employment Equality Directive (EED)[64] in 2000, representing a shift toward fundamental rights protection beyond market integration. However, these measures focused on individual rights and did not encompass collective minority protections such as language rights or cultural autonomy.

The Treaty of Lisbon later expanded the EU's commitment to equality. Article 2 TEU explicitly named "the rights of persons belonging to minorities" as part of the EU's foundational values. However, the EU's ability to legislate in this field is restricted by the principle of conferral under Article 5(2) TEU, which limits EU action to areas explicitly granted by the Treaties. As a result, minority protection remains primarily under national jurisdiction, with the EU only able to act indirectly – through related policy areas such as education, culture, or non-discrimination.

This limitation is reflected in treaty provisions. Articles 165 and 167 TFEU, for instance, provide the EU with supporting roles in education and culture, encouraging cooperation while fully respecting Member States' responsibilities and cultural diversity. Religion and language, though not specifically named, are included under cultural heritage protection, and Article 17 TFEU ensures that the EU respects the national status of religious associations.

The European Parliament has consistently pushed for stronger minority protections. In resolutions adopted in 2006, 2018, and 2023, the Parliament emphasised the need for consistent policies both for candidates and existing Member States. It criticised the EU's lack of internal standards, called for special attention to marginalised groups such as the Roma, and urged better integration of minority issues into rule-of-law monitoring. The 2022 resolution on religious persecution underscored the global dimension of minority protection, while the 2023 resolution on relations with the Council of Europe proposed deeper cooperation to enhance protection across Europe.[65]

63 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

64 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

65 1. European Parliament resolution of 8 June 2005 on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)); 2. European Parliament resolution of 11 September 2013 on endangered European languages and linguistic diversity in the European Union (2013/2007(INI)); 3. European Parliament resolution of 7 February 2018 on protection and non-discrimination with regard to minorities in the EU Member States (2017/2937(RSP)); 4. European Parliament resolution of 13 November 2018 on minimum standards for minorities in the EU (2018/2036(INI)); 5. European Parliament resolution of 17 December 2020 on the European Citizens' Initiative Minority SafePack – one million signatures for diversity in Europe (2020/2846(RSP)); 6. Parliament resolution of 18 April 2023 on the institutional relations between the EU and the Council of Europe (2022/2137(INI)). For further resolutions, see FUEN, no date.

Among minority communities in the EU, the Roma have received particular attention. The EU Roma Framework of 2011 aimed to promote the social and economic inclusion of Roma communities but was criticised for insufficient focus on antigypsyism, weak Roma participation, and lack of measurable outcomes. To address these shortcomings, the Commission introduced the EU Roma Framework 2020–2030, which set out seven objectives covering equality, inclusion, participation, education, employment, housing, and health. The new framework takes an intersectional approach and includes headline targets to monitor progress. Alongside this, the EU Anti-Racism Action Plan 2020–2025 marked the first time the EU officially acknowledged the existence of structural racism and called for proactive, institutionally driven policies to combat it.[66]

Despite these efforts, the EU's competence in the area of minority rights remains indirect. Legal instruments such as Article 18 TFEU prohibit discrimination based on nationality within the scope of EU law, and Article 19 TFEU enables legislative action against discrimination on grounds like race or religion – but these provisions are not specifically designed for the comprehensive protection of minority groups. Education and culture policy continue to fall primarily under national control, and the EU must rely on soft measures, coordination, and financial support to influence Member States' practices.

Finally, EU policies concerning indigenous peoples, such as the Sámi, are largely externally driven and remain limited in their application. While the EU supports inclusion and indigenous rights in external frameworks like the Arctic Policy, recent developments such as the Critical Raw Materials Act of 2024 have been criticised for overlooking indigenous consent mechanisms, highlighting ongoing tensions between economic policy and minority rights.[67]

In conclusion, while the EU has made progress in recognising minority issues and integrating anti-discrimination principles into its legal framework, the absence of a direct competence to legislate comprehensively in this area continues to hinder effective minority protection. The current framework reflects a mixture of normative commitments, indirect policy tools, and political aspirations, but without robust legal authority or consistent enforcement mechanisms, minority rights in the EU remain an unfinished project. Future progress will depend on sustained political will, deeper integration of minority concerns into EU law, and stronger cooperation between EU institutions and Member States.

66 See more in European Commission, 2020.
67 See Ana Radina's chapter.

6. Refugees

6.1. Refugee Protection in International Law: Foundations, Frameworks, and Evolving Commitments

The development of refugee rights is deeply intertwined with the emergence of international human rights law. Although the modern framework was formally codified under the United Nations after the adoption of the Universal Declaration of Human Rights in 1948, its conceptual foundations can be traced back to earlier legal traditions, including the law of state responsibility for injury to aliens and the protection of minorities. These early doctrines rejected absolute state sovereignty over foreign nationals and laid down fundamental principles recognising the vulnerabilities of individuals who live beyond the protection of their state of origin.[68]

The 1951 Convention relating to the Status of Refugees, and its 1967 Protocol, serve as the cornerstone of the international refugee protection regime. The Convention defines a refugee as someone who, due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion, is outside their country of origin and unable or unwilling to avail themselves of that country's protection. This legal definition places emphasis on the absence or loss of state protection, either through statelessness or a refusal to return due to legitimate fears.

In support of this framework, the United Nations General Assembly adopted the Declaration on Territorial Asylum in 1967. This non-binding instrument encourages states to uphold key principles: granting asylum to persons covered by Article 14 of the Universal Declaration, facilitating international cooperation in challenging cases, prohibiting the return or expulsion of persons to countries where they may face persecution, and restricting the use of asylum for purposes incompatible with United Nations (UN) principles. A subsequent UN conference in 1977 attempted to formalise these principles further, but its work was left incomplete, with only a few draft articles considered.

More recently, global attention to refugee and migrant issues has intensified. In 2016, the New York Declaration for Refugees and Migrants was adopted by UN Member States. The Declaration proposed a Comprehensive Refugee Response Framework (CRRF), built on principles of burden-sharing, protection, and long-term solutions. Its core objectives include streamlining refugee admission procedures, supporting host countries and communities, and promoting durable solutions such as local integration, resettlement, or voluntary repatriation. In 2019, the role of the International Organization for Migration (IOM) was strengthened through its formal integration into the UN system, enhancing coordination in addressing global migration challenges.[69]

68 See Lucia Bakosova's chapter.
69 See more in UNHCR, no date.

The 1951 Refugee Convention not only provides a definition of refugees but also outlines a series of rights and obligations. According to Erika Feller's analysis, the Convention establishes several critical rules: the principle of non-refoulement (prohibiting return to a country where persecution is likely); the prohibition of discrimination; the humanitarian nature of refugee issues, which should not incite international tensions; the expectation of inter-state cooperation; the exemption of refugees from penalties for illegal entry; and a framework for limited expulsion in cases of national security. Importantly, refugees must also respect the laws and public order of their host country, as articulated in Article 2.[70]

The Convention specifies different standards for the allocation of refugee rights. Three levels of treatment are recognised: national treatment (equal to nationals of the host state), most-favoured-nation treatment (equal to nationals of the most favourably treated foreign state), and treatment not less favourable than that accorded to other aliens in similar circumstances. Under these provisions, refugees enjoy rights to freedom of religion, property, legal access to courts, basic education, social security, and certain employment benefits. Other rights – such as freedom of association, the right to work, and access to higher education and housing – are similarly guaranteed, often contingent on residence status and integration level. Importantly, the Convention prohibits reservations to key protections, such as non-refoulement, anti-discrimination, and access to courts, thereby ensuring a universal baseline of rights.[71]

The institutional framework underpinning refugee protection is spearheaded by the UN High Commissioner for Refugees (UNHCR). Under Article 8 of its Statute, the UNHCR is mandated to promote the adoption and effective implementation of refugee conventions, negotiate special agreements to enhance refugee welfare, assist in voluntary repatriation or integration, and liaise with both state and non-state actors to ensure cohesive, coordinated action. This includes facilitating refugee admission, securing necessary goods for resettlement, collecting and analysing data from governments, and harmonising the efforts of public and private organisations in the refugee field.

The international refugee protection system continues to evolve, adapting to new challenges posed by conflict, displacement, and changing migration patterns. However, its foundational principles – human dignity, non-discrimination, solidarity, and protection from persecution – remain as critical as ever. While contemporary political realities sometimes strain the system's capacity, the legal and normative frameworks that have been built since the mid-20th century provide a solid base upon which further efforts toward fairness, safety, and shared responsibility can be pursued.

70 Feller, 2001, pp. 131–132.
71 Weis, 1982, p. 29.

6.2. The Protection of Refugees and Asylum Seekers under the European Convention on Human Rights

The European Convention on Human Rights (ECHR) does not contain specific provisions dedicated solely to refugees or asylum seekers. Nevertheless, through its substantive articles, general principles, and case law of the European Court of Human Rights (ECtHR), it provides a robust framework for the protection of individuals seeking international protection. These protections arise primarily through the interpretation and application of key rights, including the right to life (Article 2), prohibition of torture and inhuman or degrading treatment (Article 3), the right to respect for private and family life (Article 8), the right to a fair trial (Article 6), and the right to an effective remedy (Article 13). Moreover, the anti-discrimination provision under Article 14 plays a crucial role in reinforcing these protections.

A central pillar of the ECHR's protection for refugees is Article 3, which prohibits torture and inhuman or degrading treatment or punishment. This article has become especially significant in cases concerning expulsion, deportation, or extradition. The ECtHR has developed the doctrine of non-refoulement under Article 3, establishing that a state cannot remove an individual to a country where they would face a real risk of torture or inhuman treatment. This form of protection – sometimes called "ricochet protection" – extends the Convention's scope to situations outside the territory of the state concerned, based on the consequences of an expulsion.[72]

The vulnerability of asylum seekers and refugees has become a decisive factor in the ECtHR's jurisprudence. The Court has consistently held that such individuals form a vulnerable group due to displacement, lack of state protection, and exposure to trauma. This concept was clearly articulated in *M.S.S. v. Belgium and Greece*, where the applicant, an Afghan asylum seeker, suffered degrading conditions in Greece after being returned there under the Dublin Regulation. The Court recognised that his vulnerability stemmed both from his personal history and from the systemic deficiencies in the Greek asylum system, holding both states responsible for violating Article 3.[73]

The ECtHR has also addressed the living conditions and procedural guarantees required for asylum seekers, emphasising that poor detention conditions, lack of medical care, or indefinite delays in asylum proceedings may breach Article 3. This line of case law includes cases such as *Tarakhel v. Switzerland*, where the Court found that returning a family with children to Italy without individual guarantees of appropriate care would violate Article 3. Here, the Court explicitly recognised the special vulnerability of children, stressing the need for heightened protection and individualised assessments, especially in family reunification and relocation cases.[74]

Article 8 of the ECHR, which guarantees the right to respect for private and family life, has been progressively interpreted to reinforce the rights of migrants

72 See Aleksandra Syrt's chapter.

73 Case of *M.S.S. v. Belgium and Greece*, (Application No. 30696/09), Judgment, Strasbourg, 21 January 2011.

74 Case of *Tarakhel v. Switzerland*, (Application No. 29217/12), Judgment, Strasbourg, 4 November 2014.

and refugees, particularly in the context of family reunification. Initially, the ECtHR applied a restrictive "elsewhere test", asking whether family life could be maintained outside the host country. However, modern jurisprudence has shifted toward prioritising the best interests of the child and recognising the deep integration of applicants in the host society.[75]

In landmark cases such as *Jeunesse v. the Netherlands* and *M.A. v. Denmark*, the Court found violations of Article 8 where host states failed to adequately balance immigration control with the applicants' family life. In both cases, the Court criticised the lack of individualised assessments and disproportionate interference with the applicants' family life. The *M.A.* ruling, in particular, challenged Denmark's mandatory three-year waiting period for family reunification, holding that the rule disproportionately impacted the applicant's right to family life without sufficient justification.[76]

Article 2, which protects the right to life, imposes both negative and positive obligations on states. It requires that any use of force be necessary, proportionate, and lawful. In the refugee context, this provision comes into play particularly when state actions – or failures – result in endangering life, such as excessive use of force during detention or border control, or the failure to rescue individuals in peril.[77]

The ECHR also enshrines procedural guarantees that are vital for refugees and asylum seekers. Article 6 guarantees a fair trial, while Article 13 ensures access to an effective remedy. These provisions mandate that asylum seekers have access to fair procedures to challenge deportation or detention, and that these remedies are available in practice, not just in law. They reinforce the idea that rights must be enforceable, particularly in high-stakes situations such as expulsion or extradition.

Article 14, the non-discrimination clause, further strengthens the ECHR framework. It ensures that all rights under the Convention are enjoyed without discrimination based on race, religion, nationality, or other status. Although the ECHR does not explicitly mention refugees, Article 14 allows the Court to examine whether refugees or asylum seekers are being unfairly treated in comparison with others, particularly with regard to access to asylum procedures, education, healthcare, or housing.

In cases such as *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the ECtHR found Belgium in violation of Article 3 for detaining a five-year-old Congolese child alone in an adult detention centre while attempting to reunite with her mother. This and other cases underscore the importance of tailored protection for unaccompanied minors, highlighting the need for legislative safeguards and state vigilance.[78]

75 Case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, (Application No. 9214/80; 9473/81; 9474/81), Judgment, Strasbourg, 28 May 1985.
76 Case of *Jeunesse v. the Netherlands*, (Application No. 12738/10), Judgment, Strasbourg, 3 October 2014. Case of *M.A. v. Denmark*, (Application No. 6697/18), Judgment, Strasbourg, 9 July 2021.
77 Case of *Mocanu v. Romania*, (Applications Nos. 10865/09, 45886/07 and 32431/08), Judgment, Strasbourg, 17 September 2014.
78 Case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, (Application No. 13178/03), Judgment, Strasbourg, 12 October 2006.

Through these evolving interpretations, the ECtHR has significantly influenced the development of refugee law within Europe. Its rulings have had tangible effects, such as contributing to reforms of the Dublin Regulation – from Dublin II to Dublin III – which now places greater emphasis on the "sovereignty clause" allowing Member States to retain responsibility for asylum claims in exceptional circumstances, particularly where systemic deficiencies exist in the asylum systems of other states.[79]

In conclusion, while the ECHR does not contain a dedicated refugee rights regime, its provisions, interpreted dynamically by the ECtHR, have developed into a comprehensive protection mechanism for refugees, asylum seekers, and other vulnerable migrants. The Court's recognition of vulnerability, insistence on procedural fairness, and promotion of individualised assessments in expulsion and reunification cases all contribute to a broader, more humane asylum framework in Europe. Through this jurisprudence, the ECHR has established itself as a powerful legal instrument in safeguarding the dignity and rights of those seeking refuge.

6.3. Toward a Unified System: The Evolution and Challenges of the Common European Asylum System

For decades, the European Union (EU) and its Member States have positioned themselves as a sanctuary for individuals fleeing persecution and conflict. This commitment to human rights and dignity led, in 1999, to the formal establishment of the Common European Asylum System (CEAS). This system aims to harmonise the rules governing asylum procedures across the EU, ensuring equal treatment of asylum seekers and a uniform level of rights protection throughout all Member States. However, this harmonisation is not without challenges, as it lies at the sensitive intersection of individual freedoms, national sovereignty, and the collective interests of the EU.[80]

At the heart of the CEAS lies the 1951 Geneva Convention Relating to the Status of Refugees, which forms the foundation for international protection. While the CEAS lacks a singular legal definition, it is articulated through a combination of EU directives, regulations, and political instruments. These texts provide minimum standards for fair and efficient asylum procedures, define the criteria for granting refugee and subsidiary protection statuses, and establish procedures for identifying the Member State responsible for examining an asylum application. With the 2024 Pact on Migration and Asylum, the CEAS has entered a new phase, introducing a comprehensive legislative framework that will take full effect by June 2026.[81]

Historically, asylum and migration policies were tightly controlled by individual Member States. During the 1980s, increased movement across European borders and rising numbers of asylum seekers led to concerns over so-called "asylum shopping"

79 Case of *Tarakhel v. Switzerland*, (Application No. 29217/12), Judgment, Strasbourg, 4 November 2014.

80 European Commission, 2025.

81 See Kateřina Frumarová's chapter.

and "refugees in orbit." These phenomena strained national systems and prompted Member States to adopt more restrictive policies, creating competition over who could be the most stringent. This dynamic highlighted the urgent need for a collective European response, ultimately giving rise to early coordination efforts such as the Dublin Convention (1990), which established that the first Member State an asylum seeker enters is typically responsible for processing their application.[82]

Further integration came with the Maastricht Treaty in 1992, which included justice and home affairs under the EU's third pillar, promoting intergovernmental cooperation. However, this pillar offered limited progress, as decisions remained largely non-binding. The Tampere European Council in 1999 marked a turning point, establishing the CEAS based on full respect for the Geneva Convention and the 1967 New York Protocol. Over the years, this system evolved, underpinned by key texts such as the Dublin III Regulation, the Qualification Directive, the Procedural Directive, the Reception Directive, and the Eurodac Regulation, which enables fingerprint data comparison.[83]

Despite this legal architecture, the CEAS has faced persistent criticism and operational challenges. Chief among them is the pressure placed on border countries such as Greece and Italy due to the "first-entry rule", which requires these states to process the majority of asylum claims. Facilities are often inadequate, information provision is inconsistent, and standards for detention and family reunification vary widely. Judicial remedies exist, but legal definitions and deadlines differ across states, complicating enforcement. The EU's attempt to update the Dublin system through a Dublin IV proposal failed, illustrating the political difficulty of reaching consensus on asylum reform.[84]

In response to these shortcomings, the 2020 Pact on Migration and Asylum was proposed, setting out a series of legislative and policy tools designed to manage migration more effectively, ensure solidarity among Member States, and enhance the resilience of the asylum system. This pact includes instruments such as the Asylum and Migration Management Regulation, Return Border Procedure Regulation, Screening Regulation, and the Union Resettlement and Humanitarian Admission Framework, among others. It introduces fast-track procedures and strengthens support mechanisms for border countries while seeking to balance efficiency with rights protection.

A central legal foundation for asylum policy in the EU is Article 78 TFEU, which mandates the development of a common asylum policy based on the Geneva Convention and the principle of non-refoulement – the prohibition against returning individuals to countries where they may face persecution, torture, or death. This is echoed in Article 18 of the EU Charter of Fundamental Rights, which guarantees the right to asylum, and Article 19(2), which bars expulsion to countries where inhuman

82 Marinho and Heinonen, 1998, p. 1.
83 European Parliament, 1999.
84 European Commission, 2017.

treatment is a risk. These provisions, alongside Articles 2 and 3 of the ECHR, form a robust legal shield for asylum seekers and refugees.

The CEAS also recognises subsidiary protection, which extends to individuals who do not meet the strict criteria of refugee status but would face serious harm – such as torture, execution, or indiscriminate violence – if returned to their home country. The legal criteria for both refugee and subsidiary protection are enshrined in the Qualification Regulation, which builds upon earlier directives by further defining the grounds for persecution and serious harm.

Case law from the ECtHR and the Court of Justice of the European Union (CJEU) has played a pivotal role in shaping the application of the CEAS. Through landmark decisions such as *Chahal v. UK*, the ECtHR has firmly established the European doctrine of non-refoulement, which forbids returning individuals to states where they may suffer inhuman treatment, regardless of whether they pose a threat to the host state. This doctrine, though narrower in scope than the Geneva Convention, is considered absolute within European human rights jurisprudence.[85]

Closely related to this is the concept of the "safe country", which allows EU states to return asylum seekers to countries deemed capable of offering effective protection. This applies both to safe countries of origin and safe third countries. However, the use of this concept must respect the principle of non-refoulement and cannot leave applicants in legal limbo or bouncing between states without proper evaluation. EU law ensures that at least one Member State is responsible for examining every international protection application, preventing the phenomenon of "refugees in orbit."[86]

In conclusion, the Common European Asylum System represents an ambitious and evolving project to balance human rights obligations with the realities of migration management. Despite its complexities and occasional failures, the CEAS remains a crucial mechanism for protecting those in need while fostering greater cooperation and solidarity among EU Member States. With the 2024 Pact on Migration and Asylum and its implementation set for 2026, the EU stands at a critical juncture, poised to redefine how it delivers protection in an increasingly interconnected and challenging world.

7. Women

7.1. Advancing Gender Equity Through International Law and Institutions

Gender equity, at its core, implies the equal visibility, empowerment, and responsibility of women and men in all facets of life – public and private. It ensures that both genders have equal access to resources and decision-making and that these are distributed fairly. The pursuit of gender equity is not only a fundamental human right but also essential for sustainable development and social progress. In modern societies,

85 Case of *Chahal v. UK*, (Application No. 22414/93), Judgement, Strasbourg, 15 November 2016.
86 See Lambert, 2017.

gender equity has become central to the protection of human rights, driven by the growing recognition that inclusive development cannot be achieved without it.

Over the decades, the United Nations has played a crucial role in advancing gender equity globally. Key milestones include the Beijing Declaration and Platform for Action and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). These instruments reflect a collective commitment to eradicate gender-based discrimination and promote equality in law and practice. The United Nations (UN) Charter, signed in 1945, already acknowledged the equal rights of men and women, setting a foundational precedent for international gender justice. Similarly, the Universal Declaration of Human Rights (UDHR), adopted in 1948, guarantees rights and freedoms to all without discrimination based on sex, race, nationality, or other status.[87]

The evolution of gender equity within international law continued with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966. These covenants enshrined the obligation of states to uphold rights without gender discrimination. Notably, the ICCPR emphasises the equal enjoyment of civil and political rights by men and women, protection from torture, and equality before the law. The ICESCR, on the other hand, enforces equal rights to work, fair wages, and favourable working conditions, specifically mentioning the need for equal pay for equal work without gender-based discrimination.

CEDAW, adopted in 1979, remains one of the most comprehensive international treaties dedicated solely to women's rights. It targets discrimination in "any other field" and requires states to ensure equality in education, employment, family relations, and more. However, the enforcement of CEDAW faces challenges, particularly in the private sphere, where states often make reservations to critical provisions such as Article 16, which concerns equality in marriage and family life. The Optional Protocol to CEDAW strengthens accountability by allowing individuals to bring complaints before the CEDAW Committee when their rights have been violated.

Efforts to eliminate violence against women have also been prioritised within the UN framework. The Convention Against Torture (1984), though not specific to women, prohibits acts of severe physical or mental suffering when motivated by discrimination of any kind. The Convention on the Rights of the Child (1989) obliges states to ensure proper care for mothers, reflecting concern for women in their reproductive roles. Further, the Declaration on the Elimination of Violence against Women (1993) affirms women's right to live free from violence, including within the home. Since 1993, UN resolutions have addressed gender-based violence in various forms, such as trafficking, female genital mutilation, domestic abuse, and wartime sexual violence.

In 2010, the establishment of UN Women significantly bolstered the institutional capacity of the UN to promote gender equality. This entity brought together four existing agencies – the Division for the Advancement of Women, INSTRAW, OSAGI, and

87 See Olga Dorul's chapter.

UNIFEM – into a single, more powerful body for advocacy and support. UN Women plays a leading role in supporting governments and civil society to implement gender-sensitive policies and has contributed to shaping global development frameworks.[88]

In 2015, gender equity was embedded into the 2030 Agenda for Sustainable Development, specifically through Sustainable Development Goal 5 (SDG 5): Achieve gender equality and empower all women and girls. SDG 5 addresses issues such as ending all forms of discrimination and violence, eliminating harmful practices, ensuring participation and leadership, and securing reproductive rights.

Despite this progress, legal challenges persist. While there are no cases solely about women's status brought before the International Court of Justice, gender-based violations have featured in state disputes. For example, in *Bosnia and Herzegovina v. Serbia and Montenegro*, the court examined allegations of genocide, including systemic sexual violence against women. Although Serbia was not found directly responsible for genocide, the court concluded that it failed in its duty to prevent such atrocities.[89]

Several specialised UN agencies also promote gender equity. The World Health Organization (WHO) applies a gender-focused approach to healthcare, addressing issues such as female genital mutilation, maternal mortality, and adolescent pregnancy. Its work reflects the broader understanding that health disparities are often rooted in gender discrimination. Similarly, the International Labour Organization (ILO) focuses on workplace equality. Its conventions, such as the Violence and Harassment Convention (No. 190) and the Maternity Protection Convention (No. 183), are aimed at promoting safe, fair, and inclusive working environments for women.

Monitoring and enforcement remain critical to the success of international gender equity frameworks. The CEDAW Committee, composed of 23 experts from diverse legal traditions, oversees the implementation of the Convention. It reviews periodic reports from states and can issue General Recommendations to clarify legal obligations. It also handles individual complaints. A notable case is that of Ms. A.S., a Hungarian Roma woman who was sterilised without informed consent. The Committee found Hungary in violation of CEDAW, citing the failure to provide appropriate reproductive information and the breach of her cultural and religious rights.[90] The Committee also evaluates social security policies, ensuring that any restrictions placed on women's rights are necessary, proportionate, and transparent. It recognises that states have a margin of appreciation but insists on adherence to international norms, especially regarding non-discrimination and equal access to benefits such as pensions and maternity protections.

In conclusion, the pursuit of gender equity through international law has been both comprehensive and evolving. Grounded in foundational documents like the UN Charter and UDHR, reinforced by legally binding treaties such as CEDAW, ICCPR, and

88 *UNWOMEN*, no date.
89 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996.
90 United Nations, 2004.

ICESCR, and supported by institutions like UN Women, the WHO, and the ILO, the global movement toward gender equality continues to expand. Although challenges remain in enforcement and cultural resistance, the legal and institutional framework established by the UN and its partners has laid a firm foundation for advancing the rights and dignity of women and girls worldwide.

7.2. The Evolution of Anti-Discrimination Protections under the European Convention on Human Rights and Its Protocols

Within the framework developed by the Council of Europe, several key conventions have been adopted to serve specific objectives, among which the protection of human rights occupies a central place. One of the most significant legal instruments in this context is the European Convention on Human Rights and Fundamental Freedoms (ECHR), along with its additional protocols. These instruments form the cornerstone of the Council's commitment to uphold fundamental rights and liberties across its member states, particularly in the area of non-discrimination. The principle of equality is foundational to the realisation and enjoyment of human rights. As such, the ECHR, the Council of Europe's primary human rights treaty, includes explicit provisions aimed at prohibiting discrimination. Article 14 of the Convention stipulates that the enjoyment of the rights and freedoms set forth in the Convention must 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. This clause ensures that individuals placed in analogous situations are treated equally with respect to their Convention rights.[91]

Although Article 14 does not exist independently – it must be invoked in conjunction with another substantive right under the Convention – the European Court of Human Rights (ECtHR) has clarified that it can still play an autonomous role in strengthening the protection of individuals against discriminatory treatment. In the landmark case of *Marckx v. Belgium*, the Court acknowledged that while Article 14 may not provide a stand-alone guarantee, it has considerable utility in supplementing the Convention's core provisions, thereby reinforcing the equality principle. The Court emphasised that it is not necessary for a violation of a substantive right to occur in order to establish a violation of Article 14. In paragraph 32 of the judgment, the Court noted that the inclusion of the term "or other status" within Article 14 implies a non-exhaustive list of protected characteristics, thus allowing for the evolution of anti-discrimination jurisprudence to encompass emerging grounds of inequality.[92]

The scope of anti-discrimination protection was further broadened by the adoption of Protocol No. 12 to the Convention. The preamble of this protocol underlines the paramount importance of the principle of equality and the necessity of taking all appropriate steps to ensure its realisation in all aspects of public and private life. Article 1 of Protocol No. 12 significantly extends the reach of the non-discrimination

91 See Dženeta Omerdić's chapter.
92 Case of *Marckx v. Belgium*, (Application No. 6833/74), Judgment, Strasbourg, 13 June 1979.

guarantee. Paragraph 1 provides that the enjoyment of any right set forth by law shall be secured without discrimination, while paragraph 2 prohibits discrimination by public authorities in all their actions, regardless of the existence of a specific Convention right.

The Explanatory Report to Protocol No. 12 elaborates on the intended breadth of its application. It identifies various contexts in which discriminatory treatment may arise: in the enjoyment of rights conferred by national law; where a public authority is under a clear legal obligation; where discretionary powers are exercised (such as in granting subsidies); and through any act or omission by a public authority – for instance, police conduct during public disturbances. This broad interpretation ensures comprehensive protection against both direct and indirect forms of discrimination.

The first case in which the ECtHR found a violation of Article 1 of Protocol No. 12 was *Sejdić and Finci v. Bosnia and Herzegovina*. The applicants, members of the Roma and Jewish communities respectively, were barred from standing for election to the Presidency and the House of Peoples on account of their ethnic origins. The Court held that this amounted to unjustified discrimination. In a subsequent case, *Zornić v. Bosnia and Herzegovina*, the Court found that the state's failure to implement the *Sejdić and Finci* judgment constituted a continuing violation, highlighting the obligation of member states to not only respect but also give effect to the Court's judgments.[93]

An important feature of the ECHR is that, unlike some international human rights instruments such as the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), it provides symmetrical protection. This means that the protection against discrimination applies equally to all persons, irrespective of sex or gender. As a result, men have also invoked the ECHR in cases of alleged gender discrimination. A notable example is the case of *Van Raalte v. the Netherlands*, where the Court examined a Dutch tax rule that imposed a levy on childless men over the age of 45, while exempting women in the same situation. The Dutch government argued that biological differences and prevailing social attitudes justified this distinction. However, the Court rejected these arguments, noting that the biological reasoning was not universally applicable and that the purported emotional burden could equally apply to childless men, women, or couples. The decision emphasised the need for objective and reasonable justifications in any differential treatment.[94]

The case of *Kontrová v. Slovakia* further illustrates the practical implications of the Convention's non-discrimination and right-to-life guarantees. In this tragic case, the applicant reported repeated abuse by her husband and filed a criminal complaint supported by medical evidence. Despite these warnings and multiple emergency calls, the police failed to act decisively. Just days after these reports, her husband shot and

93 Case of *Sejdić and Finci v. Bosnia and Herzegovina*, (Applications Nos. 27996/06 and 34836/06), Judgment Strasbourg, 22 December 2009. Case of *Zornić v. Bosnia and Herzegovina*, (Application No. 3681/06), Judgment, Strasbourg, 15 July 2014.

94 Case of *Van Raalte v. the Netherlands*, (Application No. 20060/92), Judgment, Strasbourg, 21 February 1997.

killed their two children before taking his own life. The ECtHR found that the police had failed to fulfil their statutory duty to protect life and health, as enshrined in both the Police Corps Act of 1993 and relevant provisions of the Criminal Procedure Code. The Court held that the authorities' inaction, particularly in the face of a known and escalating threat, constituted a violation of Article 2 of the ECHR, which guarantees the right to life. The case also demonstrated institutional failures, as one police officer actively assisted the applicant and her husband in downgrading the original complaint, thereby preventing further legal intervention.[95]

These cases collectively underscore the dynamic and evolving nature of the ECHR system in responding to complex issues of discrimination and state responsibility. They reveal the critical role of the ECtHR in interpreting the Convention in a way that reflects contemporary understandings of equality, dignity, and justice. The development of Article 14 jurisprudence, complemented by Protocol No. 12, has significantly expanded the scope of protection afforded to individuals, moving from a narrowly defined list of protected characteristics toward a more inclusive and flexible model of anti-discrimination law.

In conclusion, the Council of Europe, through the ECHR and its protocols, has laid a robust legal foundation for combating discrimination and upholding the principle of equality. The jurisprudence of the ECtHR plays a vital role in ensuring that these principles are effectively implemented, holding states accountable for both their actions and omissions. Through its evolving case law, the Court continues to refine the contours of equality law in Europe, contributing to the progressive realisation of human rights across the continent.

7.3. Gender Equality and the European Union: Legal Foundations, Policy Developments, and Remaining Challenges

Gender equality is a cornerstone of the European Union's broader fight against discrimination. While anti-discrimination provisions target unequal treatment on multiple grounds, the principle of gender equality places a specific emphasis on addressing disparities between women and men. These two concepts are deeply interconnected and mutually reinforcing. As set out in Article 3 of the Treaty on European Union (TEU), the EU is not only tasked with preventing discrimination but is also under a positive obligation to promote equality between women and men across all of its activities.[96]

This commitment is reinforced by the Treaty on the Functioning of the European Union (TFEU), notably through Article 10, which mandates the mainstreaming of anti-discrimination objectives across EU policies, and Article 8, which explicitly requires gender equality to be integrated into all EU actions. Together, these provisions

95 Fourth Section Decision as to the Admissibility of Application No. 7510/04 By Dana Kontrová Against Slovakia.

96 See Petra Weingerl and Lina Atelj's chapter.

establish a strong legal basis for both the elimination of discrimination and the proactive promotion of gender equality.

Gender Mainstreaming and Positive Action

The principle of gender mainstreaming – enshrined in Article 8 TFEU – requires the incorporation of a gender perspective into every stage of policy and law-making. It is both a legal principle and a policy strategy aimed at addressing the structural and institutional causes of inequality. As a soft-law tool, gender mainstreaming is not subject to judicial review by the European Court of Justice (ECJ), but its flexibility allows it to target deeply rooted biases that often go unchecked within formal institutions. In parallel, the EU promotes positive action measures, particularly in the field of employment, to rectify historical disadvantages faced by women. Grounded in Article 157(4) TFEU, positive action allows for targeted interventions to ensure effective equality. Beginning in the 1980s, the European Commission launched a series of gender equality policy programs to advance this agenda, often in the absence of strong political support from the Council. These soft-law instruments, though lacking judicial enforceability and democratic scrutiny, have played an important role in shaping future hard-law initiatives. Both gender mainstreaming and positive action form the foundation of the EU's "gender equality acquis" – a body of hard and soft law that collectively aims to ensure the practical implementation of the Union's equality objectives.[97]

From Equal Pay to Equal Treatment: Laying the Groundwork

A pivotal moment in the development of EU gender equality law came with the ECJ's decision in *Defrenne v. Sabena* (Case C-43/75), which confirmed the direct effect of the treaty provision on equal pay (Article 119 EEC, now Article 157 TFEU). The judgment established that individuals could invoke the principle of equal pay before national courts, even in the absence of implementing legislation, thereby reinforcing the principle's practical enforceability.

Following this case, the EU adopted several directives aimed at clarifying and expanding the legal framework for gender equality. These included:

- Directive 75/117/EEC on equal pay,
- Directive 76/207/EEC on equal treatment in employment,
- Directive 79/7/EEC on equal treatment in social security,
- Directive 86/378/EEC on occupational pension schemes, and
- Directive 86/613/EEC on the self-employed.

In *Hofmann,* the ECJ ruled that certain biological distinctions – particularly in relation to pregnancy and childbirth – could justify protective measures for women. This ruling acknowledged the specific disadvantages women may face in maintaining

97 Stratigaki, 2005, pp. 165–186.

employment due to maternity, without undermining the broader principle of equal treatment.[98]

Directive 92/85/EEC (the Pregnant Workers Directive), adopted within the broader framework of workplace health and safety, extended protection to pregnant workers, new mothers, and breastfeeding women. The directive prohibits dismissal during maternity leave, guarantees a minimum of 14 weeks' leave, and ensures financial support during this period. While important, its focus remains on a singular social risk, highlighting the need for a more holistic approach that addresses broader gender inequalities in the workplace.

Efforts to promote a better work-life balance culminated in the adoption of the Parental Leave Directive (96/34/EC), later replaced by Directive 2010/18/EU. These measures aimed to support the equal sharing of childcare responsibilities, granting each parent an individual, non-transferable right to parental leave.

Procedural Justice: Burden of Proof and Effective Remedies

Over time, the ECJ has developed important procedural safeguards to ensure the effectiveness of gender equality law. In the landmark *Danfoss* case, the Court held that where a company's pay structure appeared discriminatory, the burden of proof rested with the employer to demonstrate that any differences were based on objective, non-gender-related factors. This reversal of the burden of proof became a cornerstone of enforcement and was subsequently codified in the Burden of Proof Directive (97/80/EC). While these procedural guarantees are essential, they are not sufficient to ensure substantive equality. Legal rules alone cannot eliminate structural inequality; rather, proactive and values-based measures are needed to address the social, cultural, and economic dynamics that perpetuate gender disparities.[99]

From Gender to General Non-Discrimination: Broadening the Framework

Concepts originally developed in the field of gender equality, such as indirect discrimination, were later extended to form the basis of a broader EU non-discrimination framework. The adoption of directives such as:

- Directive 2002/73/EC (amending the Equal Treatment Directive),
- Framework Directive 2000/78/EC on employment equality, and
- Directive 2000/43/EC on racial equality,

illustrate a shift towards a more inclusive and general approach. These instruments reflect the increasing constitutionalisation of equality within the EU legal order, linking anti-discrimination efforts with broader human rights principles.

98 Case 184/83 – *Ulrich Hofmann v Barmer Ersatzkasse*. Judgment of the Court of 12 July 1984.
99 Case C-94/10 – *Danfoss A/S, Sauer-Danfoss ApS v Skatteministeriet*. Judgment of the Court (First Chamber) of 20 October 2011.

Tackling the Gender Pay Gap: Transparency and Intersectionality

The persistent gender pay gap remains one of the most visible forms of gender inequality in the EU. To address this, the Pay Transparency Directive (2023/970/EU) introduces a range of obligations aimed at increasing wage transparency and employer accountability. Among its key provisions are:

- Mandatory reporting on the gender pay gap,
- Employee rights to information on pay levels and pay structures,
- Joint pay assessments in cases of significant gender disparities.

For the first time, this directive also introduces a legal definition of intersectional discrimination. Article 3(2)(e) describes it as discrimination based on a combination of sex and other protected characteristics (as defined in Directives 2000/78/EC and 2000/43/EC). Unlike multiple discrimination, which views different forms of discrimination as cumulative, intersectionality recognises the synergistic effects of overlapping identities, particularly for women belonging to marginalised groups.

The directive also reaffirms that equal pay applies to all forms of remuneration – whether fixed or variable, in cash or in kind – based on a gender-neutral assessment of work of equal value.

The Gender Care Gap: Valuing Unpaid Labor

Closely tied to the gender pay gap is the gender care gap, which stems from the disproportionate share of unpaid care work undertaken by women. This disparity limits women's full participation in the labour market and reinforces occupational segregation.

Feminist economists have long challenged the neoclassical division between "productive" and "unproductive" labour, noting that care work – whether for children, the elderly, or within the household – is a vital form of social reproduction. Nevertheless, existing legal frameworks have often reinforced traditional roles, as seen in maternity protection schemes that fail to incentivise shared caregiving responsibilities.

The Work-Life Balance Directive (2019/1158/EU) aims to shift this paradigm. By introducing non-transferable paternity leave and flexible working rights for both parents, it encourages greater male participation in caregiving and challenges entrenched gender roles. Key provisions include:

At least ten days of paid paternity leave,
Individual, non-transferable parental leave rights,
Five days of unpaid carer's leave annually,
Rights to flexible work arrangements for parents and carers.

This directive marks a significant step toward shared responsibility in caregiving and enhances women's labour market participation by addressing structural barriers to equality.

Bridging the Gender Participation Gap: Women in Decision-Making

Despite progress, women remain underrepresented in leadership positions across both public and private sectors. The Women on Boards Directive (2022/2381/EU) seeks to address this imbalance by increasing transparency in recruitment processes and encouraging gender-balanced representation on company boards.

The persistent glass ceiling – a metaphor for the invisible barriers that prevent women from reaching top positions – is rooted in stereotypes, sectoral segregation, patriarchal work cultures, and limited access to professional networks. This directive aims to create systemic change by addressing these structural obstacles and promoting merit-based gender diversity in decision-making roles.

Gender-Based Violence and the Limits of EU Criminal Law

The EU's competence in criminal law is limited, yet the urgency of addressing gender-based violence has driven legislative innovation. With the EU's accession to the Istanbul Convention in 2023, a significant step was taken in aligning EU law with international standards.

The Violence Against Women Directive (2024/1385/EU) addresses specific crimes such as rape, female genital mutilation, cyberstalking, and the non-consensual distribution of intimate images. It also includes provisions for victim support, protection measures, and improved access to justice. These advances build upon the Victims' Rights Directive (2012/29/EU) but go further in addressing the needs of survivors through individualised protection assessments and capacity-building for first responders.

Nevertheless, political resistance from some Member States, particularly regarding the definition of gender, continues to limit the scope of EU action in this area.

The Gender Health Gap and the Right to Bodily Autonomy

The gender health gap reflects both physiological differences and structural inequalities in access to healthcare. While the EU has only supporting competence in the area of public health (Article 168 TFEU), both the Charter of Fundamental Rights and the European Pillar of Social Rights affirm the right to high-quality, affordable healthcare.

Barriers to sexual and reproductive health care disproportionately affect women, particularly those from marginalised communities. The recognition of bodily autonomy as central to human dignity underscores the importance of ensuring women's ability to make informed decisions about their health and reproductive lives. This right is foundational not only to gender equality but to the broader project of human rights within the EU.

Over the past decades, the European Union has built a sophisticated legal and policy framework to promote gender equality. From the enforcement of equal pay and protection against discrimination to measures supporting work-life balance and gender-based violence prevention, the EU's efforts reflect a multidimensional

commitment to equality. Nevertheless, structural barriers remain, and formal legal guarantees must be accompanied by substantive change.

As the EU continues to address the gender pay gap, care responsibilities, underrepresentation in decision-making, and violence against women, a more inclusive, intersectional, and rights-based approach is necessary. The road to full gender equality requires not only legal innovation but also sustained political will, cultural transformation, and the active engagement of all actors in society.

Bibliography

Literature

Braddock, D.L., Parish, S.L. (2001) 'An Institutional History of Disability' in Albrecht, G.L., Seelman, K., Bury, M. (eds.) *Handbook of Disability Studies*. Thousand Oaks: Sage Publications, pp. 1–68; https://doi.org/10.4135/9781412976251.n2.

Capotorti, F. (1979) *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. New York: United Nations.

Council of Europe. Human Rights Commissioner (2012) *Human rights of Roma and Travellers in Europe*. Strasbourg: Council of Europe Publishing.

Daly, A., Ruxton, S., Schuurman, M. (2015) *Challenges to children's rights today: What do children think? A desktop study on children's views and priorities to inform the next Council of Europe Strategy for the Rights of the Child*. Strasbourg: Council of Europe Publishing.

Degener, T. (2006) 'Menschenrechtsschutz für behinderte Menschen, Vom Entstehen einer neuen Menschenrechtskonvention der Vereinten Nationen', *Vereinte Nationen*, 2006/3, pp. 104–110.

Degener, T. (2009) 'Welche legislativen Herausforderungen bestehen in Bezug auf die nationale Implementierung der UN-Behindertenkonvetion in Bund und Ländern?', *Behindertenrecht, Fachzeitschrift für Fragen der Rehabilitation*, 2009/2, pp. 34–51.

Dhanda, A. (2008) 'Constructing a new human rights lexicon: Convention on the Rights of Persons with Disabilities', *Sur. International Journal on Human Rights,* (8), pp. 43–61.

Feller, E. (2001) 'The evolution of the international refugee protection regime', *Washington University Journal of Law & Policy*, 5(1), pp. 129–139.

Harris, D.J., O'boyle, M., Bates, E., Buckley, C. (2023) *Law of the European convention on human rights*. Oxford: Oxford University Press.

Heliskoski, J. (2001) *Mixed Agreements As a Technique for Organizing the International Relations of the European Community and Its Member States*. The Hague–London–New York: Kluwer Law International.

Hrabar, D. (2024) 'Special Protection of Human Rights of Children I: History of Children's Rights' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 23–40; https://doi.org/10.71009/2024.mbar.icr_1.

Kálmán, Zs., Könczei, Gy. (2002) *A Taigetosztól az esélyegyenlőségig*. Osiris: Budapest.

Karayigit, T.M. (2006) 'Why and to What extent a Common Interpretative Position for Mixed Agreements?', *European Foreign Affairs Review*, 11(4), pp. 445–469; https://doi.org/10.54648/eerr2006037.

Kotzur, M., Richter, C. (2012) 'Anmerkung zur Geltung und Verbindlichkeit der Behindertenrechtskonvention im deutschen Recht' in Welke, A. (ed.) *UN Convention on the Rights of Persons with Disabilities with Legal Explanations*. Berlin: German Association for Public and Private Welfare, pp. 81–92.

Kovács, P. (2011) *Public International Law*. Osiris: Budapest.
Lachwitz, K. (2008) 'Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung', *Betreuungsrechtliche Praxis*, 2008/4, pp. 37–40.
Lambert, H. (ed.) (2017) *International refugee law*. Routledge.
Leal-Arcas, R. (2001) 'The European Community and Mixed Agreements', *European Foreign Affairs Review*, 6(4), pp. 483–513; https://doi.org/10.54648/391100.
Marinho, C., Heinonen, M. (1998) 'Dublin after Schengen: Allocating responsibility for examining asylum applications in practice', *Eipascope*, 1998/3, pp. 1–12.
O'Connell, R. (2009) 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR', *Legal Studies*, 29(2), pp. 211–229; https://doi.org/10.1111/j.1748-121X.2009.00119.x.
Peng, L., Chan, A.H.S. (2019) 'A meta-analysis of the relationship between ageing and occupational safety and health', *Safety Science*, 112(4), pp. 162–172; https://doi.org/10.1016/j.ssci.2018.10.030.
Rothfritz, L.P. (2010) *Die Konvention der Vereinten Nationen zum Schutz der Rechte von Menschen mit Behinderungen. Eine Analyse unter Bezugnahme auf die deutsche und europäische Rechtsebene*. Frankfurt am Main: Peter Lang Internationaler Verlag der Wissenschaften.
Sándor-Szalay, E. (2022) 'International Law in the Service of Minority Protection – Hard Law, Soft Law, and a Little Practice' in Raisz, A. (ed.) *International Law From a Central European Perspective*. Miskolc–Budapest: Central European Academic Publishing, pp. 157–179; https://doi.org/10.54171/2022.ar.ilfcec_8.
Stratigaki, M. (2005) 'Gender mainstreaming vs positive action: An ongoing conflict in EU gender equality policy', *European Journal of Women's Studies*, 12(2), 165–186; https://doi.org/10.1177/1350506805051236.
Weis, P. (1982) 'Development of Refugee Law', *Michigan Journal of International Law*, 3(1), pp. 27–42.

Internet Sources

European Commission (2006) *Towards an EU strategy on the rights of the child. COM/2006/0367* [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006DC0367 (Accessed: 17 January 2026).
European Commission (2017) *Annual activity report 2016 - Migration and Home Affairs* [Online]. Available at: https://commission.europa.eu/publications/annual-activity-report-2016-migration-and-home-affairs_en (Accessed: 18 January 2026).
European Commission (2020) *The new EU Roma strategic framework for equality, inclusion and participation (full package)* [Online]. Available at: https://commission.europa.eu/publications/new-eu-roma-strategic-framework-equality-inclusion-and-participation-full-package_en (Accessed: 18 January 2026).

European Commission (2021a) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Eu Strategy on the Rights of the Child. COM/2021/142 final* [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021DC0142 (Accessed: 17 January 2026).

European Commission (2021b) *Green Paper on Ageing: Fostering solidarity and responsibility between generations. COM(2021) 50 final.* [Online]. Available at: https://commission.europa.eu/system/files/2021-06/green_paper_ageing_2021_en.pdf (Accessed: 17 January 2026).

European Commission (2025) *Asylum in the EU* [Online]. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/asylum-eu_en (Accessed: 18 January 2026).

European Commission (no date) *European Migration Network: Asylum and Migration Glossary* [Online]. Available at: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary_en (Accessed: 17 January 2026).

European Parliament (no date) *The European Parliament Coordinator on Children's Rights* [Online]. Available at: https://www.europarl.europa.eu/at-your-service/en/be-heard/coordinator-on-children-rights (17 January 2026).

European Parliament (1999) *Tampere European Council 15 And 16 October 1999. Presidency Conclusions* [Online]. Available at: https://www.europarl.europa.eu/summits/tam_en.htm (Accessed: 18 January 2026).

FUEN (no date) *European Parliament resolutions concerning traditional national and linguistic minorities in the EU* [Online]. Available at: https://fuen.org/en/article/European-Parliament-resolutions-concerning-traditional-national-and-linguistic-minorities-in-the-EU (18 January 2026).

OECD (2019) *Pensions at Glance 2019: OECD and G20 Indicators* [Online]. Available at: https://www.oecd-ilibrary.org/sites/b6d3dcfc-en/index.html?itemId=/content/publication/b6d3dcfc-en#section-d1e182 (Accessed: 25 August 2023).

UNHCR (no date) *Comprehensive Refugee Response Framework* [Online]. Available at: https://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration/new-york-declaration-refugees-and-migrants-0 (Accessed: 18 January 2026).

UNICEF (no date) [Online]. Available at: https://www.unicef.org/ (Accessed: 1 January 2026).

United Nations (2002) *Madrid Plan of Action and its Implementation* [Online]. Available at: https://social.desa.un.org/issues/ageing/madrid-plan-of-action-and-its-implementation-main/madrid-plan-of-action-and-its (Accessed: 17January 2026).

United Nations (2004) *Communication No. 4/2004* [Online]. Available at: https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf (Accessed: 26 October 2024).

United Nations (2024) *The 2024 Revision of UN World Population Prospects* [Online]. Available at: https://population.un.org/wpp/ (Accessed: 26 October 2024).

United Nations (no date) *United Nations Disability Inclusion Strategy* [Online]. Available at: https://www.un.org/en/content/disabilitystrategy/ (Accessed: 15 April 2025).

United Nations Human Rights Council (no date) [Online]. Available at: https://www.ohchr.org/en/hrbodies/hrc/home (Accessed: 17 January 2026).

United Nations. Economic and Social Council (2005) *Commentary on the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities E/CN.4/Sub.2/AC.5/2005/2* [Online]. Available at: https://digitallibrary.un.org/record/547650?ln=en&v=pdf#files (Accessed: 17 January 2026).

UNWOMEN (no date) [Online]. Available at: https://www.unwomen.org/en (Accessed: 18 January 2026).

World Health Organization (2025) *Ageing and health* [Online]. Available at: https://www.who.int/news-room/fact-sheets/detail/ageing-and-health (Accessed: 25 August 2023).

Legal Sources

Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee.

CPR General Comment No. 23: Article 27 (Rights of Minorities) Adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994, CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments).

Declaration of the Rights of the Child [Online]. Available at: https://digitallibrary.un.org/record/195831/files/A_RES_1386%28XIV%29-EN.pdf (Accessed: 1 January 2026).

Directive (EU) 2021/1883 – conditions of entry to and residence in the European Union of non-EU nationals for the purpose of highly qualified employment.

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

European Parliament resolution of 11 September 2013 on endangered European languages and linguistic diversity in the European Union (2013/2007(INI)).

European Parliament resolution of 13 November 2018 on minimum standards for minorities in the EU (2018/2036(INI)).
European Parliament resolution of 17 December 2020 on the European Citizens' Initiative 'Minority SafePack – one million signatures for diversity in Europe' (2020/2846(RSP)).
European Parliament resolution of 18 April 2023 on the institutional relations between the EU and the Council of Europe (2022/2137(INI)).
European Parliament resolution of 7 February 2018 on protection and non-discrimination with regard to minorities in the EU Member States (2017/2937(RSP)).
European Parliament resolution of 8 June 2005 on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)).
Optional Protocol to the Convention on the Rights of Persons with Disabilities, UN Doc. A/Res/61/106, 24 January 2007.
The Optional Protocol on the Involvement of Children in Armed Conflict; The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography; Optional Protocol on a Communications Procedure [Online]. Available at: https://www.gov.ie/en/department-of-children-disability-and-equality/publications/optional-protocols-to-the-uncrc/ (Accessed: 1 January 2026).
United Nations Convention on the Rights of the Child [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (Accessed: 1 January 2026).

Case-Law

Case 184/83 – *Ulrich Hofmann v Barmer Ersatzkasse*. Judgment of the Court of 12 July 1984.
Case C-94/10 – *Danfoss A/S, Sauer-Danfoss ApS v Skatteministeriet*. Judgment of the Court (First Chamber) of 20 October 2011.
Case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, (Application Nos. 9214/80; 9473/81; 9474/81), Judgment, Strasbourg, 28 May 1985.
Case of *Andrejeva v. Latvia*, (Application No. 55707/00), Judgment, Strasbourg, 18 February 2009.
Case of *Berrehab v. Netherlands*, (Application No. 10730/84), Judgment, Strasbourg, 21 June 1988.
Case of *Blokhin v. Russia*, (Application No. 47152/06), Judgment, Strasbourg, 23 March 2016.
Case of *Chahal v. UK*, (Application No. 22414/93), Judgement, Strasbourg, 15 November 2016.
Case of *Chowdury and Others v. Greece*, (Application No. 21884/15), Judgment, Strasbourg, 30 March 2017.
Case of *D.H. and Others v. Czech Republic*, (Application No. 57325/00), Judgment, Strasbourg, 13 November 2007.
Case of *Gaygusuz v. Austria*, (Application No. 17371/90), Judgment, Strasbourg, 16 September 1996.

Case of *Gorzelik and Others v. Poland*, (Application No. 44158/98), Judgment, Strasbourg, 17 February 2004.
Case of *Jeunesse v. the Netherlands*, (Application No. 12738/10), Judgment, Strasbourg, 3 October 2014.
Case of *K.K. And Others V. Denmark*, (Application No. 25212/21), Judgment, Strasbourg, 6 December 2022.
Case of *Kokkinakis v. Greece*, (Application No. 14307/88), Judgment, Strasbourg, 25 May 1993.
Case of *M.A. v. Denmark,* (Application No. 6697/18), Judgment, Strasbourg, 9 July 2021.
Case of *M.S.S. v. Belgium and Greece*, (Application No. 30696/09), Judgment, Strasbourg, 21 January 2011.
Case of *Marckx v. Belgium*, (Application No. 6833/74), Judgment, Strasbourg, 13 June 1979.
Case of *McDonald v. United Kingdom*, (Application No. 4241/12), Judgment, Strasbourg, 20 May 2014.
Case of *Mennesson v. France*, (Application No. 65192/11), Judgment, Strasbourg, 26 June 2014.
Case of *Mocanu v. Romania*, (Applications Nos. 10865/09, 45886/07 and 32431/08), Judgment, Strasbourg, 17 September 2014.
Case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, (Application No. 13178/03), Judgment, Strasbourg, 12 October 2006.
Case of *Savickis v. Latvia, (Application No. 49270/11)*, Judgment, Strasbourg, 9 June 2022.
Case of *Sejdić and Finci v. Bosnia and Herzegovina*, (Applications Nos. 27996/06 and 34836/06), Judgment Strasbourg, 22 December 2009.
Case of *Sidiropoulos and Others v. Greece*, (Application No. 26695/95), Judgment, Strasbourg, 10 July 1998.
Case of *Stanev v. Bulgaria*, (Application No. 36760/06), Judgment, Strasbourg, 17 January 2012.
Case of *Tarakhel v. Switzerland*, (Application No. 29217/12), Judgment, Strasbourg, 4 November 2014.
Case of *Van Raalte v. the Netherlands*, (Application No. 20060/92), Judgment, Strasbourg, 21 February 1997.
Case of *Zornić v. Bosnia and Herzegovina*, (Application No. 3681/06), Judgment, Strasbourg, 15 July 2014.
Case of *Béláné Nagy v. Hungary*, (Application No. 53080/13), Judgment, Strasbourg, 13 December 2016.
Case of *Centre For Legal Resources On Behalf Of Valentin Câmpeanu v. Romania*, (Application No. 47848/08), Judgment, Strasbourg, 17 July 2014.
Case of *D.H. and Others v. The Czech Republic*, (Application No. 57325/00), Judgment, Strasbourg, 7 February 2006.
Case of *Fabris v. France,* (Application No. 16574/08), Judgment, (Just Satisfaction And Striking Out), Strasbourg, 28 June 2013.

Case of *Guberina v. Croatia*, (Application No. 23682/13), Judgment, Strasbourg, 22 March 2016.
Case of *L.R. v. North Macedonia*, (Application No. 38067/15), Judgment, Strasbourg, 23 May 2020.
Case of *Lambert and Others v. France*, (Application No. 46043/14), Judgment, Strasbourg, 5 June 2015.
Case of *Mahamed Jama v. Malta*, (Application No. 10290/13), Judgment, Strasbourg, 26 November 2015.
Case of *N. v. Romania (no. 2)*, (Application No. 38048/18), Judgment, Strasbourg, 16 November 2021.
Case of *N.Š. V. Croatia*, (Application No. 36908/13), Judgment, Strasbourg, 10 December 2020.
Case of *Saviny v. Ukraine*, (Application No. 39948/06), Judgment, Strasbourg, 18 December 2008.
Case of *Tyrer v. The United Kingdom*, (Application No. 5856/72) Judgment, Strasbourg, 25 April 1978.
Decision as to the Admissibility of Application No. 27677/02 by Nikky Semtges against the Netherlands, 3 July 2003.
Fourth Section Decision as to the Admissibility of Application No. 7510/04 By Dana Kontrová Against Slovakia.
HRC, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, decision of 26 March 1990, communication no. 167/1984.
HRC *Ivan Kitok v. Sweden*, decision of 27 July 1988, communication no. 197/1985.
HRC, *Raihman v. Latvia*, decision of 30 November 2010, communication no. 1621/2007.
ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996.

Part I
Children

| Chapter 1 |

The International Protection of Children's Rights: The United Nations Framework

Márta Benyusz – Josipa Kokić

ABSTRACT

Children, as the youngest members in society, form a vulnerable group which requires special care and protection. Throughout history, they were considered as passive objects of law, with parents making all decisions on their behalf. In prehistoric times, ancient periods, and the Middle Ages, children were often abandoned, killed or exposed, and child-parent relationship was characterised by the child's subordination and obedience. However, during the Enlightenment, the situation began to improve, and the awareness of the special care and protection children need started to emerge. With the industrial revolutions the situation of children got worse, as they began working in factories, under poor conditions and for low wages. This led to new pieces of legislation regulating minimum age and working conditions. Finally, the 20th century was a turning point for children and their rights. It all started with non-binding documents, such as the Geneva Declaration (1924) and the UN Declaration on the Rights of the Child (1959) but culminated in the adoption of the UN Convention on the Rights of the Child (1989). The UNCRC today is a truly international treaty, ratified by all countries in the world, except the USA. In just 54 articles it defines the child and guarantees a wide scope of rights to all children, without discrimination of any kind. These rights can be classified into several categories, but the most common one is the 3P: provision, participation and protection. The UNCRC is accompanied by three optional protocols: Optional Protocol on the involvement of children in armed conflict, Optional Protocol on the sale of children, child prostitution and child pornography, and Optional Protocol on communications procedure. The UNCRC also established UN Committee on the Rights of the Child, a body with a key role in protecting children's rights, with several different functions, including deliberating individual and state complaints, inquiry procedures, issuing general comments, etc. The role of UNICEF and non-profit organisations, such as NGOs and NHRIs should not be omitted.

KEYWORDS

vulnerability, children's rights, UNCRC, OPAC, OPSC, OPIC, CRC Committee, General Comments, UNICEF, NGOs, NHRIs, BIC

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1. The Concept of Child's Vulnerability

Vulnerability can be defined, in simple terms, as a '*the lack of individuals' capacity to cope with future threats.*'[1] Although it derives from the Latin word *vulnerabilis,* which in turn comes from the word *vulnus* (Latin for "wound"), the term vulnerability is not exclusively linked to the harm done to the body and the individual, but also applies to the collective forms of vulnerability, such as those affecting the household, the community, society, institutions, the state, or the international community.[2] While anyone can be vulnerable – such as the elderly, women, young people, or people belonging to minorities, depending on the context and specific circumstances[3] – special attention must be given to the vulnerability of children, who '*share the universal vulnerability inherent in the human condition*'.[4]

As the youngest members of society, children are physically weaker (shorter and weigh less) than adults, possess less cognitive skills, knowledge, life experience and wisdom, and are not (fully) emotionally mature or socially skilled. They typically depend on adults, primarily their parents, and they often lack the capability to fully understand and reason.[5] Due to this – in the eyes of those who want to punish them, take advantage of them, or simply use them as a means to achieve their own interests – children become easier targets with little ability to resist.[6] They become victims of violence, abuse (including sexual abuse), economic exploitation (including sexual exploitation), trafficking, forced marriages, use of substances, involvement in armed conflicts, or other violations of their rights.

To avoid those violations, adults – whether parents, members of society, or the state – need to become fully aware of the vulnerable position children hold in society

1 Forbes-Mewett and Nguyen-Trung, 2020, p. 12.

2 Mayrhofer, 2025, p. 1.

3 Fineman offers a different perspective arguing that vulnerability '*is not a characteristic of only some individuals or groups, nor does it differ in quality or degree from one individual or group to another*' and that '*we are all always vulnerable – there is no position of invulnerability.*' Fineman, 2020 cited in Haugli and Martens, 2025, pp. 18–19.

4 In this regard, Sandberg argues that '*children's rights are a response to (their) inherent vulnerability and the various vulnerable situation(s) in which they may find themselves.*' She also states that '*without rights, children's vulnerability may be used as a reason to keep them down and provide them with goods as charity only, leaving them to the benevolence of others.*' Sandberg, 2025, p. 202.

5 Norozi and Moen, 2016, cited in Herring, 2022, p. 1512. Based on this, three types of vulnerability can be distinguished: physical, social and structural. Physical vulnerability refers to the fact that children are weaker than adults, they are smaller and weigh less, which makes them vulnerable. Social vulnerability means that children, due to the lack of social skills, experience, and wisdom, are easier target and accordingly, are in need of special protection. Structural vulnerability, however, relates to the fact that children cannot independently and unlimitedly access resources such as food, medical care, and transport, and they need adults to help them. Meyer, 2007, cited in Herring, 2022, p. 1512.

6 The same view was expressed by the CRC Committee, which stated that '*children's developmental state makes them particularly vulnerable to human rights violations*'. UN Committee on the Rights of the Child, 2002, pt. 15.

and acknowledge it. They must also undertake necessary actions to prevent such situations, and if they occur, they must act to protect the child. For example, parents need to be attentive, supervise and guide their children, and, when appropriate, inform them about the dangers they may face and protect them from those. Society needs to be more sensitive to children, offer help and protection, when necessary, report crimes committed against them, and provide support to the child victims. The state needs to adopt all the necessary measures: first, to prevent all acts that represent violation of children's rights, second, to protect children from such violations, and finally, to provide assistance and support to children victims of such violations. The role of the international community[7] must not be overlooked either, with the United Nations playing a particularly important role in ensuring the protection of children and their rights around the globe.[8]

Even though all children are vulnerable to some extent, they are not equally so. First, vulnerability differs depending on a child's age and maturity.[9] Second, some children, in addition to being vulnerable simply because they are children, are particularly vulnerable due to biological (e.g. chronic illness), cognitive (e.g. intellectual disabilities) or social factors (e.g. coming from violent or abusive environments, or from families affected by mental illnesses, where their well-being, safety and development are at significant risk due to inadequate care and protection).[10] These include children with disabilities, children in care or detention, children from minority and indigenous groups, children living in poverty, refugee and migrant children, street

7 Within the international community, international organisations hold a unique position in the protection and promotion of children's (and in general human) rights. They can be defined as '*formal, continuous structures established by agreement between members (governmental and/or nongovernmental) from two or more sovereign states with the aim of pursuing the common interest of the membership*'. (Archer, 2015, p. 31.) They have their own membership, defined scope of functions, main and subsidiary bodies, founding treaties, rules of procedure, and professional staff. They also play a threefold role: they serve as instruments of their members, function as arenas or forums where actions are taken, and act as independent actors on the international scene. (Ibid., pp. 114, 118, 123.) Their role and importance were most vividly illustrated by Henkin, who stated: '*[i]nternational organizations contribute to the ends which law pursues, building order and promoting the common interest. They also contribute to the law itself. They reflect and create an attitude that sees law as the fulfilment of their activities and the principal means of assuring their purposes. They promote, facilitate, expedite, and improve the making of law by bringing nations together and emphasizing their common interests; by identifying problems that might lend themselves to law and developing possible legal "solutions" for them; by providing personnel, machinery, and processes for the various stages of international legislation from conception to enactment. International organizations have helped make-and unmake and remake international law.*' (Henkin, 1969, p. 657.) Among them, the UN is the largest and the most far-reaching, comprising 193 Member States. Its establishment dates back to October 24, 1945, and its mission is to ensure peace, promote economic and social development and uphold human rights, within which are the rights of children. Almakky, 2023, p. 28.

8 In this context, some authors also highlight individual characteristics of the child that may contribute to the counterbalance of their vulnerability, such as intelligence, social competence, and belief in a higher power beyond oneself. Blum, McNeely and Nonnemaker, 2001, p. 51.

9 Sandberg, 2025, p. 202.

10 Blum, McNeely and Nonnemaker, 2001, p. 51.

children, children with special needs in areas such as culture, language, health, and education,[11] children directly affected by armed conflicts, children affected by HIV/AIDS, children engaged in the worst forms of labour, as well as children whose particular vulnerability stems from the region or country in which they live.[12] However, this list is not exhaustive and may expand/vary as new challenges that children face in the modern world, emerge.[13]

2. History of Children's Rights Until the 20th Century

Throughout history, up until the 20th century, the position of children – especially reflected in relationships with their parents – was nothing like the one they have today. In fact, '*the further back in history one goes, the lower the level of childcare, and the more likely children are to be killed, abandoned, beaten, terrorised, and sexually abused.*'[14]

In the earliest beginnings of humanity – as it is assumed – care for children existed primarily to ensure the survival of humankind. The parent-child relationship (more precisely, mother-child relationship, as it was the period of matriarchy) was mostly based on meeting the child's biological needs, rather than on affection and emotional bonding.[15] One of the oldest written documents, Code of Hammurabi, dating back to around 1700 BC, mentions children (and relationship with their parents) in several provisions – for example, it provides for the death for anyone who steals another's minor son, it prescribes that if a man adopts a child, gives his name and raises him, the son cannot later be reclaimed.[16] The relationship between parents and children at that time is also evidenced by the Old Testament, which stipulates that '*anyone who strikes their father or mother shall be put to death*' and in the Ten Commandments, where it is commanded: '*[h]onour your father and your mother, so that your days may be long in the land that the Lord your God is giving you.*'[17]

In Ancient times, with the development of the concept of private ownership, patriarchy developed as well.[18] In Athens, the child did not automatically become a member of the family, but instead, was decided by *kurios* – the head of the family. As a matter of fact, all the decisions about the child's future, that is, about the child's

11 UN Committee on the Rights of the Child, 2002, pt. 15.
12 According to research conducted by SOS Children's Villages International in 2015, the most vulnerable children were those living in Somalia, Mali, Mozambique, Liberia, Zambia, Côte d'Ivoire, and Tanzania. SOS Children's Villages International, 2015, p. 5.
13 See the document *Defining Child Vulnerability: Definitions, Frameworks and Groups*, in which the Children's Commissioner identified as many as 32 groups of vulnerable children, stating that even that list is not exhaustive.
14 De Mause, 1982, p. 1.
15 Hrabar, 1994, p. 25.
16 Turki and Cheik, 2006, p. 198.
17 Bible, Exodus, 20:12; 21:15, cited in Hrabar, 2024, p. 25.
18 Hrabar, 1994, p. 25.

life or death were made by *kurios*.[19] However, the child-parent relationship was also characterised by *filia*, '*an unconditional feeling of parental giving*'.[20] By reaching the age of attending school, children were also involved in other activities, such as studying literature, music and athletics.[21] On the other hand, in Ancient Sparta, the father was not allowed to decide about the child's admission into the family, but instead, it was decided by the board of elderly. If the child was born healthy, they ordered the father to rear him, but if the child was sick or with physical abnormalities, the father had to expose him/her at *Apotheatae* on the Mount Taygetus.[22] Male children were being trained to become soldiers, and female children prepared to bear offspring.[23] In Ancient Rome, one cannot speak of children's rights, as they were considered as *personae alieni iuris*.[24] The father, as a head of the family (*pater familias*), had absolute and lifelong power (*patria potestas*) over his children and other descendants, meaning that he could decide on the child's life and death (*ius vitae ac necis*),[25] sell the child (*ius vendendi*) and request the return of his child from persons who would detain the child (*ius vindicandi*).[26] These rights also encompassed the right to expose the child in infancy and to chastisement, to perform noxal surrender (to surrender the child to the person who was harmed by the wrongful act committed by the child), and to force the married child to divorce.[27]

In the Middle Ages, due to the influence of the Roman Catholic Church, the position of children slightly improved, as abortion, infanticide and child abandonment were condemned.[28] However, due to poor living conditions, many children died in early childhood.[29] Consequently, some historians argue that parents were emotionally distant and largely indifferent to the children below the age of seven – until it became likely the child would survive.[30] When reaching the age of seven, children were either becoming apprentices or working in the agrarian community. Education was reserved only for nobles or those who wanted to become clerics. At the same age, children could become betrothed, and at the age of 12 (for girls) and 14 (for boys), they could marry. Similarly, at these ages, they could be held criminally responsible. That said, it was argued that the concept of childhood did not exist before the period between 15th and the 17th centuries and that children were perceived and treated as

19 Cox, 1998, p. 134.
20 Hrabar, 1994, p. 17.
21 Sommerville, 1982, cited in Scott, 1993, p. 223.
22 Hrabar, 2024, p. 26.
23 Scott, 1993, p. 222.
24 Prokop, 1992, cited in Hrabar, 2024, p. 26.
25 The power of the *pater familias* to kill his child was legally banned in the imperial law, meaning that those who did so without due process, were punished. Kranjc, 2024, p. 51.
26 Petrak and Žiha, 2009, p. 13; Hrabar, 2024, p. 26.
27 Kranjc, 2024, p. 46.
28 Hrabar, 1994, p. 26.
29 Nikolić Jakus, 2015, p. 378.
30 Ariès, 1962, cited in Nikolić Jakus, 2015, p. 378.

"small adults".[31] However, opposing opinions have suggested that the idea of childhood did exist during the Middle ages.[32]

During the 17th and 18th centuries, in the period known as Enlightenment, childhood began to be perceived as a stage of life requiring special care and protection. Children were increasingly regarded as innocent creatures, not inherently morally corrupt, and even as '*potential savers of the future*'.[33] Following this shift, one can speak about one of the first documents recognising children's rights – the Massachusetts Body of Liberties (1641). Among other things, it included recommendations for parents not to arrange marriages for their children, not to be excessively strict with them, and the age of 17 was prescribed as the age before which children could not be executed if they did not respect their parents.[34] The child-parent relationship evolved, as children were expected to respect their parents, instead of being obedient and yielding.[35] Accordingly, corporal punishment and whipping were used less. Education became of a great importance for children of all classes, from an early age.[36] Enlightenment thinkers, John Locke and Jean-Jaques Rousseau, played an important role in shaping the perception of childhood, and the child-parent relationship. According to Locke, children are not '*the property of their parents, but of God*', and their parents need to '*preserve, nourish and educate*' them. He also argued about the difference in mental capabilities of children compared to adults, due to which one can talk about the inception of the child's right to express his or her opinion.[37] In contrast, Jean-Jaques Rousseau argued that '*the child was to be dependent on things rather than people, because things belong to nature and cannot corrupt*'.[38] In this period, one can also talk about Thomas Spence's pamphlet – The Rights of Infants – which set out initial steps for child protection. Protecting children from poverty and exploitation, and equalising the rights of legitimate and illegitimate children, were just some of its keys points.[39]

During the period of Industrial revolution, which began at the end of the 18th century, and lasted until 1850s,

> 'for many reasons, such as high child mortality, the acceptance of corporal education tools, the prevalence of child exploitation given the industrial revolution, and serious social problems (e.g., poor public safety, poverty, and civil war), society did not show special sensitivity to children's vulnerability.'[40]

31 Scott, 1993, p. 227.
32 Nikolić Jakus, 2015, p. 378.
33 Scott, 1993, p. 230.
34 Hrabar, 2024, p. 29.
35 Scott, 1993. p. 231.
36 Ibid., pp. 230–231.
37 Hrabar, 2024, p. 29.
38 Freeman, 2020, p. 21.
39 Hrabar, 2024, p. 30.
40 Váradi-Csema, 2022, p. 414.

Many children, mostly from lower classes, were (ab)used as working force in the factories and mines. Unlike earlier in history, where children began working at the age of seven in the countryside or as apprentices within their families, they now started working for strangers, earning certain wage.[41] Their working hours often reached 12 or even 16 hours per day, and their working conditions were mostly harsh and unsafe. The age at which they could start working, as well as issues related to their healthcare and night work, were regulated only in a few countries. In the second half of the 19th century, countries such as Prussia, Denmark, Germany, Italy, Belgium and the Netherlands, introduced protection measures of children between the ages of 9 and 16, excluding younger children. Changes occurred in other countries as well. In Great Britain, working conditions and minimum age were revised, resulting in a decrease in the number of working children. In France, in 1833 and 1840, education laws were passed in order to reduce child work. In 1841, the Child Labour Law was passed, which aimed to regulate child work by taking into account the child's age and working hours. In the United States of America, in Massachusetts, child labour was prohibited in 1837.[42]

3. The 20th Century as the Century of Children's Rights

The 20th century can, with full justification, be called the century of children's rights. First, in 1919, within the International Labour Organization (ILO), two significant conventions were adopted: Convention no. 5 on the minimum age of children for employment in industry and Convention no. 6 on the night work of young persons in industry.[43] In the same year, Eglantyne Jebb, after the World War I, founded the Save the Children Fund, aimed at helping hungry children in Austria and Germany. In 1920, under the patronage of the British Save the Children Fund, the Swedish Rädda Barnen and the International Committee of the Red Cross (hereinafter: ICRC), the International Save the Children Union was established. However, these were only the beginnings, as the second half of the 20th century brought a complete shift in the status of children and the protection of their rights.[44] This shift had its origins in the non-binding Geneva Declaration of 1924, followed by the (also non-binding) UN Declaration, but it culminated with the adoption of the UN Convention on the Rights of the Child (hereinafter: UNCRC), in 1989.

3.1. Geneva Declaration

Adopted within League of Nations in 1924, the Declaration on the Rights of the child, or commonly known as Geneva Declaration, was one of the first international

41 Ilias and Akter, 2017, p. 58.
42 Hrabar, 2024, pp. 28, 32, 33.
43 For more on these conventions, see Vinković, 2008, pp. 76–80.
44 Hrabar, 2024, pp. 33–34.

documents on the protection of children and their rights. Its text was drafted and presented by Eglantyne Jebb, at a meeting of the Save the Children Fund in Geneva.[45] In its introduction, the Declaration refers to the duty of '*men and women of all nations*', to give the child '*the best that they have to give*', regardless of '*race, nationality or creed*'. Subsequently, it set out the following principles: 1) The child must be given the means requisite for its normal development, both materially and spiritually. 2) The child that is hungry must be fed; the child that is sick must be helped; the child that is backword must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured. 3) The child must be first to receive relief in time of distress. 4) The child must be put in a position to earn a livelihood and must be protected against every form of exploitation. 5) The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

These five principles can be seen as corresponding to the contemporary children's rights: principle 1 – the right to development, principle 2 – the right to survival, health, resocialisation and substitute care, principle 3 – the right to protection from economic exploitation and restricted work conditions, principle 4 – the right to upbringing and all-round development.[46] However, the fifth principle '*reflects the system of values and norms.*'[47]

3.2. United Nations Declaration on the Rights of the Child

Thirty-five years after the Geneva Declaration was adopted, within the successor of the League of Nations – United Nations, Declaration on the Rights of the Child was proclaimed. In the preamble, referring to the Universal Declaration of Human Rights, which proclaims that '*everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind*', and to the Geneva Declaration from 1924, the General Assembly calls upon '*parents, men and women as individuals, voluntary organizations, local authorities, and national governments to recognize the rights set out in the Declaration and to strive for their observance through legislative and other measures.*' Containing only ten principles, and being of non-binding nature, Declaration '*directs states towards desirable conduct*'[48] so the child '*may have a happy childhood and enjoy for his own good and for the good of society.*' (Preamble of the Declaration)

The first principle is in fact the principle of non-discrimination, which states that

> 'every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.'

45 Ibid.
46 Ibid., p. 36.
47 Veerman, 1992, cited in Hrabar, 2024, p. 36.
48 Hrabar, 1994, p. 31.

The second principle refers to the right of the child to special protection, opportunities and facilities to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner, and in conditions of freedom and dignity. It also encompasses the principle of the bests interests of the child (hereinafter: BIC) as a paramount consideration.

The third principle refers to the right of the child to identity, as it prescribes that the child has the right to name and nationality from his/her birth.

The fourth principle relates to the child's social security, stipulating that the child shall have the right to grow and develop in health, to special care and protection, adequate nutrition, housing, recreation and medical services.

The fifth principle refers to the right of children with disabilities, that is with physical, metal or social handicap, to special treatment, care and education in accordance with their condition.

The sixth principle stipulates that, in order for a child to have a full and harmonious development of his personality, he/she needs love and understanding, and, when possible, should grow under the care and responsibility of his/her parents, in an environment of affection, moral and material security. It also emphasises that the younger child should only be separated from his/her mother in exceptional circumstances, and that the state should care for children without a family or means of support, while financially supporting children from larger families.

The seventh principle implies the child's rights to education, play and recreation. It stipulates that education should be free and compulsory (at least at the elementary level), promoting the child's culture and enabling the child to develop his or her abilities, individual judgement, sense of moral and social responsibility, and to become a useful member of society. It also emphasises that the principle of the BIC shall be a guiding one for those responsible for the child's education and upbringing, primarily for the child's parents.

The eight principle emphasises that, under all circumstances, the child should be the first to receive protection and relief. However, this does not mean that other categories of vulnerable persons, such as persons with disabilities or pregnant women, are left out.[49]

The ninth principle encompasses the child's right to protection from all forms of neglect, cruelty and exploitation, including trafficking. Furthermore, it emphasises that the child must not be engaged in any employment or occupation that could jeopardise his/her health or education, or interfere with his physical, mental or moral development.

The tenth, and the last principle, provides that the child should be protected from any practices that may promote racial, religious or any other kind of discrimination. It also highlights the importance of an environment adequate for the child's upbringing, stipulating that it should be in a spirit of understanding, tolerance, friendship

49 Ibid., p. 38.

among people, peace and universal brotherhood, and with consciousness to direct his/her energy and talents to the service of his/her fellow men.

Being declarative in nature, that is, proclaiming principles without containing legally binding enforcement measures,[50] the UN Declaration has remained a list of good intentions and a compass for the future protection of children's rights.

3.3. Legislative Background of the United Nations Convention on the Rights of the Child (UNCRC)

On 21st December 1976, at its 106th session, the UN General Assembly unanimously adopted a resolution, planning to declare the year 1979 as the International Year of the Children – symbolically 20 years after the adoption of the Geneva Declaration. That same year, the Conference on the Legal Protection of the Rights of the Child was held at the Palace of Culture and Science in Warsaw. The conference was attended by representatives from nineteen Western and Eastern European countries, representatives of the UN Secretariat for the International Year of the Child, the UN Division of Human Rights and the UN High Commissioner for Refugees. Two resolutions were adopted: Resolution in Support of the Adoption of the International Convention on the Rights of The Child and Resolution in Support of the Implementation of the UN Declaration on the Preparation of Societies for Life in Peace. The plan was to adopt the final text of the Convention by the end of 1979.[51]

The work on the Convention began in 1978. The initial step was the proposal of the permanent representative of Poland to the UN Office – on the behalf of the Polish government[52] – to the Director of the Division of Human Rights, to include "The Question of the Rights of the Child" on the agenda of the session of the Commission on Human Rights. As the proposal was approved – on the 7th of February 1978, at the 34th session of the Commission on Human Rights – the Polish delegation submitted the Draft of the UNCRC.[53] Its author was Family Law Professor Tadeusz Smyczyński, who wrote it largely under the influence of the ideas of the '*icon of children's rights*',[54] '*father of the very idea that children also have rights*',[55] '*the creator of the notion of global child*',[56] and '*for many children, protector, faith and hope for better tomorrow*',[57]

50 Hrabar, 2021, p. 25.
51 Samardžić, 2024, pp. 44–47.
52 Some legal scholars argue that Poland stood out as an initiator of the adoption of the Convention not solely out of concern for the protection of children and their well-being, but also for political reasons. As at that time it was governed by the Communist Party – which presented the proposal of the Convention, only one year after ratifying the International Covenants on Human Rights under pressure from opposition movements – it has been argued that, through this, the Polish government sought to improve its reputation on the international stage. Wielec, 2024, p. 239; see also Andrzejewski, 2000, p. 4.
53 Ibid., p. 47.
54 Freeman, 2020, p. 27.
55 Hammaberg, 2009, p. 81.
56 Benyusz and Raisz, 2024, p. 16.
57 Samardžić, 2024, p. 42.

Janusz Korczak.[58] He considered that children's rights need to be mandatory immediately '*as children are not the people of tomorrow but are people of today*' and '*they have a right to be taken seriously, and to be treated with tenderness and respect.*'[59]

Even though it was largely welcomed with approval, this Draft also faced certain criticisms and objections. While some countries objected on its content, for others, its adoption was premature and should have been postponed.[60] Due to this, the Commission on Human Rights established a working group – comprised of the representatives from twenty-three countries (including the USA, Great Britain and the USSR) – to continue the work. In 1979 and 1980, the work on the Convention was progressing slowly due to several reasons: meetings were not held frequently, the states responded poorly because they did not consider this issue as urgent, the sessions of the Commission were held concurrently. Furthermore, Western countries were opposing the proposals coming from the East, Asians and Africans were expressing their concerns that the Convention will not cover all the issues they face, and UNICEF was passive. In contrast, representatives of the Holy See maintained a positive approach towards it.

In the 1980s things began to change as UNICEF, Islamic countries, and NGOs joined. In fact, in 1983, an *ad hoc* NGO was established, supported by Defence for Children International, and was composed of thirty international non-governmental organisations, including the World Health Organization (WHO), UNESCO, ICRC, and the International Labour Organization (ILO). The goal was to finalise the Convention by the 30th anniversary of the Declaration on the Rights of the Child.[61]

However, some controversial questions arose, such as: When does life begin? When does childhood end? Does a child have the right to choose or change religion? What is the minimum legal age for participation in armed conflicts? Additionally, cultural, traditional and religious differences became visible more than ever, and the matter of adoption was controversial as well, given the fact that it is prohibited under Shari'a law.[62]

Finally, an agreement was reached along the following lines: First, the solution which does not explicitly mention the protection of the unborn child was adopted: '*States Parties recognize that every child has inherent right to life*' (Article 6). Nevertheless,

58 Janusz Korczak was a paediatrician, educator, writer, thinker and publicist. His real name was Henryk Goldszmit, and he was born into a Jewish family in Warsaw in 1878. He is remembered for many things: he was the first to establish a children's parliament, develop the concept of children's courts, and set up a children's newspaper. He also wrote two significant texts for parents and teachers – The Child's Right to Respect and How to Love a Child. He died in 1942 at the extermination camp, Treblinka, to which he voluntarily accompanied 192 children taken by the Nazi. Freeman, 2020, p. 27; Samardžić, 2024, p. 42; Hrabar, 2024, p. 31.

59 See Freeman, 2020, pp. 437–439.

60 For more, see Samardžić, 2024, pp. 48–49.

61 Ibid., pp. 50–51.

62 Under Shari'a law, children without parental care cannot be adopted. Instead, they are put under a system of alternative care called kafalah. Children under kafalah cannot take the family name of the family that takes care of them, nor can they inherit from them. Langlaude Doné and Tobin, 2019, p. 766.

the Preamble indicates that '*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*'. The reason for this decision was that '*Member States were not ready to accept any type of phrasing which would include unborn children as well, fearing it may indirectly refer to the termination of pregnancy, which at that time was allowed in many countries.*'[63]

Second, childhood was determined as ending at the age of 18, unless the child had attained majority before the law applicable to him or her. Third, a concession was made to Islamic States. Even though Article 14, paragraph 1 guarantees the child the right to the freedom of thought, conscience and religion, first – it does not contain the content of this right, second – States Parties expressed reservations to this Article more than to any other.[64]

Fourth, even though many countries argued that the minimum legal age for participation in armed conflicts should be 18, the age of 15 was retained (Article 38), in accordance with Additional Protocols I and II to the Geneva Convention from 1977. This was particularly criticised as the Convention was expected to put an end to the forced recruitment of children and raise the minimum age for participation in armed conflicts to 18 years.[65] Fifth, the provision requiring all States '*to facilitate the process of adoption, where appropriate*', was revised due to opposition from Islamic States, and today Article 21 applies only to those states that recognise and/or permit adoption.[66]

Finally, on November 20, 1989, the final text of the Convention was adopted.

4. The UN Convention on the Rights of the Child (UNCRC)

The UNCRC – '*the clearest and the fullest statement of children's rights*'[67] today stands as a truly global international treaty, ratified by all countries of the world,[68] except

63 Samardžić, 2024, p. 53.
64 See Šimović, 2024, p. 151; Freeman, 2020, p. 186; Langlaude Doné and Tobin, 2019, pp. 477, 479, 489.
65 Samardžić, 2024, p. 55; Garayová, 2024, p. 209.
66 Langlaude Doné and Tobin, 2019, p. 766.
67 Freeman, 2020, p. 6.
68 In this regard Hrabar argues: '*[d]ue to the importance of having as many countries as possible bound by the principles and provisions of the Convention, it has been declared an open-type convention and allows for subsequent access by states, permits reservations at the time of accession, and the submission of amendments.*' Hrabar, 1994, p. 33.

for the United States of America.[69] *'It includes a recognition that children are "beings", and not merely pre-adult "becomings".'* As such, it guarantees a multitude of different rights, and sets up a minimum standard of protection for all children in the world, regardless of whether they live in developed, developing or undeveloped countries.[70] By placing children at the centre of life circumstances, and addressing their everyday and occasional needs, both material and non-material, as well as regular and extraordinary situations they may find themselves in, the UNCRC takes a holistic approach.[71] Its values are reflected in the fact that it has established general principles necessary for its application and interpretation, provided the definition of the child, recognised the child's needs as rights, emphasised parents as primary caregivers, unified children's rights, and finally, introduced the criteria of the BIC in decision-making regarding the child.[72]

In Article 1, for the purpose of its own application, the UNCRC defines a child as every human being under the age of 18, unless majority is attained earlier under the law applicable to the child. In the following articles it contains four principles necessary for its interpretation and implementation, among which, two are also rights: the principle of non-discrimination (Article 2), the principle of the BIC (Article 3), the right of the child to life, survival and development (Article 6), and the right of the child to express his or her views freely (Article 12).

4.1. General Principles

The principle of non-discrimination implies that all rights guaranteed by the Convention equally belong to every child, regardless of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Accordingly Article 2, paragraph 1, imposes an obligation on States Parties to respect and ensure those rights to each child under their jurisdiction without any kind of discrimination. To ensure that the child is protected from all forms of discrimination or punishment – on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members – States Parties need to undertake all appropriate measures (Article 2, paragraph 2).

69 According to the legal literature, there were several reasons why the USA did not ratify the UNCRC. First, the UNCRC was perceived as anti-family (it might undermine home schooling), anti-religion, or even as a Communist conspiracy. While there was a belief that a comparable level of protection for children already existed in domestic law, at the same time there was concern that the Convention grants children "expansive autonomy rights" to exercise independently, even though they may not be fully capable of understanding them. Another major concern was that its ratification would require congressional powers exceeding the limits set by the Constitution and would pose an obstacle to the still-existing practice of executing the death penalty on minors – juvenile offenders convicted of capital crimes. Freeman, 2020, p. 85; Wilkins et al., 2003, pp. 412, 413, 434.

70 Hrabar, 2021, p. 25.

71 Hrabar et al., 2021, p. 199.

72 Ibid., p. 198.

The principle of the BIC is a legal standard applicable to all actions concerning the child, regardless of whether such actions are undertaken by public or private social welfare institutions, courts of law, administrative authorities, legislative bodies (Article 3, paragraph 1), or child's parents.[73] This legal standard has a threefold concept: a) it is a *substantive right*, meaning whenever different interests are being considered, the BIC must prevail over the interests of others; b) it is *a fundamental interpretative principle*, meaning whenever a legal provision can be interpreted in more than one way, the interpretation that favours the child's best interests must prevail; c) it is a *rule of procedure*, meaning when making a decision affecting a child, a group of children, or children in general, the possible (positive or negative) impact of the decision on the child/children must be assessed.[74] To determine what is the best interest of the child/group of children/children in general, different criteria can be applied: a) *the child's needs*, among which it has to be determined which ones have primacy; b) *the will of parents*, as they know their child better than anyone, and they are the first ones to take care of him or her (under the condition that they are capable of doing so); c) *the standard behaviour*, meaning that the norms accepted within a certain society or family are taken as a criterion for assessing the BIC.[75]

The right of the child to life is the only right in the UNCRC depicted as inherent, meaning it cannot be derogated – not even in cases of war or public emergencies – and meaning that the death penalty is prohibited.[76] It is protected under Article 6, which in paragraph 1 stipulates that '*States Parties recognize that every child has the inherent right to life.*' This provision imposes an obligation on States Parties to '*act on children in particularly vulnerable situations, including children with disabilities, any form of sickness, victims of violence, at risk of becoming victims of "honour killings", victims of female genital mutilation, or children from groups at risk of exclusion.*'[77] Paragraph 2, however refers to the right of the child to survival and development, placing an obligation on States Parties to ensure survival and development of the child to the maximum extent possible.

The right of the child to express his or her views is one of the fundamental rights of the child, as its exercise enables the child to fully realise some other rights, such as the right to education, the right to healthcare, the right to freedom of thought, conscience and religion, etc. It is protected under Article 12 of the UNCRC, which is guaranteed in paragraph 1: 1. to every child capable of forming his or her views (which needs to be assessed case-by-case); 2. freely, meaning it is a right and not obligation of the child, and the child should not be subject to manipulation, undue influence or pressure, nor should he/she express someone else's views; 3. in all matters affecting the child, meaning that the child needs to be heard whenever some proceeding or decision might concern him/her, 4. that views need to be given due weight in accordance

73 See UN Committee on the Rights of the Child, 2013, pt. 25. See also Freeman, 2020, pp. 98–109.
74 UN Committee on the Rights of the Child, 2013, pt. 6.
75 Hrabar et al., 2021, p. 209.
76 Freeman, 2020, p. 116.
77 Nowak, 2005, cited in Wedeł-Domaradzka, 2024, p. 75.

with child's age and maturity, taking into account that all children are not equally mature at the same age. Paragraph 2 refers to the right of the child to be heard in any judicial or administrative proceedings affecting him or her, either directly or through a representative.[78]

4.2. The 3Ps: Provision, Protection and Participation

In 54 articles, the UNCRC guarantees children a wide spectrum of rights – from personal, societal, educational, and health – to social, economic, judicial-protective, and, finally, cultural rights.[79] These rights are universal, indivisible, interrelated, interdependent and inalienable.[80] The Family law theory classifies these into different categories: inherent rights,[81] the "4P", positive and negative rights,[82] etc. However, the most commonly used is still the "3P" classification, which encompasses the provision, protection and participation rights of the child.

4.2.1. Provision

Provision rights of the child are rights to services, skills and resources that are necessary for a child's growth and development,[83] such as the right to healthcare, the right to education, the right to benefit from social security, and the right to rest and leisure.

The right to healthcare, in the UNCRC, is referred to as the *right to the enjoyment of the highest attainable standard of health,* which takes into account both the child's biological, social, cultural and economic preconditions on the one hand, and the state's available sources on the other.[84] Paragraph 1 of Article 24 requires States Parties to recognise this right of the child and to '*strive to ensure that no child is deprived of his or her right of access to such healthcare services*', and paragraph 2 calls upon them to fully implement it by undertaking the said appropriate measures. Subsequently, paragraph 3 addresses the abolition of traditional practices which are prejudicial to the health of children, leaving open questions such as whether it applies only to, for example,

78 For a more detailed interpretation of art. 12, see UN Committee on the Rights of the Child, 2009.

79 On these groups of rights, see Hrabar et al., 2021, pp. 201–203.

80 Garayová, 2023, p. 61.

81 Inherent rights of the child '*are innate specifically to children in order to ensure their survival as human individuals during their growth, and not as adult persons.*' They include the right of the child to life and health, the right to live with his or her parents, the right to upbringing and education, the right to know his or her origin, and the right to physical, mental, and emotional development. Hrabar, 2021, p. 27.

82 Positive and negative rights differ in whether the provision refers directly to the child and guarantees him or her a right – positive rights (right to life, right to honour and reputation), or whether it obliges the States Party to undertake specific measures to promote, respect, and protect that right – negative rights (the right to protection from the imposition of the death penalty, the right to protection from the use of narcotics). Hrabar, 2021, p. 27; Hrabar et al., 2021, p. 200.

83 Sadowska, 2024, p. 120.

84 UN Committee on the Rights of the Child, 2013, pt. 23.

female genital mutilation, or also to male circumcision.[85] The child's right to health is also protected under other provisions, such as Article 6, which safeguards the child's right to life.[86]

The right to education is one of the most essential rights of the child, as its realisation enables the child not only to acquire knowledge but also to develop different social, emotional, creative and cognitive skills necessary for the adult life.[87] The UNCRC protects it under two articles – Articles 28 and 29. While Article 28 mainly deals with access to education and differentiates three levels: primary, secondary, and higher or vocational, Article 29 sets out the direction in which education should be aimed for.[88]

The right to benefit from social security '*is premised on poverty and poverty impacts on other guaranteed rights, such as the right to education and the right to the highest attainable standard of health.*'[89] The UNCRC acknowledges this right in Article 26, which binds States Parties to recognise the right of the child to benefit from social security to every child, including social insurance (paragraph 1). In doing so, States Parties must take into account the resources and circumstances of the child and persons having responsibility for the child's maintenance, as well as any other considerations relevant to an application for benefits made by or on behalf of the child (paragraph 2).[90]

The right to play enables the child to truly experience childhood, and to develop creativity, as well as some important life skills. This is recognised by the UNCRC in Article 31, which in paragraph 1 stipulates that '*States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts*', while paragraph 2 requires States Parties to respect and promote the right of the child to participate fully in artistic and cultural life.[91] Being '*often overlooked and constantly undervalued*', this right has rightly been described as '*the red-headed stepchild of the Convention*'.[92]

4.2.2. Protection

Protection rights of the child aim to ensure that the child is protected from all forms of violence, exploitation (including economic exploitation) and other actions – carried out either by adults or institutions – that jeopardise the child's dignity, integrity, survival and development. They include, for example, the right of the child to be protected from abuse and neglect, the right to be protected from economic exploitation

85 Šimović and Kokić, 2025, p. 313.
86 See Sadowska, 2024, pp. 120–124.
87 For more on this right, see Freeman, 2020, pp. 189–193.
88 Freeman, 2020, p. 189.
89 Nkosi, 2015, p. 490.
90 For more on this right, see Sadowska, 2024, pp. 132–133. On the development of this right in international law, see Nkosi, 2015, pp. 404–503.
91 For more on this right, see Garayová, 2023; Mrnjaus, 2014; UN Committee on the Rights of the Child, 2013.
92 Garayová, 2023, p. 47.

and hazardous work, the right to be protected from all forms of sexual exploitation and sexual abuse, and the right to protection and care in the child's best interests.

The right to be protected from all forms of violence – enshrined in Article 19 – encompasses protection from all forms of physical or mental violence, injury, abuse (including sexual abuse), neglect, negligent treatment, maltreatment or exploitation, regardless of whether they are carried out by child's parents, legal guardians, or other persons who have the care of the child.[93] Given that it involves safeguarding the child from '*exploitation of one's advantages over a child*',[94] this right aims to preserve the child's health, development, and behaviour and to prevent any negative consequence for the same.

The right to be protected from economic exploitation and hazardous work – safeguarded under Article 32 – seeks to protect the child from economic exploitation and from any work that is likely to be hazardous or to interfere with child's education, or to be harmful to the child's health, physical, moral, spiritual, or social development. To implement this right, paragraph 2 of this Article stipulates that States Parties need to undertake educational and other measures, particularly those involving minimum age, working conditions and hours, as well as appropriate penalties.[95]

The right to be protected from all forms of sexual exploitation and sexual abuse – which, even though differ in that the sexual exploitation is for commercial purposes, both '*violate the dignity of the child and represent a flagrant breach of several fundamental rights essential for the child's healthy development and survival*'[96] – is protected under Article 34. As such, it encompasses protection from: the inducement or coercion of a child to engage in any unlawful or psychologically harmful social activity; the use of children in commercial sexual exploitation; the use of children in audio or visual images of child sexual abuse; child prostitution, child slavery, sexual exploitation in travel and tourism, trafficking (within and between countries) and the sale of children for sexual purposes and forced marriages.[97]

4.2.3. Participation

Participation rights of the child are to be said as '*one of the most profound transformations in moving towards a culture of respect for children's rights, for their dignity and citizenship, and for their capacities to contribute significantly towards their own well-being.*'[98] Accordingly, they can be defined as a group of rights, that, when exercised, allow children to engage in processes, which lead to the realisation of their other rights

93 For more on this right, see Lis, 2024, pp. 98–105; UN Committee on the Rights of the Child, 2011.

94 Lis, 2024, p. 99.

95 Vinković criticises the fact that the Convention failed to specify a minimum working age, but instead left it to the discretion of States Parties. Referring to its '*recognition of other international instruments*', Vinković argues that this has undermined the protection of children in countries that have not ratified the relevant labour conventions. See Vinković, 2008, p. 128.

96 Van Bueren, 1994, cited in Vinković, 2008, p. 129.

97 UN Committee on the Rights of the Child, 2011, pt. 25.

98 Lansdown, Jimerson, and Shahroozi, 2014, cited in Burger, 2018, p. 66.

and enable them to become active participants in society.[99] By '*regulating children's relationships with family members and, more broadly, with all individuals and institutions with whom they come into contact*',[100] participation rights enable the child to be seen, noticed and acknowledged in society. They include: *the right of the child to express his or her views freely in all matters affecting him or her* (Article 12); *the right to freedom of expression*, which includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art, or through any other media of child's choice (Article 13);[101] *the right to freedom of thought, conscience and religion* (Article 14), which encompasses both the right of the child to manifest his or her beliefs, and obligation of the state to respect, protect and promote this right;[102] *the right to free association and peaceful assembly* (Article 15).[103]

Being of a relative nature, these rights can be subject to certain restrictions, which, in order to be legitimate, need to be necessary and provided by law – for the protection of national security, public order, public health, morals, or the rights or reputations of others.[104]

99 Burger, 2018, p. 66.

100 Šimović, 2024, p. 138.

101 The implementation of this right may face certain challenges, particularly in the context of the digital environment. Children, by expressing their views on politics or other topics, or by revealing their identity online, may be exposed to criticism, hostility, threats, or punishment. They may become victims of cyberaggression and threats, censorship, data breaches and digital surveillance. (UN Committee on the Rights of the Child, 2021, para. 60) Exposure to hate speech, racist or violent content, Internet propaganda, misinformation, fake news, and influencers may negatively affect the formation of their opinions. The same is with content personalisation, which may result in limited exposure to diverse information. Challenges can also arise with children being not only Internet users, but also creators and distributors of online content (e.g. photos, videos, texts), which may lead them to breaking the law by inciting hatred or violence against others. (Lievens et al., 2018, p. 4) To combat these challenges, States Parties should undertake several actions. First, they need to '*protect children and young people from any act by private persons or entities that would impair the enjoyment of their rights to freedom of expression, within the limits of the Convention*'. (*Vandenhole et al., 2019, p. 178)* Any restriction on this right (e.g. filters) needs to be lawful, proportionate and necessary. (UN Committee on the Rights of the Child, 2021, para. 59) Second, they should ensure that '*uses of automated processes of information filtering, profiling, marketing and decision-making do not supplant, manipulate or interfere with children's ability to form and express their opinions in the digital environment*'. (Ibid., para. 61) Finally, they should promote children's awareness of how to create and share digital content safely, while not violating the law and at the same respecting rights and dignity of others. UN Committee on the Rights of the Child, 2021. See Guštin, 2022, pp. 472–475.

102 For more on this right see Šimović and Kokić, 2025.

103 For more on these rights, see Šimović, 2024, pp. 137–159. For a detailed analysis of arts. 12–15, see Langlaude Doné and Tobin, 2019, pp. 397–550.

104 See Šimović, 2024, p. 138.

5. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

The UNCRC decided to follow the path laid out by Additional Protocols I and II to the Geneva Convention from 1977, which prohibited military recruitment and direct participation in hostilities of children under the age of 15. However, this meant that children over the age of 15 could still be recruited and that indirect involvement of children under the age of 15 was still possible. Thus, children could serve as spies, scouts, cooks, porters, informants, or messengers.[105] This provoked both criticism and disappointment among those who had expected the Convention to finally put an end to the involvement of children in war. Finally, as a result of this dissatisfaction and a global campaign – led by human rights activists and certain governments – in 1994, the Commission on Human Rights established a working group for the enactment of the new document which would regulate these issues.[106]

The working group – consisting of representatives of different states, non-governmental organizations, UN bodies and agencies, and independent experts – worked on the text for the next six years, led by the "straight-18" principle.[107] The aim was to abolish the child's involvement in war in any way. The work was challenging as some countries – Bangladesh, Cuba, Israel, South Korea, Kuwait, Pakistan, the United Kingdom, and the United States – had opposing views. Finally, on 25th May 2000, the UN General Assembly, at its 54th session, adopted the Optional Protocol to the UNCRC on the involvement of children in armed conflict (hereinafter: OPAC). After being ratified by the required number of states (ten) the Protocol became legally binding on 12 February 2002.[108]

The OPAC applies to both national and international armed conflicts, and prohibits recruitment or use of children both by state and non-state armed groups.[109] In its introduction, the States Parties '*reaffirm that the rights of children require special protection and calling for continuous improvement of the situation of children without distinction*', and '*condemn with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State*'. Furthermore, they express their belief that the adoption of this Protocol – which raises the age for recruitment of children into armed forces and participation in hostilities – will contribute to the full implementation of the pivotal principle of the BIC. Unlike the UNCRC and Additional Protocols I and II to the Geneva Convention – which prohibit recruitment only of children under the age of 15, this

105 Garayová, 2024, pp. 212–213.
106 Ibid.
107 Ibid., p. 214, Fabijanić Gagro, 2017, p. 448; Langlaude Doné and Tobin, 2019, p. 1667.
108 Garayová, 2024, pp. 213–215. As of today, 173 countries have ratified the Protocol, 17 have neither signed nor ratified it, and 7 countries have signed but have yet to ratify it. See UN, no date.
109 Langlaude Doné and Tobin, 2019, p. 1668.

Protocol raises that age and prohibits compulsory recruitment into armed forces and direct participation in hostilities for all children under the age of 18.

From Article 1, it arises that '*States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.*' This provision has been criticised for two reasons: 1. unlike the Rome Statute of the International Criminal Court, which contains a clear prohibition on the involvement of children under the age of 18 in armed conflicts, ('*children shall not be used [...] to actively take part in hostilities*'), the Protocol states that states should take '*all feasible measures to ensure*' it, 2. this wording does not include indirect involvement in hostilities – unlike in the Additional Protocol II to the Geneva, which prohibits any participation – leaving open the possibility for children being engaged as spies, porters, messengers (etc.), or even being used for forced marriages and sexual exploitation.[110]

Article 2 requires States Parties '*to ensure that persons who have not attained the age of 18 years are not compulsorily recruited into armed forces*'. This provision represents "a long-awaited step forward" compared to UNCRC and other international treaties, as it raised the minimum age for the recruitment from 15 to 18 years. Unlike Article 1, it does not refer to the mere use of '*all feasible measures*', but contains an absolute obligation aimed at achieving a certain goal.[111] The term recruitment '*differs from participation in hostilities and implies the registration, examination, and classification of children for armed conflicts.*'[112] As it involves the inclusion of children into the military system, recruitment does not, however, encompass the mere listing of future conscripts.[113]

Article 3 imposes an obligation on States Parties to raise the minimum age for voluntary recruitment above the age of 15. Even though it does not specify the exact age, it is clear that it cannot be below 16, and that leaves States Parties to determine it. This solution deviates from the "18-straight" principle, supported by representatives of many countries, but also by the UN Committee on the Rights of the Child (hereinafter: CRC Committee), which, in its Concluding Observations of the report, supported by New Zealand under Article 8(1) of the Protocol, recommended New Zealand to consider to raise the minimum age for voluntary recruitment to 18.

However, if the state allows the voluntary recruitment of children, it needs to respect certain rules: 1. it needs to ensure that such recruitment is genuinely voluntary, 2. it needs to make sure that it is done with the informed consent of the child's parents, or legal guardians, 3. it needs to make sure that such persons are entirely informed and aware of duties once being involved in military service, 4. it needs to ensure that such persons submit reliable proof on the child's age before the acceptance into military service. This solution has been criticised for several reasons: 1. it does not provide a definition of the terms "voluntary" and "recruitment";

110 Garayová, pp. 220–221.
111 Ibid., p. 223.
112 Fabijanić Gagro, 2008, p. 754.
113 Ibid.

2. it overlooks the fact that in war-affected areas, parents may be financially motivated to send their child to war; 3. proving a child's age can be difficult and challenging in countries that do not have a developed birth registration system, 4. children may lie about their age (as it happened in Libya when some joined armed groups opposing Muammar Qaddafi's dictatorship).[114]

The OPAC also forbids *armed groups different from the armed forces of the State*[115] to use or recruit in hostilities persons under the age of 18. Accordingly, it requires from States Parties to '*take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.*'[116] States Parties also need to provide information regarding armed groups operating within their territories or originating from that territory.

Even twenty-five years after the adoption of the OPAC, this provision remains of a great importance, as the use or recruitment of children by non-state armed forces continues to be widespread.[117]

6. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

At the same session at which it adopted the Optional Protocol on the Involvement of Children in Armed Conflict, the UN General Assembly also adopted the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (hereinafter: OPSC). Entered into force on 18th January 2002, it is now the most widely ratified of the three Protocols, with 178 states having ratified it and 7 having signed but not yet ratified it. Unlike the OPIC, which came from certain pressures and dissatisfaction with the solutions provided in the Convention, the OPSC emerged at the initiative of the Commission on Human Rights. It all started in 1990, when the Commission appointed a special rapporteur to consider issues related to the sale of children, children prostitution and pornography. As its reports drew attention to these problems, in 1992, the Commission adopted a Programme of Action for Prevention of the Sale of Children, Child Prostitution and Child Pornography. Finally, in 1994, the UN General Assembly was introduced to these issues. Acting upon its request, the Commission established a working group with the aim of drafting a new document, which would extend the existing measures for combatting the sale of children, child prostitution and child pornography.[118]

114 Garayová, 2024, p. 225; Langlaude Doné and Tobin, 2019, p. 1685.
115 Armed groups different from the armed forces of the state are non-state armed groups, such as rebel movements, dissident factions, and insurgents. Ibid., p. 1690.
116 OPAC, art. 4.
117 Garayová, 2024, p. 226.
118 Langlaude Doné and Tobin, 2019, pp. 1713–1714, 1716–1717; Fetai and Stajnko, 2024, pp. 182–183.

Over the next six years, the group – consisting of the representatives from nearly 100 states, UN bodies, international organisations, and NGOs – worked on this document through six sessions, each held once a year.[119] Even though there were opposing views – that there was no need for a new document since the UNCRC already provided necessary legal framework and that it would cause '*duplication of efforts and proliferation of international instruments, (which) should be avoided*'– many countries continued to advocate for its adoption stating that it would not be amiss to impose additional obligations on states in order to address existing issues.[120] Finally, in 2000, the OPSC was adopted.

In its introduction, the States Parties express their deep concern '*at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography*', '*at the widespread and continuing practice of sex tourism, to which children are especially vulnerable*' and at the '*growing availability of child pornography on the Internet and other evolving technologies*'. Being of the belief that these issues can be eliminated by using a holistic approach, addressing the contributing factors (e.g., poverty, lack of education, economic disparities, armful conflicts, harmful traditional practices), and by raising public awareness, States Parties have agreed on the following provisions.

In Article 1, the Protocol imposes an obligation on States Parties to prohibit sale of children, child prostitution and child pornography. Unlike Articles 34 and 35 of the UNCRC, which stipulate that States Parties '*shall take all appropriate [...] measures to prevent*' child prostitution, pornography and sale, Article 1 uses a stronger term "prohibit" and does not leave States Parties the possibility to invoke a lack of resources as a reason for their failure to combat the aforementioned issues.[121] To ensure the proper application of the Protocol, as well as of the relevant provisions of the UNCRC, Article 2 defines what is meant by sale of children, child prostitution and child pornography.

Sale of children, as defined in Article 2, is '*any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration*'. This definition does not specify what do '*acts or transactions, whereby a child is transferred*' include, but the answer could be found in Article 3, which enlists the acts – related to the sale of the child – that need to be criminalised: delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child, transfer of organs of the child for profit, engagement of the child in forced labour, improper inducement of the consent for the adoption of the child by intermediary.[122] Some legal scholars argue that commercial surrogacy may also fall within the scope of this definition, as it fails to specify who the persons or group of persons involved in the transaction are, and whether they have a biological connection to the child, and what the purpose of the transaction is.[123]

119 For more on these sessions, see Langlaude Doné and Tobin, pp. 1719–1726.
120 Ibid., pp. 1714, 1726.
121 Ibid., p. 1727.
122 Fetai and Stajnko, 2024, p. 183.
123 Langlaude Doné and Tobin, 2019, p. 1731.

The sale of children needs to be distinguished from child trafficking, which refers to the

> 'recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, or the abuse of power or of a position of vulnerability or of the giving or receiving payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.'[124]

While the sale of children involves payment or other forms of remuneration and does not require any form of exploitation, child trafficking does not involve payment or any other form of remuneration, but entails child exploitation.[125]

Child prostitution, as defined in Article 2, '*means the use of a child in sexual activities for remuneration or any other form of consideration*'. On that note, three things need to be observed. First, the term "use of a child" '*is not qualified by any requirement that the use be exploitative or unlawful*', unlike in Articles 34 of the UNCRC.[126] Article 3 – which provides for its criminalisation – suggests that it encompasses the '*offering, obtaining, procuring or providing a child for child prostitution*' and similarly, the legal literature suggests that it pertains to the '*acts of obtaining, coercing, procuring, facilitating, or offering the service of a child or inducing a child to perform sexual acts*'.[127] Second, the term "sexual activities" is not defined. For that reason, in its Guidelines regarding the implementation of the OPSC, the CRC Committee provided a non-binding definition, according to which, sexual activities

> 'should include, at a minimum and whether real or simulated, all forms of sexual intercourse and intentional sexual touching involving a child, independent of the sex of all involved persons, and any lascivious exhibition of the genitals or the pubic area of a child'.[128]

Third, it must be noted that the

> '[p]rotocol must not be understood as suggesting the child could consent to the sexual activities in exchange for remuneration or any other form of consideration, or that the child is necessarily the recipient of money or other form of consideration [...] such remuneration or consideration may be paid or given to any third person, and the child often does not receive anything directly, or the "consideration" is provided in the form of basic survival needs such as food or shelter.'

124 OPSC, art. 3.
125 UN CRC, *Guidelines on Optional Protocol*, 2019, CRC/C/156, pt. 7.
126 Langlaude Doné and Tobin, 2019, p. 1734.
127 Ibid.
128 UN CRC, *Guidelines*, 2019, CRC/C/156, pt. 53.

In fact, 'a child under the age of 18 can never consent to any form of their own sale, sexual exploitation or sexual abuse, and that States parties must criminalize all the offences covered by the Optional Protocol, committed against any child up to the age of 18',[129] even if their national legal systems sets a lower minimum age for sexual consent.

Child pornography, as defined in the Protocol, '*means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.*' As with the definition of child prostitution, there is an inconsistency between the UNCRC (Article 34 (c)) and the OPSC, as the latter does not require representation to be exploitative.[130] However, it distinguishes and prohibits engagement of the child in both real and simulated explicit activities. The latter include '*any material, online or offline that depicts or otherwise represents a child appearing to engage in sexually explicit conduct.*'[131]

Moreover, the OPSC prohibits representation of sexual parts of a child but imposes a condition: it must be primarily for sexual purposes. Therefore, the parental possession of photos of their naked child, kept for sentimental reasons, does not fall under this Protocol. Similarly, possession of photos of someone else's children by paedophile that do not explicitly display their sexual parts, does not fall under the scope of this Protocol. On the other hand, a situation involving a person keeping photos of naked children where their sexual parts are explicit and for sexual purposes will indeed fall under this Protocol.

Any act or action involving the production, distribution, dissemination, import, export, offering, sale, or possession of child pornography, needs to be fully covered under criminal or penal law of the States Parties (Article 3(c)).

7. Optional Protocol on a Communications Procedure

The Optional Protocol on a communications procedure (hereinafter: OPIC) – adopted on December 19, 2011 – is the youngest and the newest protocol among the three. Its primary objective was to ensure that, in cases of alleged violations at the national level, children have access to legal remedies at the international level, too. Even though the idea to establish communication procedure already existed during the negotiations on UNCRC, it was not carried out for several reasons. First, there was a hesitation regarding the justiciability of the economic, social and cultural rights, contained in the UNCRC.[132] Second, the States Parties were not willing to empower the CRC Committee – a non-judicial body – with competences of receiving and deciding on violations of child's rights.[133]

129 Ibid., pts. 54 and 72.
130 Langlaude Doné and Tobin, 2019, p. 1735.
131 UN CRC, *Guidelines*, 2019, CRC/C/156, pt. 62.
132 UN Human Rights Council, 2009.
133 Benyusz, 2024a, p. 242.

The idea was brought up again in 2007, as the UNCRC was one of the few international treaties without a communications procedure and its monitoring mechanism apparently had certain deficiencies. The first proposal appeared in 2008 at the 47th session of the CRC Committee, however, it was in 2009 when the drafting process started, with the establishment of the Open-Ended Working Group. The states were expressing their concerns mainly about the impact on their national sovereignty, but also about issues such as the scope of the Protocol, the additional work for the Committee, its lack of legal expertise, the legal capacity of the child, his or her capability to communicate on his or her own behalf, or through a representative, and the duration of the procedure.[134]

In its Preamble, among other things, by '*reaffirming the status of the child as a subject of rights and as a human being with evolving capacities*'[135] *and by 'recognizing that children's special and dependant status may create real difficulties for them in pursuing remedies for violations of their rights*', States Parties agreed to entrust the Committee with functions provided for in the text of the Protocol. Following the Preamble, the OPIC contains four separate parts: 1. General Provisions (Articles 1–4), 2. Communications Procedure (Articles 5–12), 3. Inquiry Procedure (Articles 13–14), and 4. Final Provisions (Articles 15–22).

In the first part, the OPIC states that the competences of the Committee, arising from this Protocol, are reserved solely for the States Parties to the Protocol, and the Committee shall not act upon violation committed by a States Party concerning violation of a right protected under a document to which the state is not a party, nor shall it receive communications if the violation concerns a non-Party State.[136] While exercising those competences, the Committee needs to be guided by two principles: the principle of the BIC and the respect for the child's rights and views, with due weight given in accordance with the child's age and maturity.[137] In the same part, the Protocol further imposes an obligation on the Committee to adopt procedural rules for responding to the child's submissions and to include in those rules safeguards to prevent any manipulation of the child by those who act on the child's behalf.[138] It also allows the Committee to decline any communication that it considers to be against the principle of the BIC.[139]

In the second part, the OPIC regulates the first way for children to challenge their rights violated by a States Party – a *communication procedure*. Communications can

134 Ibid., pp. 242–243.
135 In this regard Hrabar states that the child '*as subject of rights*' with '*evolving capacities*' faces obstacles in protecting his or her rights, and that '*it is for this reason that the Protocol opens a new door for children, claiming that it will enable national legislatures and regional organisations to submit complaints in the event of violations of their rights*.' Hrabar, 2017, p. 19.
136 OPIC, art. 1.
137 Ibid., art. 2.
138 The Committee adopted these rules on April 8, 2013. See more on them in: Benyusz, 2024a, pp. 245–250, 252–253.
139 OPIC, art. 3.

be submitted either on behalf of an individual child, or a group of children,[140] if they claim to be victims of violation committed by a States Party to the Protocol of rights protected under the UNCRC, the OPAC or the OPSC.[141] The OPIC also prescribes that at any time after receiving the communication, and before making a decision, the Committee can request urgent consideration from the States Party in question to undertake interim measures necessary in exceptional circumstances to prevent possible irreparable damage to the victim or to the victims of alleged violation.[142]

To be considered as admissible, a communication needs to meet certain criteria: it shall not be anonymous; it shall be in written form; it shall not constitute abuse of the right of submission of the communications, nor shall it be incompatible with the UNCRC and/or Protocols; the same matter must not have already been examined by the Committee nor be under examination by another procedure of international investigation or settlement; all available domestic remedies must be exhausted; the communication should not be manifestly ill-founded and should be sufficiently substantiated; the facts of the communication must not have occurred before the entry into force of this Protocol for the States Party in question; and it must be submitted within the period of one year after the exhaustion of domestic legal remedies, unless the author can prove it was impossible to submit it within the timeframe.[143]

After receiving the communication and determining it to be admissible, the Committee needs to introduce the States Party in question with it – confidentially and as soon as possible. The concerned States Party then needs to respond within the following six months with written explanations or statements clarifying the situation.[144] After considering the communication, the Committee will share its views and recommendations with the concerned States Party. The state must then respond and provide information on actions taken in light of those views and recommendations,

140 See about the legal representation and the legal capacity of the child during the proceedings: Benyusz, 2024a, pp. 253–254.

141 OPIC, art. 5. During the reporting period (2020–2022) the CRC Committee received over 200 individual complaints, adopted decisions in 62 cases, and found violations in 19 of them: eight against Spain, three against France and Switzerland, two against Belgium and Denmark and one against Finland. The majority of cases related to migration issues, in particular non-refoulment cases, age determination and administrative detention of migrant children. Others included issues of education, climate change, repatriation of children detained in the Syrian Arab Republic, and the right of children to maintain contact with both parents. The cases concerned mostly European States, but also some from Latin America. Report of the Committee on the Rights of the Child, 2022, paras. 46, 49. During the reporting period (2022–2024) the CRC Committee received over 200 individual communications, adopted decisions in 45 cases, and found violations in 14 of them: three against Denmark; two against Spain; and one each against Argentina, Chile, Czechia, France, Finland, Georgia, Paraguay, and Peru. The cases involved issues such as non-refoulment, education, international child abduction, the institutionalisation of children, the child justice system, the repatriation of children from refugee camps, reproductive rights, corporal punishment, and an adequate standard of living. Report of the Committee on the Rights of the Child, 2024, paras. 40, 43.

142 OPIC, art. 6.

143 OPIC, art. 7.

144 OPIC, art. 8.

also within six months.[145] Meanwhile, during the proceedings, the Committee must offer its good offices to the parties in question in order for them to reach a friendly agreement. In case they do so, the Committee will close the case.[146]

In the same part, the OPIC also provides for an option for states to report alleged violation of the rights guaranteed under the UNCR, or under the Protocols, committed by another state. However, as of today, no inter-state communication has been initiated before the Committee.[147]

In the third part, the OPIC regulates the second way for children to challenge violations of their rights committed by a States Party – an *inquiry procedure*. If the Committee receives credible information that there is a systematic and grave violation of children's rights by some States Party, the Committee needs to invite that state to cooperate and to submit observations regarding those issues without delay. The Committee may also appoint one or two members to conduct a confidential inquiry – which may include the visit of that country, and to report the Committee about it. After receiving the report, the Committee must examine it, and without any delay, inform the state in question about it, but also provide it with its views and recommendations. The state must then respond to those observations in the following six months.[148]

In the last part, the OPIC sets out provisions concerning international assistance and cooperation with UN specialised agencies, funds, programmes and other bodies; reporting to the General Assembly; dissemination of and information on the Protocol; procedures for signature, ratification and accession; its entry into force; violations after the entry into force; provisions for amendments and denunciation; the role of the Secretary General as depositary of the Protocol; and official languages of the Protocol.[149]

As of today, the OPIC has the lowest rate of ratification, having been ratified by only 52 states. Even though at the time of its adoption it was considered '*a huge step towards promoting children's rights*'[150] and '*a good idea how to overcome the obstacle of the impossibility to punish states pursuant to the Convention on the Rights of the Child and its two Protocols*',[151] it is clear that the OPIC has not reached its full potential. Many states are still hesitating to sign or to ratify it, and the reasons vary from the impact of the

145 OPIC, arts. 10–11.
146 OPIC, art. 9.
147 See OPIC, art. 12. See also Benyusz, 2024a, p. 251.
148 OPIC, art. 13. During the reporting period (2020–2022), the CRC Committee received four requests to open an inquiry. With respect to three of them, it decided to launch an inquiry and informed the states in question accordingly. Report of the Committee on the Rights of the Child, 2022, paras. 52–57. During the reporting period (2022–2024), the CRC Committee received four requests to open an inquiry. Three of them were dismissed, as the States Parties to the UNCRC were not parties to the OPIC. Regarding the fourth, the Committee requested additional information and eventually decided not to launch an inquiry. Report of the Committee on the Rights of the Child, 2024, para. 46.
149 OPIC, arts. 15–22.
150 Benyusz, 2024a, p. 254.
151 Hrabar, 2017, p. 22.

Protocol on national sovereignty, the Committee's non-judicial nature and a lack of legal expertise, capability of children to bring complaints on their own behalf, the lack of clarity in situations of manipulation and conflict of interests between the child and his or her representative.

However, what is concerning is that many of these states are those where the protection of children and their rights remains inadequate.[152]

8. The Role of the Committee on the Rights of the Child

The CRC Committee – established under Article 43 of the UNCRC – is a treaty body with the role of examining the progress made by States Parties in fulfilling the obligations undertaken under the UNCRC. It consists of 18 members, elected by States Parties – from among their nationals, with due consideration to equitable geographical distribution and principal legal systems. These members – despite being elected based on geographical distribution – serve in their personal capacity, and not as representatives of the states they come from. Another requirement is that they are experts of high moral standing and recognised competence in the field of children's rights.[153]

The members of the Committee are elected by secret ballot from a list of persons nominated by the States Parties, with each state being able to select one individual from among its nationals.[154] Elections are held every two years, but the entire preparation procedure begins at least four months before each selection. Namely, the procedure's initial step is undertaken by the Secretary General of the UN who needs to send a letter to the States Parties within this timeframe, requesting States Parties to submit their nominations in the following two months. After receiving nominations from the states, the Secretary General needs to prepare a list of the nominated persons – in alphabetical order and indicating the states that nominated them.[155] The elections are held at the meeting of States Parties – convened by the Secretary General – at the United Nations headquarters. Two procedural conditions must be met: 1. at least two-thirds of the representatives need to be present in order to form a quorum necessary for voting; 2. members will become those with the largest number of votes and an absolute majority of the votes of States Parties that are present and voting.[156]

The members' term of office is four years, and they may be re-elected if re-nominated. In case a member dies, resigns, or declares – for any other reason – that he or she can no longer perform this function, the state that appointed him/her needs

152 Notably, less than 20% of the States Parties to OPIC are from Sub-Saharan Africa, the Middle East and North Africa, and South Asia. See *Ratification Status*, no date.
153 UNCRC, art. 43(2).
154 UNCRC, art. 43(3).
155 UNCRC, art. 43(4).
156 UNCRC, art. 43(5).

to appoint another one from among its nationals – to perform for the remainder of the term.[157]

For its proper functioning, the Committee needs to adopt its own rules of procedure and elect its officers for a period of two years. Its meetings are held every year at the Headquarters of the United Nations or at some other place determined by the Committee itself.[158]

Even though its role is not authoritative, the significance of the Committee in the protection and advancement of children's rights is not to be underestimated.[159] The Committee has a broad mandate, which includes a range of working methods: it reviews States Parties' reports submitted every five years, considers individual and inter-state complaints, and conducts inquiries (under OPIC), issues General Comments (which is one of its most important roles), prepares open letters and statements, organises conferences and discussions, and lastly, cooperates with non-governmental organisations.[160]

State reports are submitted by the States Parties to the Committee through the Secretary-General of the United Nations. In these reports, the states need to indicate any factors and difficulties they face in fulfilling obligations arising from the Convention, as well as provide a full picture on the implementation of the Convention in the concerned state.[161] These reports need to be made publicly available within their own countries. The Committee, however, may ask the state to provide further information in this regard. After considering the report, the Committee will issue suggestions and recommendations and communicate them to the state and the General Assembly.[162]

General Comments – even though non-binding – offer detailed explanation, clarification, guidance and direction for the proper implementation of the rights contained in the UNCRC and its Optional Protocols. In them, the Committee expresses its position on various issues: the aims of education (No. 1, 2001), the role of independent national human rights institutions (No. 2, 2002), HIV/AIDS and the rights of the child (No. 3, 2003), adolescent health and development (No. 4, 2003), general measures of implementation (No. 5, 2003), treatment of unaccompanied and separated children (No. 6, 2005), implementing child rights in early childhood (No. 7, 2005), protection from corporal punishment (No. 8, 2006), the rights of children with disabilities (No. 9, 2006), children's rights in juvenile justice (No. 10, 2007), indigenous children and their rights (No. 11, 2009), the right of the child to be heard (No. 12, 2009), freedom from all forms of violence (No. 13, 2011), best interests of the child (No. 14, 2013), the right to the highest attainable standard of health (No. 15, 2013), impact of the business sector on children's rights (No. 16, 2013), the right to rest, leisure, play, recreational activities,

157 UNCRC, arts. 43(6) and (7).
158 UNCRC, arts. (8), (9) and (10).
159 Grabowski, 2024, p. 174.
160 Ibid., p. 165.
161 The Committee has adopted principles regarding these reports and their content. For more, see Ibid., p. 164.
162 Ibid.

cultural life and the arts (No. 17, 2013), harmful practices (No. 18, 2014), public budgeting for the realisation of children's rights (No. 19, 2016), the rights of the child during adolescence (No. 20, 2016), children in street situations (No. 21, 2017), general principles in the context of migration (No. 22, 2017), state obligations regarding children in migration (No. 23, 2017), children's rights in the child justice system (No. 24, 2019), children's rights in relation to the digital environment (No. 25, 2021), children's rights and the environment, with a focus on climate change (No. 26, 2023).[163]

The open letters serve the Committee to publicly call for the respect of children's rights, and through *statements*, it expresses its standpoint on various issues concerning children. The thematic discussions and conferences, in particular – *Day of general discussion* – is organised every two years, addressing current issues that children face, such as international migration, digital environment, armed conflicts, indigenous children, children without parental care, domestic and peer violence, etc.[164]

Overseeing the work of states, open to cooperation with non-governmental organisations and even children, and addressing an increasing number of various and crucial issues regarding the protection of children, the CRC Committee can be seen both as a "driving force" and "rejuvenator" of the UNCRC and its supporting Protocols.

9. The Role of UNICEF and Non-Profit Organisations at the Universal Level

The United Nations Children's Fund (UNICEF) – originally known as the United Nations International Children's Emergency Fund – is an international humanitarian organisation established by the UN General Assembly on 11 December 1946.[165] Founded as a successor to the United Nations Relief and Rehabilitation Administration (UNRRA), which was established on 9 November 1943, its primary aim was to provide food and healthcare to mothers and children in areas affected by World War II. After the situation began to improve in the 1950s, some Western countries advocated for its dissolution. However, in 1953, a resolution was adopted – on the 8th Plenary session of the United Nations held in New York – which transformed the "Fund" into a permanent body with the primary function to provide help in those parts of the world where it is needed. It also changed its name into United Nations Children's Fund, or as we know it, UNICEF.[166]

Today, as a part of United Nations, UNICEF has a semi-autonomous status and is present in 192 countries around the world. It has a governing body – the Executive Board consisting of 36 members from five main regional areas of Member States – and a Bureau, comprising a President and Vice Presidents, each from one of the five

163 For more on these comments, see ibid., pp.167–173.
164 Ibid., p. 173.
165 Benyusz, 2024b, p. 268; Klinčić, 2007, p. 51.
166 Ibid., pp. 51–52.

regional areas. The Board meets three times a year (at two regular and one annual session) at the UN Headquarters. The work of the Executive Board it supported and serviced by the Office of the Secretary, which organises its field visits and communicates with UNICEF Secretariat.[167]

As of today, UNICEF has been working and continues to work in the fields of child protection, child survival, education, social policy, emergency intervention, gender equality, innovation, supply and logistics, and evidence-based research and analysis.[168] In 1965, it received the Nobel Peace Prize, '*as a true advocate for children's rights and their dignified position in society [...] without which, the world would undoubtedly be a sadder and more uncertain place.*'[169]

Alongside UNICEF, the role of non-governmental organisations (NGOs) and National Human Rights Institutions (NHRIs) shall not be omitted. *NGOs* are government-independent – mostly non-profit – organisations established by group of individuals and representing specialist expertise. In regard to the UNCRC, their role has been twofold: they played an important role in its drafting and adoption, and they continue to do so in its monitoring and implementation. Their influence on the UNCRC goes back to the Geneva Declaration in 1924 – one of the two UNCRC's predecessors, when the International Save the Children Fund, the British Save the Children Fund and the Swedish Rädda Barnen were established, and their importance continues to this day. NGO's organised activity started in 1983, when the Informal Ad Hoc Group for the Convention on the Rights of the Child was founded.[170]

During the drafting of the Convention, NGOs had a significant impact on regulating matters such as the protection of children against sexual exploitation, trafficking, torture, and armed conflict with special focus on reintegration and promotion of physical and psychological recovery measures for children victims of these violations. They also sought to influence matters such as rights of the unborn child, and the minimum legal age for involving children into armed conflict, though with less success.

Regarding the second role – the implementing and monitoring of the Convention, the UNCRC was the first among human rights treaties to involve NGOs in these processes. Article 45 foresees this role both for UNICEF and other competent bodies, including NGOs and special agencies. To carry out this function, NGOs can organise activities to raise awareness on certain issues, to educate different groups and provide platforms for professional discussions, share information and enhance cooperation, and enhance visibility through collaboration with the media.

National Human Rights Institutions (NHRIs) are independent, state-mandate and state-financed institutions, established to promote and protect human rights at the national level. Unlike NGOs, NHRIs are public institutions, which appear in different

167 See UNICEF, no date.
168 Benyusz, 2024b, p. 268.
169 Klinčić, 2007, p. 64.
170 Ibid., 263.

forms, such as ombudsman offices, councils, commissions. They deal with a wide scope of rights – from civil and political, to social, economic and cultural rights – and are accountable to the public for their work.

The idea for the establishment of the NHRIs emerged in the mid-20th century, two years before the adoption of the Universal Declaration on Human Rights. Subsequently, in 1978, draft guidelines concerning the role and functioning of NHRIs were adopted.[171] However, the key step came fifteen years later, with the adoption of the Paris Principles – '*a guiding threshold for the credibility and legitimacy of these institutions*'.[172] Adopted by the UN General Assembly in 1993, the Paris Principles '*called for the establishment of NHRIs that meet the requirements of a broad mandate, effective functioning, pluralism, independence from the government, adequate powers and resources, cooperative practices, and international engagement.*'[173]

Today, the establishment of the NHRIs is referenced in many international documents, including the UN Declaration on the Rights of Persons with Disabilities (UNCRPD), UN Guidelines on Alternative Care, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Rules for the Protection of Juveniles Deprived of their Liberty (so-called *Havana Rules*), and the Lanzarote Convention.[174] Notably, the UNCRC is not among them, as it contains no provision which directly refers to the establishment of the NHRIs. Nonetheless, in its (even though non-binding) General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, the CRC Committee '*considers the establishment of such bodies to fall within the commitment made by States Parties upon ratification to ensure the implementation of the Convention and advance the universal realization of children's rights*'[175] and derives the obligation of States Parties to establish NHRIs from Articles 4 of the UNCRC, which stipulates that '*the States Parties undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention*'.

Once established, the NHRIs specialised in children's rights have multifaceted functions: they promote and monitor the implementation of the UNCRC, they may propose legislative reforms or provide input to those initiated by the government, they promote children's rights and participation in legislative procedures, play important role in monitoring and evaluating implementation of children's rights legislation, and they may also be mandated to receive complaints from children when their rights

171 Benyusz, 2024b, p. 270.
172 Ibid.
173 Ibid.
174 For more on this, see Benyusz, 2024b, pp. 272–273.
175 UN Committee on the Rights of the Child, 2002, pt. 1. In the same document, the Committee provides guidance on establishment, mandate and powers, resources, pluralistic representation, provision of remedies for breaches of children's rights, as well as accessibility and participation. See Ibid; see also Benyusz, 2024b, pp. 273–275.

are violated, and provide remedies – such as advocacy, independent advice and complaints procedures.[176]

10. Concluding Remarks

The idea that children are legal subjects, particularly vulnerable, who should enjoy different rights, was not fully recognised by adults until the 20th century. In fact, throughout history, the position of children has often been far from enviable, as they were subjected to corporal punishment, abandonment, abuse, or even death. Regarded as the property of their parents, in some historical periods, children could even be sold or killed by their father.

The 20th century brought significant changes and marked a renaissance for children and their rights. The adoption of the UNCRC was a major step taken by the international community, which had to find compromise and invest considerable efforts to ensure that every child in the world would be protected. Taking into account geographical, political, social and cultural differences of the states, as well as the challenges of reaching an agreement, the significance of the adoption of the UNCRC becomes even more pronounced.

Today, despite those efforts, and despite being positioned and protected as subjects of law, children are unfortunately still facing various challenges, living in poor conditions, and having their rights violated.

Unlike the history which has shown its ugly side towards children, and the present, which carries both the burden from the past and challenges that emerge, the opportunity for improvement lies in the hands of the future, which should be more prudent and proactive in safeguarding the rights of those who need it the most.

176 See *Independent child rights institutions and national human rights institutions*, no date.

Bibliography

Literature

Almakky, R. (2023) 'The Role of International Organisations in the Development of International Law: An Analytical Assessment of the United Nations', *Law and World*, 9(28), pp. 40–66; https://doi.org/10.36475/9.4.4.

Andrzejewski, M. (2000) 'Konwencja o Prawach Dziecka. Geneza i znaczenie', *Problemy Opiekuńczo-Wychowawcze*, 2000/5, pp. 3–8.

Archer, C. (2015) *International organizations*. 4th edn. Abingdon–New York: Oxon–Routledge.

Ariès, Ph. (1962) *Centuries of Childhood: A Social History of Family Life*. New York: Knopf.

Benyusz, M. (2024a) 'Optional Protocol on a Communications Procedure' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 241–259; https://doi.org/10.71009/2024.mbar.icr_10.

Benyusz, M. (2024b) 'The Role of National Human Rights Institutions, the UNICEF, and Non-governmental Organisations in the Implementation of the United Nations Convention on the Rights of the Child' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 261–279; https://doi.org/10.71009/2024.mbar.icr_11.

Benyusz, M., Raisz, A. (2024) 'Introduction' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 15–20; https://doi.org/10.71009/2024.mbar.icr_0.

Blum, R.W., McNeely, C., Nonnemaker, J. (2001) 'Vulnerability, Risk and Protection' in Fischhoff, B., Nightingale, E., Iannotta, J.G. (eds.) *Adolescent Risk and Vulnerability: Concepts and Measures*. Washington: National Research Council and Institute of Medicine, Board on Children, Youth, and Families, pp. 50–72; https://doi.org/10.17226/10209.

Burger, K. (2018) 'The Subjective Importance of Children's Participation Rights: A Discrimination Perspective', *American Journal of Orthopsychiatry*, 89(1), pp. 65–76; https://doi.org/10.1037/ort0000343.

Commissioner for Children (2017) *Defining Child Vulnerability: Definitions, Frameworks and Groups*.

Committee on the Rights of the Child (2022) *Report of the Committee on the Rights of the Child, 2020-2022*. United Nations: New York.

Committee on the Rights of the Child (2024) *Report of the Committee on the Rights of the Child, 2022-2024*. United Nations: New York.

Cox, C.A. (1998) *Household interests. Property, marriage strategies, and family dynamics in Ancient Athens*. Princeton: Princeton University Press.

De Mause, L. (1982) *Foundations of psychohistory*. New York: Creative Roots.

Fabijanić Gagro, S. (2008) 'The protection of children in armed conflicts in accordance with UN Security Council resolutions' *Collected Papers of the Faculty of Law in Zagreb,* 58(3), pp. 747–778.

Fabijanić Gagro, S. (2017) 'The protection of child soldiers in contemporary armed conflicts' *Collected Papers of the Faculty of Law in Zagreb,* 67(3–4), pp. 439–464.

Fetai, A., Stajnko, J. (2024) 'Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography – Criminalising Practices Including and Exceeding Exploitation and Abuse of Children' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 181–209; https://doi.org/10.71009/2024.mbar.icr_8.

Fineman, M.A. (2020) 'Reasoning from the Body: Universal Vulnerability and Social Justice' in Dietz, C., Travis, M., Thomson, M. (eds.) *A Jurisprudence of the Body. Palgrave Socio-Legal Studies*. Cham: Palgrave Macmillan, pp. 17–34; https://doi.org/10.1007/978-3-030-42200-4_2.

Forbes-Mewett, H., Nguyen-Trung, K. (2020) 'Defining Vulnerability' in Forbes-Mewett, H. (ed.) *Vulnerability in a Mobile World*. 1st edn. Bingley: Emerald Group Publishing Limited, pp. 5–27; https://doi.org/10.1108/978-1-78756-911-920191004.

Freeman, M. (2020) *Magna Carta for Children? Rethinking Children's Rights*. Cambridge: Cambridge University Press.

Garayová, L. (2023) 'The Right to Play: Interpretation through the Lens of the Convention on the Rights of the Child', *European Integration Studies,* 19(1), pp. 47–69; https://doi.org/10.46941/2023.e1.3.

Garayová, L. (2024) 'Optional Protocol on the Involvement of Children in Armed Conflicts' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 181–209; https://doi.org/10.71009/2024.mbar.icr_9/.

Grabowski, M. (2024) 'The role of the Committee on the Rights of the Child' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 157–177; https://doi.org/10.71009/2024.mbar.icr_7.

Guštin, M. (2022) 'Challenges of Protecting Children's Rights in the Digital Environment', *EU and comparative law issues and challenges series (ECLIC),* 6, pp. 453–486; https://doi.org/10.25234/eclic/22439.

Hammaberg, T. (2009) 'Children have the right to be heard and adults should listen to their views' in *The Child's Right to Respect. Janusz Korczak's legacy: Lectures on today's challenges for children*. Strasbourg: Council of Europe Publishing, pp. 81–90.

Haugli, T., Martnes, M. (2025) 'Vulnerability and Children's Rights', in Haugli, T., Martnes. M. (eds.) *Perspectives on Children, Rights and Vulnerability*. Scandinavian University Press, pp. 13–31; https://doi.org/10.18261/9788215069500-25-02.

Henkin, L. (1969) 'International Organization and the Rule of Law', *International Organization,* 23(3), pp. 656–682.

Herring, J. (2022) 'Vulnerability and Children's Rights', *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, 36, pp. 1509–1527; https://doi.org/10.1007/s11196-022-09951-0.

Hrabar, D. (1994) *The Child – a Legal Subject in the Family*. Zagreb: Faculty of Law, University of Zagreb – Institute for Civil Law and Family Law.

Hrabar, D. (2017) 'Bridging the Non-Protection of Children's Rights through the Optional Protocol to the CRC on Communications Procedure and a Future European Court', *Annual of the Croatian Academy of Legal Sciences*, 8(Special Issue), pp. 13–33.

Hrabar, D. (2021) 'Introduction to children's rights' in Hrabar, D. (ed.) *Rights of the child – multidisciplinary approach*. Zagreb: Faculty of Law, University of Zagreb, pp. 13–37.

Hrabar, D. (2024) 'Special Protection of Human Rights of Children I: History of Children's Rights' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 21–39; https://doi.org/10.71009/2024.mbar.icr_1.

Hrabar, D., Hlača, N., Jakovac-Lozić, D., Korać Graovac, A., Majstorović, I., Čulo

Ilias, M., Akter, R. (2017) 'Social History of Childhood and Children: A note on the Cultural and Historical Differences in Child Care', *IOSR Journal of Humanities and Social Science*, 22(7), pp. 54–59.

Independent child rights institutions and national human rights institutions (no date) [Online]. Available at: https://www.childrensrightsreform.org/who/independent-child-rights-institutions-and-national-human-rights-institutions (Accessed: 15 April 2025).

Klinčić, D. (2007) 'UNICEF in Croatia', *History in education*, 9(1), pp. 51–65.

Kranjc, J. (2024) 'Some Aspects of the Legal Position of Children in Roman Law' in Mensah, C.M. (ed.) *Protecting Children's Rights in Civil, Criminal and International Law – Under a Touch of Digitalization*. Maribor: University of Maribor Press, pp. 43–65; https://doi.org/10.18690/um.pf.4.2024.

Langlaude Doné, S. Tobin J. (2019) 'Article 14. The Right to Freedom of Thought, Conscience, and Religion' in Tobin, J. (ed.) *The UN Convention on the Rights of the Child – A Commentary*. Oxford: Oxford University Press, pp. 475–516; https://doi.org/10.1093/law/9780198262657.003.0015.

Lansdown, G., Jimerson, S. R., Shahroozi, R. (2014) 'Children's rights and school psychology: Children's right to participation', *Journal of School Psychology*, 52(1), pp. 3–12. https://doi.org/10.1016/j.jsp.2013.12.006.

Lievens, E., Livingstone, S., McLaughlin, S., O'Neill, B., Verdoodt, V. (2018) 'Children's rights and digital technologies' in Kilkelly, U., Ton, L. (eds.) *International Human Rights of Children*. Singapore: Springer, pp. 1–27; https://doi.org/10.1007/978-981-10-3182-3_16-1.

Lis, W. (2024) 'UN Convention on the Rights of the Child: Protection' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 91–119; https://doi.org/10.71009/2024.mbar.icr_4.

Margaletić, A., Šimović, I. (2021) *Family Law*. Zagreb: Official Gazette.
Mayrhofer, M. (2025) 'The concept of vulnerability and its relation to the concepts of inequality and discrimination – a review article', *International Journal of Human Rights*, 29(9), pp. 1589–1618; https://doi.org/10.1080/13642987.2025.2488938.
Meyer, A. (2007) 'The moral rhetoric of childhood', *Childhood*, 14, pp. 85–93.
Mrnjaus, K. (2014) 'The Child's Right to Play', *Croatian Journal of Education*, 16(1), pp. 217–233.
Nikolić Jakus (2015) 'The history of childhood in the Middle Ages and the history of emotions: parental feelings toward children as an example of a research approach to the topic of emotions in the past', *Historical Review*, 68(2), pp. 377–381.
Nkosi, G. (2015) 'The international evolution of the right of the child to social security', *Southern African Public Law*, 30(2), pp. 404–503; https://doi.org/10.25159/2522-6800/3590.
Norozi, S., Moen, T. (2016) 'Childhood as social construction', *Journal of Educational and Social Research*, 6, pp. 75–81.
Nowak, M. (2005) 'Article 6. The Right to Life, Survival and Development' in Alen, A., Vande Lanotte, J., Verhellen, E., Ang, F., Berghmans, E., Verheyde, M. (eds.) *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Martinus Nijhoff Publishers.
Petrak, M., Žiha, N. (2009) 'Protection of the Child in the Roman Legal Tradition', *Child and Law*, pp. 13–31.
Prokop, A. (1972) *Family Law: Parent–Child Relations*. Zagreb: Školska knjiga.
Ratification Status (no date) [Online] Available at: https://opic.childrightsconnect.org/ratification-status/ (Accessed: 15 April 2025).
Sadowska, M. (2024) 'UN Convention on the Rights of the Child: Provision' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 119–137; https://doi.org/10.71009/2024.mbar.icr_5.
Samardžić, S. (2024) 'Legislative History of the UN Convention on the Rights of the Child' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 41–61; https://doi.org/10.71009/2024.mbar.icr_2.
Sandberg, K. (2025) 'Children's Access to Justice in Climate Matters: The Role of Vulnerability' in Haugli, T., Martnes, M. (eds.) *Perspectives on Children, Rights, and Vulnerability*. Scandinavian University Press, pp. 199–224; https://doi.org/10.18261/9788215069500-25-11.
Scott, S. (1993) 'From Major to Minor: An Historical Overview of Children's Rights and Benefits', *Journal of Law and Social Policy*, 9, pp. 222–257; https://doi.org/10.60082/0829-3929.1119.
Šimović, I. (2024) 'UN Convention on the Rights of the Child: Participation' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 137–159; https://doi.org/10.71009/2024.mbar.icr_6.

Šimović, I., Kokić, J. (2025) 'Role of the Parents in the Exercise of the Child's Right to Freedom of Thought, Conscience and Religion', *EU and Comparative Law Issues and Challenges Series*, 9, pp. 300–325; https://doi.org/10.25234/eclic/38104.

Sommerville, C.J. (1982) *The Rise and Fall of Childhood*. Sage Publications.

SOS Children's Villages International (2015) *Child at risk. The world's most vulnerable children: who they are, where they live and what puts them at risk*.

Turki, H., Cheik, B. (2006) 'Children's rights: From Hammurabi's Codex to the Convention on the rights of the child', *Mediterranean Journal of Human Rights*, 10(1), pp. 197–215.

UN (no date) *Optional Protocol on the Involvement of Children in Armed Conflict* [Online]. Available at: https://childrenandarmedconflict.un.org/en/tools-for-action/opac (Accessed: 15 April 2025).

UN Committee on the Rights of the Child (2002) *General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, CRC/GC/2002/2.*

UN Committee on the Rights of the Child (2009) *General Comment No. 12. The right of the child to be heard, CRC/C/GC/12.*

UN Committee on the Rights of the Child (2011) *General Comment No. 12. The right of the child to freedom from all forms of violence, CRC/C/GC/13*.

UN Committee on the Rights of the Child (2013) *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14*.

UN Committee on the Rights of the Child (2013) *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15*.

UN Committee on the Rights of the Child (2019) *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, CRC/C/156*.

UN Committee on the Rights of the Child (2021) *On children's rights in relation to the digital environment, CRC/C/GC/25.*

UN Human Rights Council (2009) *Feasibility of a communication procedure under the Convention on the Rights of the Child* [Online]. Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGCRC/Session1/A-HRC-WG-7-1-CRP-1.pdf (Accessed: 15 April 2025).

UNICEF (no date) *About the UNICEF Executive Board* [Online]. Available at: https://www.unicef.org/executiveboard/about (Accessed: 15 April 2025).

Van Bueren, G. (1994) 'Child sexual abuse and exploitation: A suggested human rights approach', *The International Journal of Children's Rights*, 2(1), pp. 45–59.

Vandenhole, W., Erdem Türkelli, G., Lembrechts, S. (2019) *Children's rights: A Commentary on the Convention on the Rights of the Child and its Protocols*. Cheltenham: Edward Elgar Publishing; https://doi.org/10.4337/9781035316847.

Váradi-Csema, E. (2022) 'Children's Rights and the Criminal Protection of Minors' in Váradi-Csema, E. (ed.) Criminal Legal Studies: European Challenges and Central European Responses in the Criminal Science of the 21st century. Miskolc–Budapest: Central European Academic Publishing, pp. 413–435; https://doi.org/10.54171/2022.evcs.cls_15.

Veerman, P.E. (1992) The Rights of the Child and the Changing Image of Childhood. Dordrecht–Boston–London: Martinus Nijhoff Publishers.

Vinković, M. (2008) Child Labour in International, European, and Comparative Labour Law. Zagreb: TIM Press.

Wedeł-Domaradzka, A. (2024) 'Principles of the UN Convention on the Rights of the Child' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 63–91; https://doi.org/10.71009/2024.mbar.icr_3.

Wielec, M. (2024) 'Poland as the Initiating Country of the Convention on the Rights of the Child', *Acta Universitatis Sapientiae. Legal Studies*, 13(1), pp. 231–248; https://doi.org/10.47745/AUSLEG.2024.13.1.12.

Wilkins, R.G., Becker, A., Harris, J., Thayer, D. (2003) 'Why the United States Should Not Ratify the Convention on the Rights of the Child', *Saint Louis University Public Law Review*, 22(2), pp. 411–434.

Legal Sources

Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 19 December 2011, *United Nations, Treaty Series*, vol. 2983, p. 135 ff.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, *United Nations, Treaty Series*, vol. 2173, p. 222 ff.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 25 May 2000, *United Nations, Treaty Series*, vol. 2171, p. 227 ff.

Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

UN Convention on the Rights of the Child, *Official Gazette of the SFRY*, No. 15/1990, *Official Gazette of the Republic of Croatia* – International Treaties, Nos. 12/93, 20/97.

| Chapter 2 |

Children's Rights in the Jurisprudence of the European Court of Human Rights

Sibilla Buletsa

ABSTRACT

The European Convention on Human Rights has recognised several crucial domains that are specifically pertinent to children. These factors encompass the significance of giving priority to a child's best interests and ensuring that their perspectives are duly considered. Furthermore, it underscores the imperative of safeguarding children from danger and ensuring thorough inquiry and appropriate remedy in the event of injury. The treaty also emphasises the significance of upholding a child's personal and familial life, guaranteeing their right to legal proceedings and the implementation of court rulings, providing safe housing for children, and protecting their rights within the criminal justice system.

The European Court of Human Rights lacks the authority to overturn national verdicts or invalidate national laws. If the Court determines that children's rights have been violated, it has the authority to grant the applicant (either the child or parent) "just satisfaction", which is a monetary compensation awarded for specific types of harm. The Member State is obligated to make the payment. A ruling that finds a Member State guilty of violating the Convention puts pressure on the state to modify its laws and for national courts to change their legal decisions in order to comply with the Court's rulings. This is done to rectify the violation of the Convention and prevent future rulings that would condemn the state and require it to provide compensation to future applicants. When dealing with asylum processes involving kids, it is crucial to consider the child's best interests, specific circumstances, as well as any psychological discomfort or traumatic experiences that they may have endured. Frequently, at national level, circumstances arise when parents or legal guardians lack the legal capacity to seek recourse from different governmental bodies on behalf of the child. This is particularly accurate when they are not cohabiting or when children are residing in specialised state facilities. Nevertheless, the presence of these limitations may potentially infringe upon both the rights protected by the Convention and the overall rights of children.

KEYWORDS

children, rights, European Convention on Human Rights, protection, best interests, satisfaction, education, discrimination, life, adoption, European Court of Human Rights

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1. Introduction

Contemporary international and European law recognises "vulnerable groups" in society, who are objectively disadvantaged and more exposed to discrimination and insecurity. In international human rights law, "vulnerability" relates to women, children, and disabled people. These people need special government protection for their civil and socioeconomic rights due to their inherent or acquired traits.[1] State policy for vulnerable groups helps governments meet their international human rights commitments by improving their global reputation and reducing social unrest. Protecting vulnerable children's rights is urgent and requires collaboration, especially given the potential harm armed conflicts and other factors could cause to impoverished children worldwide. The following factors produce vulnerable group rights violations: the formation of statistical data by the department; weak material and technical base of forensic service units; the marginalisation of vulnerable groups and high stigmatisation; the motivation of police officers to enrich themselves financially at the expense of drug users and CSWs; impunity of police officers who violate vulnerable persons' rights; repressive legislation; the indifference of society; widespread corruption in law enforcement; and a thirst for satisfaction.[2]

Discrimination or infringement on the rights of children can have political, social, economic, demographic, and legal consequences. Children want to have the right to vote in their care, families, communities, and society. Children may feel disillusioned when adults do not trust or appreciate them, and when efforts to hear their opinions do not yield results or feedback. Children believe that people making decisions affecting them, including the broader community, need education and training to recognise and exploit their significant contributions. A common observation is that children really cherish their relatives and friends. This may impact the implementation of children's rights. Children often prefer to receive legal support from trusted friends and family, rather than from professionals. Policymakers should consider involving parents and carers in processes where children need information and support. Children may fear losing control of difficult situations if they seek aid due to mistaken paternalism. Authorities should prioritise building trust among vulnerable populations, including those in care homes and those who have experienced sexual exploitation, as it is a common issue among children. The question of resources is a significant rights concern for children in Europe. The current economic, climate and government policies are negatively impacting children's education, employment, and mental health. This includes disadvantaged children, inclusive of those with impairments. Training, such as promoting participation and creating awareness of discrimination against children, can positively impact all aspects of children's rights in Europe.[3]

1 Stepanenko, 2022, pp. 123–130.
2 Bielousov, 2016, p. 83.
3 Daly, Ruxton and Schuurman, 2016, p. 39.

Any form of discrimination tarnishes law enforcement, the government, and the state globally. Modern international law prioritises protecting children's rights through international mechanisms and state legislation, e.g., through international legal standards, which are the same for everyone, but vulnerable groups – children in particular suffer more harm from violations than others. Thus, international law distinguishes these individuals and requires states to protect them.

International human rights norms are replicated in national constitutions, integrated into legislation, and enforced by local courts within the framework of the national system of legal protection. Additionally, specialised human rights institutions operate at a national level to advocate for and safeguard human rights, while also monitoring the situation of vulnerable groups-children.[4] International judicial institutions' case law highlights the importance of giving special care to vulnerable individuals in order to safeguard their fundamental rights. In the *Stubbings and others v. United Kingdom*[5] case, the European Court concluded that sexual abuse is an extremely serious crime that leaves victims in a vulnerable state. The court recognised that children and other vulnerable individuals have the right to be protected by the state, which includes being effectively warned, to prevent them from experiencing such severe violations of their private lives.

The European Court of Human Rights (ECtHR) is the key body for the protection of children's rights in Europe. To date, numerous ECtHR judgments on issues related to the protection of children's rights are based on the provisions of the European Convention on Human Rights (ECHR), the Universal Declaration of Human Rights, and the Convention on the Rights of the Child (UNCRC).

The protection of children's rights is based on a hierarchical framework of standards that range from universal declarations to regional agreements and specific national or organisational initiatives. This hierarchy ensures that children's individual needs are met and that their rights are promoted and protected across Europe. At the top of the hierarchy are universal standards for the protection of children's rights. These foundational instruments articulate fundamental principles and rights applicable to all children, irrespective of their location, background, or circumstances. The most prominent and influential of these is the United Nations Convention on the Rights of the Child.[6] The UN Convention on the Rights of the Child is the main document defining legal standards in the field of child protection. All European countries have ratified it. In 2000, two Optional Protocols to the Convention were adopted and these entered into force in 2002; namely the Optional Protocol on the Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. In December 2011, the UN General Assembly adopted the Third Optional Protocol, which was opened for signature in 2012. The Protocol provides for the possibility of the Committee on the Rights of the Child to

4 Hrustova, 2019, p. 75.
5 *Stubbings and Others v. the United Kingdom*, 1996.
6 Convention on the Rights of the Child, 1989.

consider complaints about violations of the Convention by countries that are parties to the Protocol, which has become an important and effective tool in the mechanism for protecting children's rights. In addition, it is worth paying heed to the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure of 19th December 2011. Adopted in 1989, the UNCRC is the most widely ratified human rights treaty in history, outlining a comprehensive set of civil, political, economic, social, and cultural rights for every child. It defines a child as any human being under the age of 18 unless, under the law applicable to the child, majority is attained earlier. The four main principles of the Convention – non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child - provide a complete roadmap for all subsequent efforts in child protection. Also, the Universal Declaration of Human Rights, like universal instruments, also contains provisions relevant to children, often serving as a broader context for the specialised rights articulated in the UNCRC.

Other international documents aimed at ensuring and protecting children's rights include: The Convention concerning the Limitation of Night Work of Children and Adolescents in Non-Industrial Work, 1946, which 'sets time limits for night work of minors in non-industrial work'; The Convention on the Recovery of Maintenance Abroad, 1956, which 'establishes a simplified procedure for the recovery of alimony in favour of a child when the plaintiff and the defendant reside in different countries'; The European Convention on the Legal Status of Children Born Out of Wedlock, 1975, in which 'a child born out of wedlock should be provided for by the father and mother in the same way as a child born in wedlock'; The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 which was set up 'to ensure that intercountry adoption is in the best interests of the child'; The Convention on Contact with Children, 2003, 'to ensure the rights of the child to communicate with a parent or close relatives living separately'; The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007, 'to protect the rights of children who are victims of sexual abuse and sexual exploitation'; The Declaration of the Rights of the Child, 1959, where 'The child, regardless of colour, language, sex, religion, shall be guaranteed by law social protection, conditions and opportunities to develop physically, mentally, morally and spiritually'; The UN Convention on the Rights of the Child, 1989 which 'enshrines the political, economic, social and cultural rights of children until they reach the age of majority, ensures the right of the child to the protection of these rights and the creation of the necessary conditions for this'.[7]

Regional standards for the protection of children's rights are based on these universal standards. These instruments are developed and adopted by intergovernmental organisations within specific geographical regions, allowing for a greater degree of cultural and socio-economic sensitivity while still upholding universal principles. The European Convention on Human Rights (ECHR), while not exclusively

7 Pozihun, 2022, p. 160.

focused on children, has been instrumental in protecting children's rights through the European Court of Human Rights' jurisprudence on various articles, such as the right to private and family life. The ECHR proclaimed the principle of the rule of law and the obligation of contracting parties to respect human rights. The set of rights enshrined in the ECHR can be divided into two subsystems: 1) rights that belong to every person from birth (life, liberty, and security of person); 2) rights acquired with the onset of a certain age (fair trial in a criminal case, marriage). A separate subsystem can be considered a list of prohibitions, the implementation of which guarantees the realisation of the rights enshrined in the ECHR (prohibition of discrimination, torture, ill-treatment, and slave labour). The text of the ECHR contains virtually no provisions on the protection of children's rights (except, for example, the provisions on the special status of minors in Articles 5-6), but the scope of most of the rights granted by it is such that they can be enjoyed by any person, regardless of age or other characteristics. In this regard, the ECtHR, when considering cases where children's rights have been violated, refers to the ECHR as a basic document.

Finally, the protection of children's rights is further strengthened by initiatives undertaken by entities such as the Council of Europe internally, and by national governments and civil society organisations. These initiatives translate the broad principles of universal and regional standards into concrete policies, programs, and legal frameworks at the national and local levels. The Council of Europe has specifically developed a range of initiatives and recommendations aimed at strengthening child protection, including strategies on violence against children and the promotion of child-friendly justice. Also, the Committee of Ministers officially approved the new Strategy for the Rights of the Child (2022-2027).[8] Council of Europe member states' children are entitled to the full range of human rights protected by the ECHR, the UNCRC, and other international and European human rights instruments. They have civil, political, economic, social, and cultural rights. In the national legislation of European countries, regional standards are reflected. Countries develop their own laws and policies to implement their obligations under international and regional treaties, establishing child protection systems, defining offenses against children, and ensuring access to education, healthcare, and social services. Countries create special state institutions to protect children's rights, ombudsmen for children, and dedicated juvenile justice systems are crucial for monitoring, advocating, and enforcing children's rights. Non-governmental organisations also play a critical role in advocating for children's rights. Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms and the Rights of the Child does not directly enshrine certain types of children's rights and constitutes a "general human rights document"; along with it, the international community has adopted a number of "special" international treaties that, among other things, address various aspects of child protection, including the UN Convention on the Rights of the Child.

8 CM(2021)168-final, 2022.

1.1. Definition of Children's Rights and Protection, and the Importance of Protecting Children's Rights

Children are full-fledged holders of rights. They are beneficiaries of all human and fundamental rights and subjects of special regulations, given their specific characteristics. Their rights are frequently infringed upon due to their lack of awareness regarding their rights and freedoms. A child, being a constituent of society, possesses the same entitlement to the safeguarding of their rights as adults. It also considers the importance of parents and guardians or other legal representatives and makes reference, where appropriate, to situations in which rights and responsibilities are most prominently vested in children's carers. Some scholars believe that the system of children's rights is a component of human rights and define the concept of "child rights" as the opportunities (freedoms) of a child necessary for his or her existence, upbringing, and development. Many of the child's rights coincide with human rights (the right to life, name, citizenship, free expression, etc.).[9] The lists of rights of children is next: 1) right to life from the moment it is determined to be alive and viable according to the criteria of the World Health Organisation; 2) right to a name and a nationality from the moment of birth; 3) right to a standard of living sufficient for his physical, intellectual, moral, cultural, spiritual and social development; 4) right to freely express their personal opinion, form their own views, develop their own social activity, and receive information appropriate to their age; 5) right to freedom, personal integrity and protection of dignity. In case of violation of rights, the child or his/her legal representatives have the right to apply to the court for protection of violated rights and freedoms.

The Convention on the Rights of the Child of 1989 is the clearest and fullest statement of children's rights. It is the most widely ratified human rights treaty, yet children still face poverty, violence, war, disease, and disaster. It is one of the nine core human rights treaties, all of which are of relevance to children, who are, of course, human beings.[10] The Convention lumps all who are under eighteen years of age into one category. They are children. Article 5 emphasises that states parties are to 'respect the responsibilities, rights and obligations of parents' to provide appropriate direction and guidance in the exercise by the child of his rights.[11] The convention is widely regarded as the 'touchstone for children's rights throughout the world',[12] and its particular merits include its breadth and the extent of its detailed provision for the autonomous rights of children.[13] Its comprehensive nature means that the CRC contains standards applicable to all areas of the child's life including school (Articles 28 and 29) and the family (Articles 3, 5, 12 and 18), as well as in specific settings of alternative care (Article 20, 21) and youth justice and detention (Articles 37 and 40), for example. It provides for children's wellbeing in a variety of contexts (Articles 6,

9 Manina, 2013, p. 51.
10 Freeman, 2020, p. 68.
11 Alderson, 2015.
12 Fortin, 2009, p. 49.
13 McGoldrick, 2001, p. 133; Kilkelly, 2001, p. 308.

24, 27) and makes specific provision for children with disabilities (Article 23), children whose parents have separated (Articles 3, 9), children who have suffered abuse and exploitation (Articles 19, 30–4, 37) and refugee children (Articles 7, 8, 10). The convention contains rights of general relevance (Articles 7 and 8 on identity), rights of special importance to children (Articles 18 on family support and 31 on the right to play, rest and leisure) and general human rights adapted to the specific needs of children (Articles 13 on freedom of expression, 14 on expression of religion and 17 on access to information).The Convention is informed by a number of principles: (1) the non-discrimination principle (Article 2); (2) the best interests principle (Article 3(1)); (3) the inherent right to life, survival and development (Article 6); (4) participation rights (Article 12). Article 5 of the UNCRC, which introduces the concept of the evolving capacities of the child, provides the transitional linkage between the initial dependency of a newborn child and the full autonomy afforded to an adult. Children necessarily rely on adult direction and guidance during the period of their childhood as their capacities evolve.[14] Even though the European Convention does not include child protection, it protects them. Only one Convention article hastily refers to children in the context of family relationships: Article 5 of Protocol 7 mentions the interests of the child in relation to equality between spouses, but this article actually welcomes measures taken by Member States that impose a difference in treatment between parents while serving children's interests. No other Convention article includes the term "child". Only the terms "minor" and "juveniles" are used. In fact, article 5 § 1 d) regulates the detention of a "minor" while article 6 § 1 authorises the exclusion of the press and public from a trial in the interests of "juveniles". Despite the fact that the European Convention does not explicitly aim at protecting children, children can apply to the Court claiming the violation of the rights guaranteed by the Convention. However, Article 5 imposes clear boundaries on the exercise of that guidance. It states that any guidance by parents or other caregivers must be appropriate, consistent with the evolving capacities of the child, and directed to the exercise by the child of his or her human rights. In other words, parents are not free simply to decide for themselves what is in their child's best interests. They must ensure that their actions and decisions are consistent with the child's rights and that they gradually allow for a transfer of decision-making from the adult to the child as the child acquires the capacity to take responsibility for himself or herself.[15] The ECHR does not contain a definition of a child, but its Article 1 obliges states to secure rights under the convention to "everyone" within their jurisdiction. Article 14 of the ECHR guarantees the enjoyment of the rights set out in the convention "without discrimination on any ground", including grounds of age. The ECtHR has accepted applications by and on behalf of children irrespective of their age. In its jurisprudence, it has accepted the UNCRC definition of a child, endorsing the "below the age of 18 years" notion.[16]

14 Kilkelly, 2010, p. 246.
15 General Comment No. 14, 2013, para. 44.
16 Handbook on European Law Relating to the Rights of the Child, 2022, p. 20.

In the UNCRC, the definition of a child is[17]: "any person under the age of 18". The rights of the child are a system of opportunities that a person needs for his or her complex and integral development in the conditions and in accordance with the requirements of the environment, taking into account the immaturity of the child (according to international legal acts, it is recognised that 'every human being up to the age of 18, if by law, that applies to this person, he does not reach the age of majority earlier'). This is unlike the UN Convention on the Rights of the Child, which without exception defines a child as anyone under the age of 18. Crucially, the effective application of the "best interests of the child" often depends upon the foundational element of accurately establishing a child's age and identity. It is important in contexts involving vulnerable children, such as migrants or asylum seekers, where a child's age determines the specific protections, rights, and procedural safeguards afforded to them under both international and national law. According to Lansdown, the best interests principle may be misapplied alone or as a trump to overcome opposing perspectives. The UNCRC must respect children's views and their right to make decisions. In M.B., a Spanish procedural case, the UN Committee on the Rights of the Child assessed age. Despite pretending to be a child, a Guinean national was judged to be an adult in Spain after being apprehended aboard a boat. He requested refuge as an adult in a Detention Centre for Foreigners (CIE) after believing he would not be considered a youngster. He was released from the CIE and placed in an adult social house once his representatives received his birth certificate. He had no guardian or minor status.[18] The committee underlined the importance of determining the age of a young person who claims to be a child, the assumption of authenticity of papers a juvenile may provide, and legal assistance and interpretation during age determination. These reasons convinced the Committee that Spain had violated Articles 3 and 12 of the Convention on the Rights of the Child. The commission advised that Spain should have followed the Convention on age determination. According to Section 3.3, the Bulgarian Supreme Administrative Court found procedural errors when interviewing adolescents due to a lack of legal and social aid. A mother and her two children were denied international protection solely based on the mother's refugee background, without examining the minors' application. The Administrative Court of Sofia and the Supreme Administrative Court overturned and remanded the SAR's verdict.[19]

The ECtHR has recently been called upon to decide cases in which various issues concerning age assessment procedures were addressed. In particular, in the case of *Mahamed Jama v Malta*,[20] the appellant was detained despite the fact that she was allegedly a minor at the time. The Court focused on the length of the age assessment procedure, in the light of the number of cases the Maltese Government should have faced in the relevant period of time, in order to understand whether the period was

17 Convention on the Rights of the Child, 1989; Handbook on European Law Relating to the Rights of the Child, 2022, p. 20.
18 The Best Interests of the Child: A Dialogue between Theory and Practice, 2016, pp. 154–155.
19 *Asylum Case*, 2020, p. 26.
20 *Mahamed Jama v. Malta*, 2016.

reasonably compatible with the State's good faith behaviour (para. 147). After having considered the concrete procedure through which assessment has been performed, the Court considered that the applicant's detention during the relevant period was in compliance with Article 201 5(1) of the Convention. However, the Court expressed reservations about the duration of such age assessment procedures. With specific regard to the time passed in detention during the age assessment procedure, the Court stated that considering that age assessment is a preliminary step of an asylum assessment, as regrettable as the delay in determining the applicant's age may have been in the present case, the seven months of detention until her age was determined, as well as the subsequent two weeks until her asylum claim was verified, were related to the grounds of detention mentioned in Article 5 ECHR (para.150).[21] There may be cases where there is doubt as to whether a person is a minor. An example of such a case is the case of *M.D. v. France*.[22] The case concerned an asylum seeker who claimed to be 16 years old. A medical examination and testing showed that he was 19 years old. The person did not have any documents that could confirm his age, but after the test, he was treated as an adult. Later, the authorities of the country of origin provided documents confirming that the applicant was 16 years old. After that, a guardian was appointed, and the person was treated as a child. The ECtHR concluded that there had been no violation in this case, as the authorities had done everything reasonably necessary to establish the applicant's age, and they had no reasonable grounds to question the conclusions of the medical examination. Furthermore, the authorities immediately fulfilled their duty of due care when they became aware that the detainee was under 18 years of age.

1.2. Overview of the European Convention on Human Rights (ECHR)

The ECHR guarantees the right to life, freedom from torture and slavery, liberty and security, a fair trial, no punishment without law, respect for private and family life, freedom of thought, conscience, and religion, freedom of expression, assembly, and association, marriage, an effective remedy, and prohibition of Protocols to the Convention grant more rights. The ECHR guarantees the right to life, freedom from torture and slavery, liberty and security, a fair trial, no punishment without law, protection of property, the right to education, respect for private and family life, freedom of thought, conscience, and religion, freedom of expression, assembly, and association, marriage, an effective remedy, and prohibition of discrimination. Protocols to the Convention grant even further rights and protections. The parties guarantee these rights and freedoms to all residents. The Convention also establishes international enforcement. Children's vulnerability and insecurity make protecting their rights a priority. Child rights are a key part of modern international and national law. Rights protection and defence are becoming the foundation of global stability and harmony. While the ECHR provides a robust framework for fundamental human rights that

21 Directive 2011/36/EU, 2011.
22 *M.D. v. France*, 2019.

applies to all, including children, it is important to recognise that a more specialised and universally adopted instrument directly addresses the unique needs and rights of minors. The UNCRC is the most universal instrument that requires signatories to respect and safeguard children's rights. The Convention outlines fundamental rights: Every kid, regardless of country, has the right to dignity, moral, spiritual, and physical growth. All underage minors have equal rights that cannot be limited, humiliated, or violated. State citizenship and parental names make children full citizens of their countries. They deserve growth, social, and medical care. Children with physical or mental problems need special care. Parents, being citizens, and the state must care for children. This should be manifested by free education, responsibility, and benefiting society. Child rights come first while obtaining medical care. Article 8, in its essence, lays down the right to privacy, which broadly ensures 'the development and fulfilment of individuals' personality'[23] by providing a private sphere for all individuals. Critically, children enjoy this right both offline and online,[24] recognising their evolving capacity for autonomy and identity formation. To further elaborate on the specific dimensions of privacy and self-determination particularly relevant to children in the digital age, it is essential to also consider Convention 108+ (the modernised Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data), in article 15, Convention 108+ notes that this shall be given to the data protection rights of children. While raising awareness on data protection issues, the authorities have to be attentive to specifically address children and the information presented should be easily accessible, legible, understandable, and adapted to the relevant data subjects (for example, in a child-friendly language where necessary). The Preamble of Convention 108+ refers to 'the right to personal autonomy and the right to control one's personal data'. This convention secures children's autonomy by granting them essential protections regarding their personal data, while also facilitating the strengthening of their autonomy through increased control over their digital footprint. Consequently, when evaluating the extent of children's right to privacy, especially regarding their development and changing digital connections, it is essential to consider the fundamental principles of children's rights established in both the ECHR and Convention 108+.[25]

1.3. Impact of ECHR judgments on children's rights protection and the best interests of children

It is crucial to clarify the ECtHR's consistent reference to the Convention on the Rights of the Child (CRC) when adjudicating cases under the ECHR. While the ECHR establishes fundamental human rights, the ECtHR often relies on other international human rights instruments, including the CRC, as interpretive tools. Given that the CRC specifically and comprehensively articulates the rights of the child, its provisions,

23 *A.-M.V. v. Finland*, 2017.
24 Recommendation CM/Rec, 2018.
25 Convention 108+, 2018.

in particular Article 3 on the best interests of the child, serve as a fundamental guideline for the ECtHR in assessing the proportionality and necessity of state action affecting children under Article 8 of the ECHR. The ECtHR uses this principle to assess cases involving children's rights. The UN Committee on the Rights of the Child has explained the principle of the "best interests of the child" in detail in its General Comment on the right of the child to have his or her best interests as a primary consideration.[26] In particular, the Committee emphasises that the purpose of the concept of the best interests of the child is to ensure the full and effective realisation of all the rights enshrined in the Convention, the full development of the child (para. 4), and the assessment of the best interests of the child in each individual case, while balancing 'all the elements necessary to make a decision in a particular situation for a particular child or group of children' (para. 46). The determination of what decision is in the "best interests of the child" must begin with an assessment of the specific circumstances that make the child unique. This means that the court will take into account some elements and disregard others, and affects the way in which they will be taken into account in relation to each other (para. 49). The Committee considers it necessary to draw up a non-exhaustive, non-subordinate list of elements that may be considered in assessing the best interests of the child by any decision-maker (para. 50). In addition, many different important factors and aspects must be taken into account in determining and assessing the best interests of the child.

In addition, the best interests of the child are also addressed in other articles of the Convention, such as Article 9 (separation from parents); Article 10 (family reunification); Article 18 (parental responsibilities); Article 20 (removal from the family environment and alternative care); Article 21 (adoption); Article 37(c) (separation from adults in case of deprivation of liberty); Article 40(2)(b) (procedural guarantees, including the presence of parents in court in criminal proceedings against a child alleged to have infringed the criminal law).

There is no best interests principle in the ECHR but in *Yousef v. Netherlands* (2002), the Court ruled that, where the rights of parents and a child were at stake in a case directly about children, the child's rights must be the "paramount" consideration.[27] In addition to the Convention on the Rights of the Child of 1989, the principle of ensuring the "best interests of the child" is also enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Convention on the Civil Aspects of International Child Abduction of 1980; the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993; the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures of Protection of Children of 1996 and a number of others. The Convention on the Rights of the Child, and the best interests

26 General Comment No. 14, 2013.
27 Freeman, 2022, p. 103.

principle codified in Article 3 in particular, has played an increasingly significant role in decisions involving the admission or removal of a child from a host State.[28]

At the declarative level, the best interests of the child are taken into account in the course of court proceedings in accordance with the Guidelines for Child-Friendly Justice[29] as a practical tool for member states in adapting their judicial and non-judicial systems to the specific rights, interests, and needs of children. The Guidelines are based on the principles enshrined in international instruments and the case law of the European Court of Human Rights (hereinafter – ECtHR). The European Court of Human Rights judgements on Article 8 violations provide a summary of its child protection case law and highlights its main approaches to uphold the best interests of the child: 1) in circumstances of child residency, ensuring the kid's best interests entails preserving family ties if they create a safe and secure environment; 2) family contact between parents and children is essential to a harmonious family life and the best interests of the child, thus actions that prevent it must address a pressing social necessity; 3) the biological mother's right to visit and contact the kid is guaranteed in custody and guardianship cases to protect the child's best interests; 4) national judicial discretion in paternity issues shall not compromise the child's best interests; 5) in circumstances of parental rights deprivation, guardians and parents cannot trump kid interests.[30]

Several international accords guarantee the child's best interests. National courts and governmental authorities can misinterpret this notion, as practice indicates. The ECtHR sets precedents for member states by safeguarding the best interests of children in its rulings. The ECtHR must have jurisdiction over all child best interests cases. ECtHR rulings show how to uphold the best interests of the child, a democratic principle. In this regard, studying the European Court's best interests of the child case law is important. According to the study, the European legal tradition applies the best interests of the child principle to child situations. Additionally, national courts are the bodies that most commonly decide the best interests of children and make key judgments for children and their parents.[31] M. Leloup proposes reversing the burden of proof so that the state must prove the expulsion measure is proportionate rather than the family. *Maslov v Austria* is the classic case for the expulsion of the kid. The Court explicitly specifies that the child's best interests must be considered. This is done by tying the best interests premise to other significant UNCRC rights. However, case law shows that national authorities do not always consider this concept. This is somewhat understandable. Countries want to remove illegal or dangerous immigrants, yet prioritising the child's interests may make it impossible. However the best interests principle is too important to ignore. A clear case law that requires national authorities

28 Pobjoy, 2015, p. 4.
29 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 2010.
30 Tomliak, 2022, p. 116.
31 Ibid., pp. 109–119.

to consider the best interests of the child under international court supervision could make substantial headway in this area.[32]

The effective implementation of children's rights inside the family, as interpreted by the ECtHR and established in international instruments, crucially depends on their procedural ability to assert those rights at the national level. The European Convention on Human Rights does not clearly delineate age restrictions for legal standing; however, its effective implementation necessitates that national legal systems facilitate children's participation in judicial proceedings pertaining to their interests. To comprehensively contextualise the ECHR's safeguarding of private and family life (Article 8) in relation to children's practical experiences in Central and Eastern Europe, it is essential to grasp the varied national methodologies regarding children's procedural autonomy. Civil lawsuits begin with a "plaintiff". EU Member States require litigants to have a complete legal competence (procedural capacity), hence children cannot sue. Parents and guardians can exercise their rights as authorised child representatives. Under some conditions, children may initiate legal procedures autonomously. This covers family, property, and employment lawsuits. In rare cases, minors can speak to the court without their parents. No EU member state allows children to launch judicial proceedings without full procedural capacity. This normally requires a minimum age of18 years in most Member States. In Portugal and Scotland, 16 is the minimum legal age. Many Member States allow married or parenting children to initiate court proceedings. Child capacity affects their ability to exercise basic rights, including marriage, property ownership, and a job. For instance, Austrians aged 14+ can sue for custody. Belgian courts can make exceptions. Czech citizens 16 and older can sue for marriage, parental business authorisation, and full legal competence. German adolescents can sue for commercial, job, and social benefit cases with parental and court permission to trade, work, or offer services. If mature, Estonians 14 and older can start family court actions. Finland lets 15-year-olds sue over property, paternity, and employment. Hungarian children over 14 years old can sue for their right to freely control their employment earnings or legal status, such as parentage. Italians aged 15 and older can sue for job concerns. Latvians aged 15 and older can sue for property and employment. Lithuanian minors over 14 years old can sue for relationship issues. Children over 12 years old in the Netherlands can sue for family concerns. Minors aged 16 and older can sue over job or medical contracts. Polish children aged 13 and older can sue for guardianship and family concerns. Ad hoc exclusions by the Slovakian courts are permitted. Slovenian children aged over 15 can sue for family and contract issues.[33] The different ages of procedural capacity in each country are not directly ECHR violations unless they interfere unfairly with substantive rights. It shows how states try to make sure that children's rights are protected and their views are heard through national legal channels, within the limits of what they can do.

32 Leloup, 2019, pp. 50–68.
33 Age at Which a Child Plaintiff Can Bring a Civil Case to Court on Their Own, 2018.

2. Role of the ECHR in Protecting Children's Rights

According to Article 1 of the European Convention, the Member States 'shall secure to everyone within their jurisdiction the rights and freedoms defined' in the Convention. Children are undoubtedly included in the term "everyone". Moreover, legal capacity is not required for applying to the ECtHR and hence, a child can apply to the Court without the intervention of his or her legal representative. However, it is not easy for children to introduce an application to the ECtHR; they face a number of practical problems, such as a lack of knowledge of the Strasbourg procedure, difficulties in obtaining legal assistance, and a lack of financial resources. Moreover because of their young age, they may not be able to speak, write, or understand what is happening to them. Therefore, children themselves rarely apply to the ECtHR, especially in relation to cases regarding family life. The majority of applications concerning children are introduced on their behalf by their parents or another member of their family. Furthermore, a large number of applications are introduced by one of the parents claiming to be a victim of a Convention violation; and their allegations can indirectly influence their children.[34] The ECtHR has ruled on cases regarding children's rights several times; it has indeed become a guardian of children's rights in Europe. In its judgments, the Court refers systematically to the UNCRC and to the concept of the best interests of the child.[35] The ECtHR is not only capable of developing new standards of human rights protection from a child's perspective, but it is equally willing to build on those that currently exist, under the UNCRC and companion instruments.[36]

Taking into account the above, we can distinguish three stages of the role of the European Court of Human Rights in the protection of children's rights:

1) Laying the groundwork – early interpretations and the "Living Instrument" (pre-UNCRC era). Even before the advent of the UNCRC, the ECtHR began to interpret the ECHR in a manner that implicitly extended protection to children. This early phase was characterized by the Court's groundbreaking "living instrument" doctrine,[37] first articulated in cases like *Tyrer v. the United Kingdom* (1978).[38] In *Tyrer*, the Court condemned the corporal punishment of a child under Article 3 (Prohibition of Inhuman and Degrading Treatment). In this decision, the Court demonstrated how the Convention can be applied to changing living conditions and social standards, taking into account progressive punishment-related norms. The ECtHR has built its own case law to protect children's rights and requires states parties to guarantee their fundamental rights. Protecting children means protecting their rights to grow up in a peaceful environment, be free from discrimination, and have access

34 Patsianta, 2017, pp. 53–54.
35 Children and the European Court of Human Rights, 2019.
36 Kilkelly, 2010, p. 261.
37 Letsas, 2012; Oganesian, 2024, pp. 113–122; Bjorge, 2015.
38 *Tyrer v. the United Kingdom*, 1978.

to education, the right to family, and the right to inheritance. The ECtHR, in its early jurisprudence, laid the foundation for the possibility of adapting the convention and offering protection to children, even without child-specific provisions. The main problem was the lack of Court decisions for children's rights, which meant protection often had to be inferred from general human rights principles. Practical access to the Court for children themselves was also virtually non-existent, and this problem remains to this day.

2) Consolidation and influence – the impact of the UNCRC and "Best Interests" (Post-1989). The UNCRC's adoption in 1989 and its subsequent universal ratification were significant events. The Tyrer case happened before the UNCRC, but its goal of protecting individuals from degrading treatment certainly aligned with the UNCRC's forthcoming principles. After the UNCRC came into effect, the ECtHR's approach became clearer. The Court began to refer to the UNCRC and the concept of the "best interests of the child" in its judgments. The ECtHR not only recognised the UNCRC but also incorporated its principles, so enhancing the persuasive authority of its decisions and assuring alignment with wider international standards. Notwithstanding the UNCRC's impact, children continue to have substantial obstacles in directly accessing the ECtHR; they confront considerable barriers, including ignorance of processes, challenges in obtaining legal help, financial limitations, and communication difficulties related to their youth. Consequently, applications concerning children are predominantly lodged by parents or other family members, often indirectly raising children's rights issues through a claim of parental victimhood. This indirect route, while effective, means the child's voice might not always be directly heard.[39]
3) Expansion, Specialization, and Protection (early 21st century till now). In the subsequent period, the ECtHR has deepened its role as a guardian of children's rights, developing sophisticated case law. The Court has moved beyond general protections to address children and ensure their fundamental rights across a wide range of contexts. The Court has become particularly active in challenging discrimination against children. The 2007 Grand Chamber judgment in *D.H. and Others v. the Czech Republic*[40] is a powerful example. In this case, the Court found a violation of Article 14 (Prohibition of Discrimination) in conjunction with the right to education, ruling against the segregation of Roma children into separate classes. This decision highlighted the Court's dedication to guaranteeing equitable access to fundamental rights for all children, expressly denouncing practices that result in 'emotional, psychological, and educational harm'. The 2010 Grand Chamber judgement[41] was concerned about the right of Roma children to be free from discrimination and to have

39 Daly, Ruxton and Schuurman, 2016, p. 39.
40 *D.H. and Others v. the Czech Republic*, 2007.
41 *Oršuš and Others v. Croatia*, 2010.

> access to education. The applicants were Roma nationals who were during their schooling in separate classes composed exclusively of pupils; they complained that they were discriminated against and that access to education was a problem in a concrete case, and they felt the harm that was manifested in emotional, psychological, and educational ways. The government cited applicants' low Croatian language skills. The court determined a violation because the typical disease for placing Roma students in separate classes did not focus on language skills, and the language-improvement programme was not properly monitored.

The ECtHR has also intervened to rectify historical inequalities, such as those faced by children born outside of marriage. The 2013 Grand Chamber ruling in *Fabris v. France* addressed this problem. The applicant's father had an affair with a married lady who had two other children with her husband. The applicant, who was born from an affair outside of marriage, was refused an inheritance equivalent to that of his half-siblings due to outdated French law prioritizing "legal certainty". The Court's intervention in such cases demonstrates its commitment to the principle of equitable treatment, ensuring that legal distinctions based on marital status do not unfairly disadvantage children. This is crucial for ensuring that all children receive equal legal protection, irrespective of their birth status or other characteristics.

The court continued the line of authority for the Landmark judgement in *Marckx v. Belgium*[42] (Violation of Article 8 and Article 14 taken in conjunction with Article 8 of the Convention). Belgian law did not establish a bond of relationship between an unmarried mother and a child. Adoption was necessary for the child to acquire a family status,[43] and *Mazurek v. France*[44] helped establish that French law was in violation of the convention, specifically in the court finding that the difference in Treatment between the applicant and his legitimate siblings born in Vellore was discriminatory and lacked an objective and reasonable justification. National child-interest application restrictions surfaced in *X. and Y. v. the Netherland*.[45] Mr. X appealed the Public Prosecutor's Office's decision to the Court of Appeal of Arnhem on 4th December 1978, asking the court to decide whether to file criminal charges. In the subsequent application of 10th January 1979, he argued that a legal representative could represent the applicant subject to an exhaustive list of exceptions, none of which were applicable in this case. The Court of Appeals denied the case on July 12, 1979. It was doubted that the rape charge could be proven. The Court of Appeal found that the father's complaint could not replace the girl's complaint, who was over sixteen years old and had to make it herself, even though the police had considered her incapable of doing so. Since no one in the case was legally authorised to make a complaint, there was a

42 *Marckx v. Belgium*, 1979.
43 Case Law of the European Court of Human Rights, 2011, p. 17.
44 *Mazurek v. France*, 2000.
45 *X and Y v. the Netherlands*, 1985.

gap in the law, but it could not be filled by a broad interpretation adverse to Mr. B. The Commission accepted the application on 17th December 1981. Article 31 of the 5th July 1983 report said that there had been a violation of Article 8 (art. 8) as regards Miss Y, but not Article 3. The application should not have been reviewed under Article 14, adopted with Article 8, Article 3, or Article 13. Respect for Mr. X's family life was not addressed. The applicants said only criminal law could have safeguarded Miss Y. The Government argued that the Convention allowed states to pick their measures and did not preclude civil law provisions. The Court agreed with the Commission that Contracting States must decide how to comply with Article 8 in their relations. The State had different obligations for "respect for private life" in different ways. There were alternatives to criminal law. The Court considered that civil law did not effectively protect Y from wrongdoing. Fundamental values and privacy were at stake. Criminal laws must deter this. Yest such provisions are usually limited. As the Commission recognised, the Netherlands has always used criminal law to protect this region. The Commissioner and Court said the sole concern was for Miss Y and those facing a procedural block that the Dutch government did not anticipate. The Arnhem Court of Appeal said Miss Y's lawyer could not represent her. The Court of Appeal's expansive interpretation damaged Mr. B and failed to close this legal gap. The European Court of Human Rights could not interpret national law for courts. No realistic solution was given to Ms. Y. She suffered an Article 8 Convention violation due to the offence.

3. Protection of Children's Rights Under the ECHR

3.1. Article 2: Right to Life

The duty to protect the right to life seems to have been imposed by Article 2, particularly on the legislator: "shall be protected by law".[46] Pro-Life lobbyist align their reasoning with the right to life enshrined in Article 2 and extend this to the rights of unborn children.[47] In a 2004 case, the case *Vo. v. France*[48] concerning the loss of a fetus due to a medical error, the Court decided not to rule on whether a foetus has the right to life under Article 2, stating that even if it did, the state had not failed in its obligations. The Court noted that the possibility of bringing an action for damages was a sufficient remedy. On the other hand, 10 of 17 judges expressed explicitly their opinions on the applicability of Art. 2 to a fetus. This shows that the delicate circumstances did not keep the majority from deciding this question. Above that, the attitude of the ECtHR in *Vo v. France* did not correspond to the principle of interpreting the Convention as a living instrument. On the contrary, the ECtHR has once again held on to the status quo, which had been established by the ECtHR since the 1970s. This status quo, however, left the Contracting States in the dark about dealings with

46 van Dijk et al., 2006, p. 352.
47 Levy and Somek, 2001, pp. 109–166.
48 *Vo v. France*, 2004.

foetuses. Only a clear decision by the ECtHR in this area could bring legal certainty into this situation, which was the more desirable given current developments in the field of genetic manipulation.[49]

The European Court of Human Rights noted that legal decisions as to when life begins and when the protection of it should commence all fall within the margin of appreciation enjoyed by respective States. Accordingly, in states that never recognise the rights of embryos, it is asserted that these lack distinct rights under the ECHR.[50] A decision was recognised by the decision of the Grand Chamber in the case of *Evans v UK*.[51] The decision in the case of *A, B, and C v Ireland*[52] presents another classical illustration of the extent to which the European Court of Human Rights is willing to go in avoiding a strict rule for abortion. The decision in the *A, B, and C v. Ireland* The European Court of Human Rights has ruled that Ireland's failure to provide for abortion on grounds of the woman's health or well-being did not constitute a violation of Article 8 of the ECHR, since in the absence of political and scientific consensus among States as to the beginning of life, such a decision should fall within the margin of appreciation of the State, the breadth of which is inversely proportional to the level of consensus; the failure to implement Article 40 of the Irish Constitution, which recognises the right to life of the unborn child and requires that information on available services be provided in order to protect the equal rights of the mother, constituted a violation of the positive obligations of the State under Article 8. In *Tysiac v Poland*,[53] the Human Rights Court relied on procedural grounds in finding a violation of Article 8 of the ECHR. The Polish authorities allow abortion only in those situations where the life and health of the mother are impacted by the pregnancy. In this context, an applicant who suffered from intense myopia had a pregnancy as a result of which three ophthalmologists concluded that there would be a serious risk to her sight if she carried the pregnancy until the final trimester. According to the findings of a gynaecologist, there were no medical grounds for performing a therapeutic abortion. Subsequently, there was a delivery of a child, but as a result, the applicant's eyesight was affected as a result of a retinal haemorrhage that caused considerable deterioration in the applicant's eyesight. The court noted that due to the presence of effective means and methods for challenging the decision, the decision held that Polish law contained no effective mechanisms for her to challenge the gynaecologist. It seems that Article 8 remains for some time the only article upon which the Court was prepared to accept the acceptability of anti-abortion legislation. It is apparent that complaints can be classified into those associated with violations pertaining to substantive issues, those dealing with positive obligations, and those related to violating protective obligations, which are of a procedural nature.

49 Pichon, 2006, p. 444.
50 Mugabi, 2023.
51 *Evans v. the United Kingdom*, 2007.
52 *A, B and C v. Ireland*, 2010.
53 *Tysiąc v. Poland*, 2007.

In the case of *Landi v. Italy*,[54] right to life (art. 2 of the ECHR): Italy was convicted by the Strasbourg Court for not assessing the risk of mortality linked to cases of domestic violence. In the case of *Pitsiladi and Vasilellis v. Greece*,[55] in accordance with Article 2 of the ECHR (right to life), the applicants complained about inadequate national legislation that prevented them from accessing donations for their very ill child's treatment abroad. The youngster died days after the legislative amendments granting access took effect. The ECtHR stated that the list of fundraising rules and conditions for accessing collected donations was intended to ensure legal certainty, protect donors, and prevent fraud and abuse of public generosity. The applicants had the right to request funding for their son's treatment abroad from special healthcare committees, but they did not. Given the above, it appears that the problem was not caused by the State failing to establish a legal framework. In any case, the Court found no causal link between national authorities' actions and the child's death. It acknowledged that the American hospital had provided new treatment in circumstances like the applicants' son, which statistically could have extended people's lives. The hospital only supplied an information document on the treatment and procedures employed because the child was scheduled for an individual medical assessment on 5th February 2001, and the treatment did not start before then. Considering these and other factors, the ECtHR found no breach of Article 2 of the Convention. These cases reveal the ECtHR's dual approach: a firm stance on state responsibility to prevent known risks (e.g., domestic violence fatalities) through robust protective measures, juxtaposed with a more measured assessment of state obligation in complex medical cases, requiring a direct causal link and an evaluation of whether existing reasonable legal frameworks were adequately utilised.

3.2. Article 3: Protection From Torture, Inhuman, or Degrading Treatment

The absolute nature of the guarantees provided for in Article 3 of the Convention means that there can be no exceptions to this right and no grounds for derogation by the state from its obligations under Article 3 of the Convention in time of war or other public emergency threatening the life of the nation.[56] The fact that victim behaviours, no matter how unpleasant or harmful, cannot excuse any violation of a person's dignity, liberty, or physical integrity reinforces this ban. Ill-treatment must be severe to violate Article 3 of the Convention. In the decision in the case of *Ireland v. the United Kingdom*[57] the Court noted that

> the assessment of the minimum level of cruelty is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its

54 *Landi v. Italy*, 2022.
55 *Pitsiladi and Vasilellis v. Greece*, 2023.
56 Khort, 2021.
57 *Ireland v. the United Kingdom*, 1978.

physical and mental effects, and in some cases, the sex, age, state of health of the victim and other circumstances.

The Court has developed certain principles for assessing the level of cruelty, which apply in each case. Firstly, the Court's case-law has identified three types of treatment prohibited by Article 3 of the Convention: a) degrading treatment or punishment; b) inhuman treatment or punishment; and c) torture. Secondly, the Court takes into account the individual characteristics of the victim, his/her age, gender, as well as his/her relationship with the person who inflicts suffering (in particular, the proportionality of the victim's physical strength to the physical strength of the arresting officer) when assessing the cruelty of treatment. Therefore, it is the principle of minimum cruelty that determines the lower limit of suffering, which is considered to be the level of treatment prohibited by Article 3 of the Convention. The upper limit of the suffering that a person suffers as a result of a violation of Article 3 of the Convention is such ill-treatment as torture. The European Parliament stressed that trafficking for sexual exploitation and other purposes is one of the biggest risks for women and children fleeing the war in Ukraine.[58] The Resolution is a tool for amending and filling gaps in the national legislation of EU Member States. These detailed recommendations can and should unite the European community to actively cooperate in combating such phenomena as trafficking in women and children, sexual violence, gender-based violence and multiple discrimination; providing systematic assistance to Ukraine in recording war crimes against civilians, in particular against women and children, and bringing perpetrators to justice under national and international law.[59]

In case *Sh.D. and others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia, and Slovenia*,[60] the applicants have filed complaints under Article 3 of the Convention about conditions in Greek police stations and Idomeni camp, and Article 5 § 1 respecting "protective custody" at police stations. Five Afghan unaccompanied children came in Greece in early 2016. In February 2016, authorities arrested them and ordered their deportation with one month to depart from Greece. Candidates tried to cross into North Macedonia but were prevented entry by border guards. Greek police held one applicant in "protective custody" at Polykastro for 24 days. After being caught on Chios and deported, four applicants crossed over to the Greek mainland and resided in the Idomeni camp for a month. After that, the applicants switched shelters. One applicant was put in "protective custody" at Igoumenitsa Port and Filiata police stations while trying to reach Italy. The Court acknowledged that detaining minors for even a few days violated Article 3. It found that police stations could isolate people and harm their health. The Court decided that Polykastro and Filiata police stations' detention arrangements violated Article 3 since they were demeaning to children.

58 Melesh, 2022.
59 Luzan, 2022, pp. 299–306.
60 *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, 2019.

Idomeni camp was not under state authority, and the children were not incarcerated, the Court said. However, the Court stressed the State's positive obligations to protect and care for unaccompanied migrant children under Article 3 and Article 20 of the UNCRC, which requires alternative care for children without family. The Court decided that the Idomeni camp was unsuitable for minors and that the authorities failed to safeguard the applicants, who were particularly vulnerable due to their age. The Court ruled that the three petitioners' "protective custody" in police stations was a deprivation of liberty.

In the Tarakhel case,[61] which concerned the Dublin transfer of an Afghan family with six children, of which one was a newly born baby, from Switzerland to Italy, the ECtHR has expressly rejected the "systemic deficiencies" threshold as the only situation where a Member State's compliance may be challenged and an Article 3 ECHR violation triggered. The Court clarified that the 'source of the risk does nothing to alter the level of protection guaranteed by the Convention…and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established'. Hence, although 'extreme poverty on a large scale in Greece at the time of M.S.S. judgment is in no way comparable to the current situation in Italy' (para. 144), the Court still concluded that there were problems with reception capacities, in particular keeping families together, and living conditions. Consequently, and after examining the individual situation, the Court concluded that, given children's "extreme vulnerability", specific guarantees must be given to the family that they would be received in facilities and that they would be kept together in order to assure compliance with Article 3 (para. 120). In this case, the ECtHR found Switzerland in violation of Article 3 ECHR for not having obtained sufficient assurances that the family would be kept together and that there would be no risk of violation of their Article 3 ECHR guarantees if transferred to Italy.[62]

3.3. Article 8: Right to Family Life and Privacy

The European Court recalls that the notion of family under this provision is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit from the moment and by the very fact of his birth. Thus, there exists between the child and his parents a bond amounting to family life.[63] Although, as a rule, living together may be a requirement for such a relationship, exceptionally, other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto "family ties". A child born of such a relationship is ipso jure part of that "family unit" from the moment of its birth and by the very fact of it (see the Keegan judgment, ibid.). Respect for family life under Article 8 requires the legal recognition of social and biological ties and represents a very

61 *Tarakhel v. Switzerland*, 2014.
62 Re-Jus Casebook: Effective Justice in Asylum and Immigration, 2018.
63 *Keegan v. Ireland*, 1994, para. 44.

important step in the application of the ECHR to the serious, practical issues affecting children and their parents in this area. The positive obligations approach was central to the court's development of these principles. In particular, it demonstrated that the convention did not simply require that the state refrain from interfering in families; rather, it established how the national legal system governs and recognises family relationships – including in less traditional forms – is an issue that engages convention rights, as well as being of huge importance to family members, including children. Again, here the ECtHR can be said to have gone further than the protection secured by the CRC although the Committee on the Rights of the Child has actively encouraged states parties to eliminate all discrimination between children on the basis of Article 2 of the CRC, which requires that all children enjoy convention rights equally, regardless of their status (under Article 2(1)) or, notably, that of their parents (under Article 2(2)).[64] It was perhaps a reasonable assumption from the court's use of language ("biological ties") in the Kroon case[65] that the obligation in Article 8 to recognise family ties could only be invoked by those whose social and biological ties pointed to the same conclusion, i.e., where children lived socially with their biological parents. Indeed, to an extent, this viewpoint informed the court's judgment in the case of *X, Y, and Z v UK* in 1996.[66] This case concerned a female-to-male transsexual (X), his partner (Y), and their child (Z) born by donor insemination (AID), who claimed that the failure to recognise X as the child's father on her birth certificate due to his status as a transsexual amounted to a failure to respect their rights under Article 8. Despite the somewhat unusual circumstances of the case, the court applied the same approach as it had in other family ties cases. In this respect, its first conclusion was that the applicants enjoyed "family life" within the meaning of Article 8, and it then went on to consider whether the applicants' treatment showed the necessary "respect" for that family life. It began by citing the principles set out in the Marckx and Johnston cases, i.e. that where the existence of a family tie with a child has been established, the state must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his family.

Furthermore, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents had broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention.[67]

Traditionally, the ECtHR pays great attention to cases related to the determination of the child's place of residence, as well as to the exercise of the right to communicate with him or her not only by parents, but also by other relatives: grandparents. Principle 6 of the Declaration of the Rights of the Child, proclaimed by the UN General

64 Convention UN Doc. CRC/C/5, 1991.
65 *Kroon and Others v. the Netherlands*, 1994.
66 *X, Y and Z v. the United Kingdom*, 1997.
67 *Johansen v. Norway*, 1996; *Elsholz v. Germany*, 1999.

Assembly Resolution of 20th November 1959, provides that the child needs love and understanding for the full and harmonious development of his or her personality. He or she should, as far as possible, be brought up under the care and responsibility of his or her parents and, in any case, in an atmosphere of love and moral and material security; a young child should not, except in exceptional circumstances, be separated from his or her mother. In *Eriksson*, the ECtHR states that it is the parents' right under art.8 of the ECHR to have measures taken to secure the reunion between biological parents and child. If the authorities fail to implement such measures, this would constitute a violation of the biological parents' right to family life (Eriksson v. Sweden, 1989).[68]

In the case of *Amanalachioai v. Romania*[69] in connection with a complaint about the severance of relations between a child and the parent who retains parental rights, after the grandparents refused to return the child, the court found that the requirements of Article 8 of the Convention had been violated. The grandparents deprived the applicant of the possibility of exercising parental rights and custody of their daughter. In refusing to return the child to the applicant, the domestic courts referred in their decisions to the material conditions provided by the applicant and his behaviour, as well as to the potential difficulty of integrating the child into her new family and the integration of the child into the environment of her grandparents, to whom she had become deeply attached. However, the fact that a child could have been placed in a more favourable environment for their upbringing does not in itself justify his removal from the care of their biological parents. In this case, the applicant had permanent housing and normal material conditions. The European Court has repeatedly noted that Article 8 of the Convention includes the right of parents to have measures taken to reunite with their child, as well as the obligation of national authorities to take such measures. This applies not only to cases involving the mandatory appointment of custody by the state and the adoption of custody measures, but also to cases where disputes arise between the parents and/or other members of the child's family regarding the child's communication and residence (judgment in the case of *Hokkanen v. Finland* of 23rd September 1994).[70]

A violation of Article 8 of the Convention in connection with the automatic and indefinite deprivation of parental rights as a result of a criminal conviction for child abuse was also found by the ECtHR in the case of *M.D. and Others v. Malta*.[71] At the same time, the ECtHR, pursuant to the requirements of Article 46 (Binding force of decisions and their enforcement) of the CCHR, demanded that the respondent state introduce measures to automatically and indefinitely deprive Parents Of Parental Rights As A Result Of A Criminal Conviction For Child Abuse And Lack Of Access To justice. In this context, another judgement of the ECHR is given – in the case of *Haas*

68 Helland, 2019, p. 79.
69 *Amanalachioai v. Romania*, 2009.
70 *Hokkanen v. Finland*, 1994.
71 *M.D. and Others v. Malta*, 2012.

v. Germany.[72] The applicants were deprived of parental rights to their 7 children by a court on the basis of an expert psychologist's opinion that their parents had brought them up incorrectly and that their family conditions were poor. The ECtHR found a violation of Article 8 of the Convention and considered that the temporary deprivation of parental rights was not based on substantial and sufficient reasons and that the applicants were not sufficiently involved in the decision-making process in their case. Thus, the mere fact that a child can be placed in a more favourable environment for his or her upbringing does not justify coercive measures to remove him or her from his or her biological parents; there must be other circumstances that indicate the need for such interference with the right of parents to family life with their child, as enshrined in Article 8 of the Convention for the Protection of Human Rights.

In light of the widely discussed aspects of the excessive role of guardianship and trusteeship authorities in the Scandinavian countries, the ECtHR formulated legal positions in the judgment in *Olsson v. Sweden*,[73] in which the applicants' three minor children were removed from the family and placed in state care on the grounds that the children's development was at risk because they were living in an unfavourable environment and their parents were unable to meet the children's needs for care, education and protection. The court found a violation of Article 8 of the Convention not in connection with the decision to take custody of the children, but in connection with the methods by which it was implemented (separation of the children from both parents and each other, restriction of parents' access to communication with the children).

In the case of *Cînța v. Romania*,[74] the application concerned restrictions placed by the courts on the applicant's contact rights in respect of his four-year-old daughter during divorce and custody proceedings. The applicant alleged that his mental illness had played a significant role in that restriction, even though there had been no evidence before the courts that he would pose a threat to his daughter's well-being. The Court concluded that the respondent State did not bring forward convincing reasons to rebut the presumption of discrimination against the applicant on the grounds of his mental health. There had accordingly been a breach of Article 14 of the Convention, taken in conjunction with Article 8.

In the case of *M.S. v. Ukraine*[75] Court held that there had been a violation of Article 8 of the Convention on account of the lack of an effective investigation into the alleged sexual abuse of the applicant's child, a violation of Article 8 of the Convention in respect of the determination of the applicant's child's place of residence. The importance of this decision lies in the fact that: firstly, it deals with topical issues of protection of family rights, especially the rights of the child, which are quite common in Ukrainian realities; secondly, this judgment was delivered against the State of Ukraine, reflecting

72 *Monika Haas v. Germany*, 2001.
73 *Olsson v. Sweden*, 1988.
74 *Cînța v. Romania*, 2020.
75 *M.S. v. Ukraine*, 2017.

the current problems of law enforcement, and concerns circumstances that occurred in the not too distant past and continue to exist today; thirdly, the judgment of the ECtHR is quite "fresh" and reflects the views and vision of human rights protection that are relevant to the current conditions. This decision confirmed the stable position of the European Court, which is to determine the "best interests of the child", not the parents, which requires a detailed study of the situation, consideration of various factors that may affect the child's interests, and a fair procedure for all parties. The European Court's ruling didn't mean national courts must always rule in favour of the father. It involved determining the proportionality of interference with rights and the child's interests, and resolving the matter in favour of the "interests of the child" based on the instance. Judge Carlo Ranzoni of Liechtenstein noted that in this case, the national courts seem to have developed a methodology based on a "presumption in favour of the mother" in child custody cases, i.e., that the child should live with the mother, which can be rebutted in "exceptional circumstances". Under this presumption, domestic courts have focused on determining "exceptional circumstances" in fact-finding. In the absence of "exceptional circumstances", the courts have refused to consider all additional contingencies that may affect the case. Judge Ranzoni noted that the UN Declaration, European Court case law, and the majority of Council of Europe member states do not support the presumption in favour of the mother in child-related cases.[76]

The ECtHR ruled that national court decisions, which interfered with the applicant's right to respect for her family life,[77] were based on national legislation and aimed to protect the rights of others, including the applicant's children and father (paragraph 8 of the judgment).

The Court examined whether national courts conducted a thorough analysis of the family situation, balancing interests and seeking the best solution for children, regardless of marital status. The Court considered that national law does not allow for the determination of the child's alternate residency with each parent (para. 9 of the judgment). The ECtHR noted that the domestic courts had based their decisions on a comprehensive analysis of all relevant aspects of the dispute and evidence, including reports from psychologists, specialised services, authorities, and the children's school, as well as arguments from both parties. The petitioner had time to present her arguments and facts with counsel. The court-considered evidence is not biased or otherwise suspect. At an earlier stage, the Court dismissed the applicant's discrimination claims as unfounded. The domestic courts' finding that the children's overall development required them to live with their father was not manifestly unfounded or arbitrary and appeared to be based on good reasons, mainly reports of the children's relatively few extracurricular activities and the applicant's interference in their upbringing. As the Court of Appeal did not grant the children's request to live with the applicant, the ECtHR reminded that children have the right to be consulted

76 *Znachennia rishennia YeSPL u spravi «M.S. proty Ukrainy» dlia pravozastosovchoi praktyky,* 2017.
77 *Antonyuk v. Russia*, 2013; *G.B. v. Lithuania*, 2016.

and heard in matters affecting them, but their views are not necessarily decisive and their objections, which must be considered, are not necessarily sufficient to reject the parents' interests. While children have the right to express their opinions, it is important to consider all factors and circumstances when determining their best interests.[78] The Court of Appeal explained its conclusion, which was based on the children's behaviour in court and their stated psychological worry and stress (para. 11). The Court had no doubt that the domestic courts' decision to determine the children's place of residence was in the best interests of the children (para. 12 of the judgement) because they had direct contact with the children and other interested parties and had a wide margin of appreciation in resolving parental custody disputes. Finally, the ECtHR noted that the applicant's contact with her children was not considerably restricted by the court decisions. They did not limit her parental or access rights (paragraph 13 of the judgment). So, the applicant's objections did not violate Article 8 of the Convention. Due to the aforementioned, the application was rejected as unfounded under Article 35 §§ 3 (a) and 4 of the Convention. Conclusion: The application was denied. On 7th September 2023, the Committee announced its final conclusion.

4. Case Studies on Children's Rights Violations

4.1. Analysis of Landmark Cases Involving Violations of Children's Rights

Indicatively, the European Court has ruled on cases relating to:

1) Newborns. The right to respect for private life of a newborn; two photographs of the baby were taken without his parents' permission, when he was one day old, in a sterile unit of the private clinic in which he was born, as part of the photography service offered to clients by the clinic that refused to hand over the negatives of the photographs to the parents;[79] The practice of certain registry offices in Greece indicating on birth certificates by the handwritten note "naming" when a child is named by a civil act and, thus, implying that he or she had not been christened.[80] C., a cancer survivor, was unable to find out whether her pregnancy posed a risk to her life. The European court ruled that Ireland's lack of an accessible and effective process by which C. could have established whether she qualified for a lawful abortion breached her human rights. The judgment led to Ireland changing the law on abortion.

2) Assisted Reproductive Technology and surrogacy. On 31st August 2023, in the case of *C. v. Italy*, the ECtHR delivered a judgment concerning a four-year-old child born via a gestational surrogacy arrangement in Ukraine and subsequently deemed stateless in Italy. This judgment prompts reflection on surrogacy as a potential (indirect) contributor to statelessness and on possible legal remedies to avert new incidents

78 *Zelikha Magomadova v. Russia*, 2019.
79 *Reklos and Davourlis v. Greece*, 2009.
80 *Stavropoulos and Others v. Greece*, 2020.

of statelessness.[81] This case emphasised the need for the practical consequences of the lack of legal norms to prevent statelessness in the context of surrogacy arrangements. Establishing or recognising a legal parent-child relationship formed through surrogacy or alternative reproductive technology can be difficult, particularly in jurisdictions with explicit or implied prohibitions on surrogacy. The prohibition may result in officials rejecting birth certificate transcriptions for children born through surrogacy elsewhere. Establishing this bond is essential as it affects the child's attainment or validation of nationality, especially in nations where nationality is predominantly determined by the principle of *jus sanguinis*, such as Italy. A kid born abroad without legally recognised parents may encounter the risk of statelessness. Through its interpretation of Article 8, the ECtHR can prevent new cases of statelessness by centring its reasoning on the respect for a child's identity and their best interests as part of their right to private life.[82]

After having their daughter in 2006, Rosetta Costa and Walter Pavan[83] discovered they were healthy carriers of cystic fibrosis. The lung-focused illness was present at birth. Expanding their family was their goal. In 2010, Rosetta became pregnant again and found the fetus had cystic fibrosis. Medical reasons led to the abortion. Rosetta and Walter considered medically assisted reproduction, also known as in vitro fertilisation (IVF), and preimplantation genetic diagnosis (PGD), which would allow them to screen and select a disease-free embryo. However, Italian legislation only allowed medically assisted procreation for sterile or infertile couples and, since 2008, couples where the father had HIV or hepatitis. PGD was banned outright. Thus, Rosetta and Walter were denied the treatment. ECHR ruling: The European Court found Italian law inconsistent here. It abolished embryo screening, which permitted only those without cystic fibrosis to be implanted, but allowed termination of a baby with the illness. This meant Rosetta and Walter could only start a pregnancy naturally and terminate it if examinations proved the fetus was ill. Rosetta and Walter's human rights had been violated. After the European court's ruling, Rosetta and Walter received a court order in Italy legalising medically assisted reproduction. In 2015, Italy's Constitutional Court declared medically assisted reproduction laws unconstitutional, affecting Rosetta and Walter. This lifted the restriction. Healthy carriers of major hereditary illnesses like cystic fibrosis can now get treatment.

3) Child adoption. Under CoE law, the right to respect for family life as expressed in Article 8 of the ECHR is applicable and relied on in adoption cases. Moreover, adoption is an alternative to family care and is governed by the European Convention on the Adoption of Children (revised), which calls for a child rights-based approach to adoption. The convention states, for instance, that 'the competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child'. The convention also requires that adoption should not be granted by the

81 *C v. Italy*, 2024.
82 Bittoni, 2023.
83 *Costa and Pavan v. Italy*, 2012.

competent authority without 'the consent of the child considered by law as having sufficient understanding'. A child not deemed to understand this shall, 'as far as possible, be consulted and his or her views and wishes shall be taken into account having regard to his or her degree of maturity'. The ECtHR has emphasised that the best interests of the child may override those of the parent in adoption. Accordingly, a balancing exercise has to be carried out between the interests of the child and those of their biological family, taking into account any possibility that the child could be reunified with their biological family. The Court requires procedures relating to adoption to be accompanied by safeguards commensurate with the gravity of the interference and the seriousness of the interests at stake. According to the ECtHR, any radical measure such as annulling an adoption must be supported by relevant and sufficient reasons, and should not be envisaged if it would be against the interests of an adopted child. *In Kearns v. France,*[84] the ECtHR found it compatible with the ECHR that an Irish woman, who had placed her child for adoption in France, could not revoke her formal consent to adoption after the expiry of a two-month period. The French law sought to strike a fair balance and ensure proportionality between the conflicting interests of the biological mother, the child, and the adoptive family. In this process, the child's best interests had to be paramount. From the evidence presented to the Court, it was in the child's best interests to enjoy stable relations within a new family as quickly as possible, and all of the necessary steps had been taken to ensure that the applicant understood the precise implications of her action.

In the case of *A.B. and Others v. France,*[85] the Court held that the presence in the administrative detention of a child who was accompanying his or her parents was only compatible with the ECHR if the domestic authorities established that they had taken this measure as a last resort only after having verified, in the specific circumstances, that no other less restrictive measure could be applied. The Court also observed that

> the authorities had not taken all the necessary steps to enforce the removal measure as quickly as possible and thus limit the time spent in detention. In the absence of a particular risk of absconding, the administrative detention of eighteen days' duration seemed disproportionate to the aim pursued.

The court reiterated that the child's extreme vulnerability was the decisive factor and took precedence over considerations relating to the status of an irregular immigrant. In addition, asylum-seeking children have specific needs that are related in particular to their age, lack of independence, and status. The court also noted that, although the material conditions in certain centres were appropriate, the conditions inherent in establishments of this type are a source of anxiety for young children. The case concerns the placement of a child for adoption without her biological mother's consent. No violation Art 8 for Family life. No shortcomings in authorities' decision to place

84 *Kearns v. France,* 2008.
85 *A.B. and Others v. France,* 2016.

child for adoption without the biological mother's consent. Decision based on child's best interests. Domestic authorities not responsible for the breaking of family ties and bond between mother and child. Margin of appreciation not overstepped. Possibility for mother to participate in decision-making process. Annulment of adoption placement possible, in principle, if a change in circumstances.[86]

The applicant lived in Russia and looked after her sister's daughter, a Russian citizen, after her sister had lost her parental rights in the case of *Lazoriva v. Ukraine*.[87] The sister had another boy in Ukraine a few years later. More than five times, the child was brought to an orphanage in Chernivtsi until he was five, and in July 2012, a court judgment stripped the mother of her parental rights and placed the boy on the adoption list. Meanwhile, in July 2012, the applicant's niece visited Chernivtsi and discovered her brother was in an orphanage, which she informed him about. The applicant notified Chernivtsi's guardianship department of her decision to guard her nephew and began preparing all the appropriate documentation. At the time of document filing, the local court had already ordered that the boy should be adopted by another family since it was in his best interests.

The applicant appealed to the appellate and cassation courts, arguing that the adoption decision was made without notifying close relatives and disregarding their priority in establishing custody of the child, and that the Ukrainian court had ignored the fact that the boy was a Russian citizen. The municipal court's adoption judgment did not affect her rights and interests regarding child custody, so the domestic courts dismissed her claims. The applicant applied to the ECtHR, claiming that Ukraine had violated Article 8 of the ECHR by disrespecting her family life due to the adoption decision and the inability to establish custody of her nephew, as well as Article 6- access to a court. The Court reinterpreted "family life" for Article 8 of the ECHR, determining its existence or absence by considering real intimate ties in practice. Close connections that are not "family life" are usually termed as "private life" (§ 61). The ECtHR also noted that while Article 8 of the ECHR does not specify procedural requirements, its observance requires that the applicant be involved in the decision-making process (when adopting his nephew), which is sufficient to protect his or her interests (§63). The applicant and her nephew did not live together, and the child recalled only one meeting with the applicant, so the Court found no evidence that the relationship was "family life". The Court noted that the ECHR does not guarantee the right to form a family if the applicant has care of her nephew. The ECtHR found that the applicant's interest in maintaining and developing her relationship with her nephew was consistent with the definition of "private life", which includes the right to establish and develop relationships with others (§66). The ECtHR found that the adoption of the applicant's nephew interfered with her private life because it ended their relationship and negated her attempts to become the child's guardian. The Court decided that this interference violated the applicant's right to respect for her private life since it did not

86 *V.Y.R. and A.V.R. v. Bulgaria*, 2023.
87 *Lazoriva v. Ukraine*, 2018.

meet Article 8's procedural criteria. The Court found procedural flaws in the case, including the improper consideration of the applicant's intention to establish custody of her nephew, insufficient justification for the courts' conclusion that adoption was in the best interests of the child, and inadequate consideration of the applicant's arguments regarding reasonable time delays due to document preparation. The ECtHR found a violation of Article 6 of the ECHR. In her dissenting opinion, Judge Yudkivska noted that adoption is usually the best way to care for an abandoned child because it allows the child to no longer be considered an orphan and receive full rights like a biological descendant. Judge DeGetano agreed that adoption was best for the child.

4) Children placed in institutions or foster care. As a general rule, persons under the age of 18 are treated as children and should be provided with special conditions of detention, taking into account their physical and psychological development. Thus, in the case of *Khan v. France*[88], the ECtHR stated that the prolonged detention of a twelve-year-old child in conditions for adults and with adults without sufficient supervision appropriate to his age, and especially the refusal of human rights organisations that appealed to the authorities to place the child in a specialised institution, constituted a violation of Article 3 of the Convention.

5) "Non-conventional" family structures, such as children born out of wedlock, families formed by same-sex couples, and families where one of the parents is a transgender individual. The following Member States do not allow two persons of the same sex to be recognised as the joint legal parents of a child under any circumstances: Bulgaria, Croatia, Cyprus, The Czech Republic, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, and Slovakia. In cases concerning visitation rights and custody issues in respect of children born in or out of wedlock (*Paparrigopoulos v. Greece*,[89] Anagnostakis and others v. Greece,[90] Fourkiotis v. Greece,[91] Syngelidis v. Greece,[92] *Boljević v. Serbia*,[93] etc.), the Court reaffirmed that there was no reason of principle to exclude paternity matters from the scope of Article 8.

The case concerned the rejection of the applicant's civil action for judicial recognition that a late person was his father. The applicant claimed that, without justification, the courts refused to consider DNA evidence and insisted on applying outdated legislation requiring proof of cohabitation and other "social" circumstances. He complained under Article 8 of the Convention in that respect. That there had been a violation of Article 8 of the Convention.[94]

The applicant alleged that she had been discriminated against on the basis of her sexual orientation in proceedings for full parental rights and custody rights over her youngest child. The applicant complained that the domestic courts had refused

88 *Khan v. France*, 2019.
89 *Paparrigopoulos v. Greece*, 2022.
90 *Anagnostakis and Others v. Greece*, 2021.
91 *Fourkiotis v. Greece*, 2016.
92 *Syngelidis v. Greece*, 2010.
93 *Boljević v. Serbia*, 2020.
94 *Moldovan v. Ukraine*, 2024.

to grant her custody of her child D on the grounds of her sexual orientation, which amounted to discrimination in the enjoyment of her Convention rights, in breach of Article 14 taken in conjunction with Article 8 of the Convention.[95]

The ECtHR pointed out that to date, DNA analysis was the only scientific method for accurately establishing the paternity of a particular child, and its evidential value significantly exceeded any other evidence presented by the parties to confirm or refute their close relationship.[96] In the case of *Moldovan v. Ukraine*,[97] the court stressed the need for careful consideration of the evidence of DNA testing results. In the case of *Kautzor v. Germany*,[98] the applicant assumed that he was the biological father of his ex-wife's daughter, born in March 2005. The applicant's ex-wife was living with a new partner who acknowledged paternity of her daughter in May 2006. The applicant expressed to his ex-wife his desire to have access to the child and to recognise his paternity. The applicant filed a paternity action, which was rejected on the grounds that there were social and family ties between the child and his legally recognised father and, as the child already had a legal father, the applicant was not entitled to have his paternity established by genetic testing. The applicant lodged a complaint under Article 8 separately and in conjunction with Article 14 of the Convention against the German courts' denial of the right to challenge the paternity of another man and the fact that he had been discriminated against. As the ECtHR found, there were no violations of Articles 8 and 14 of the Convention, since, on the one hand, states are obliged to consider whether establishing a relationship with the biological father is in the best interests of the child, for example, by granting the right to contact with the child, and there is no procedure for establishing biological paternity without formally challenging the paternity of the recognised father in European law. Thus, the ECHR sought to take into account, not only the interests of the biological father, but also, above all, the interests of the child himself in the issue of establishing paternity.

6) Paternity issues, deprivation of parental rights. Under CoE law, children have complained to the ECtHR about the impossibility of determining the identity of their natural fathers. The ECtHR held that the determination of the legal relationship between a child and the alleged natural father was part of the scope of private life (Article 8 of the ECHR). Who one's parents are is a fundamental aspect of one's identity. A child's interest in establishing paternity, however, must be balanced against the interests of the presumed father as well as the general interest. Indeed, a child's interest in having legal certainty about his or her paternal affiliation does not trump a father's interest in rebutting the legal presumption of paternity.[99]

95 *X v. Poland,* 2022.
96 *Cutajar v. Malta*, 2015; *Kalacheva v. Russia*, para. 34; *Brauer v. Germany*, 2009, paa. 43; *Tsvetelin Petkov v. Bulgaria*, 2014, para. 55.
97 *Moldovan v. Ukraine*, 2024.
98 *Kautzor v. Germany*, 2012.
99 Handbook on European Law Relating to the Rights of the Child, 2022, p. 78.

In *Mikulić v. Croatia*,[100] the applicant was born out of wedlock and instituted proceedings for the establishment of paternity against her presumed father. The respondent refused to appear on several occasions for court-ordered DNA testing, which led to an unnecessary protraction of the paternity proceedings for about five years. The ECtHR held that if, under domestic law, alleged fathers could not be compelled to undergo medical testing, states had to provide for alternative means allowing for the swift identification of natural fathers by an independent authority. It found a violation of Article 8 of the ECHR in the applicant's case.

The deprivation of parental rights (i.e., the rights to raise a child, protect his or her interests, take the child away from other persons who illegally keep him or her, etc.), which are granted to parents before the child reaches the age of majority and are based on kinship with the child, is an extreme measure of influence on persons who do not act as parents, so its application should only be decided after a full investigation. In Ukraine, you can only lose parental rights for a child under 18 on the grounds of Article 164 of the Family Code.[101] Parental evasion occurs when parents do not care about the child's physical and spiritual development, education, or preparation for independent living, in particular: don't provide the child with the necessary nutrition, medical care, or treatment, which negatively affects physical development as a part of upbringing; don't communicate with the child enough to help him or her develop self-awareness. Only if the parents are guilty and willfully disregard their duties may these factors be considered child rearing avoidance.

7) International child abduction. Whereas in other fields – such as international child abduction – the best interests principle is the crucial argument in the Court's reasoning, such a coherent approach where genuine significance is attached to the child's best interests is absent in expulsion cases. Child abduction is the unlawful removal or retention of a child. If you have custody and your child is abducted to another member state, you may apply to that state for the return of the child. The courts of the member state to which the child has been abducted can only refuse the return of the child in limited circumstances – for example, if there are not adequate safeguards to ensure that there is no serious risk that return would expose the child to harm.[102] This case dealt with the international abduction of a child and, more specifically, the inability of a mother living in France to exercise her custody rights, which had been awarded to her by the Greek tribunals, in relation to one of her sons; the child lived in Greece with his father and brother and did not wish to return to France with his mother (*M.K. v. Greece*[103]). In 2010, the Court's Grand Chamber delivered its first judgment in a child abduction case, *Neulinger and Shuruk v. Switzerland*.[104] The Court ruled 16–1 that enforcing a Swiss return order would infringe the petitioners' Article 8 ECHR right to family life. The judgment appears to have shifted the

100 *Mikulić v. Croatia*, 2002.
101 *Simeinyi Kodeks Ukrainy*, 2002, art. 135.
102 Divorce in Europe, 2024.
103 *M.K. v. Greece*, 2018.
104 *Neulinger and Shuruk v. Switzerland*, 2009.

Court's approach to the Hague Convention, arguing that Article 8 must be interpreted in light of both the Hague Convention and the UN Convention on the Rights of the Child. The Grand Chamber stated that the child's family ties must be maintained except in exceptional circumstances, that the child must be developed in a sound environment, and that a parent is not entitled to measures that would harm the child's health and development. In return instances, the Grand Chamber mandated a thorough inspection of the entire family situation by national courts, as noted in section 5. This judgment was heavily criticised, and in 2013, the Grand Chamber corrected some Neulinger remarks in *X v Latvia*.[105] In X, the Grand Chamber ruled that the child's best interests could not be interpreted the same way whether the court is considering a Hague Convention return request or a custody or parental responsibility case. A nuanced strategy was adopted. Return cases were different from custody proceedings, and the Court concluded that the Hague Convention must be applied in the child's best interests. The Grand Chamber clarified that the term "in-depth examination" in Neulinger did not establish a basis for national courts to apply the Hague Convention. The Hague Convention's return duty is not absolute; thus, the national court should carefully consider all relevant considerations and make a well-reasoned conclusion in each return case. After 2013, the Court repeated and applied X v Latvia statements in child abduction cases. The X judgement did not change Neulinger principles in public child care situations.[106] Article 8 ECHR would be the introduction of more effective measures to promote expeditious outcomes. But this could only be achieved if States provide the necessary investment, especially if effective examinations are to be undertaken where exceptions are raised, with, potentially, greater use made of Article 13 (3) of the 1980 Hague Convention.[107]

In particular, in the case of *Khadzhiev v. Bulgaria*.[108] the failure to provide supervision to a fourteen-year-old girl while her parents were in custody was recognised by the European Court of Human Rights as a failure of the state to fulfill its positive obligations and led to the violation of Art. 8 (Right to respect for private and family life) of the Convention on the Protection of Human Rights and Fundamental Freedoms. The applicant was alone at home on 4th December 2002 when the police arrived to arrest her parents for extradition to Turkmenistan. Her parents were arrested upon their return and taken into custody. The applicant remained alone in the apartment. On December 17th 2002, she was reunited with her parents after they were released on bail. The applicant subsequently sought compensation for the stress and suffering she had suffered as a result of the authorities' failure to provide support and care for her while her parents were in custody.

8) Different forms of violence against children, such as domestic violence or mistreatment of children by their teachers in schools. The presence of violence within

105 *X v. Latvia*, 2013.
106 Kvisberg, 2019, pp. 90–106.
107 McEleavy, 2015, pp. 365–405.
108 *Khadzhiev v. Bulgaria*, 2014.

educational institutions can significantly impact the psychological and physical well-being of children. Children who are exposed to violence may suffer from bodily harm, sexually transmitted infections, sadness, anxiety, post-traumatic stress disorder (PTSD), and suicide ideation. Additionally, they may start displaying hazardous, belligerent, and unsociable conduct. Children who are exposed to violence during their upbringing are more likely to perpetrate it, therefore creating a fresh cycle of victims. At its utmost severity, violence occurring within and in the vicinity of educational institutions might result in fatalities. For the vast number of children and teenagers residing in regions devastated by violence, their education frequently becomes the primary battleground. In addition, the presence of violence in schools can lead to a decrease in school attendance, a decline in academic performance, and an increase in drop-out rates. This has profound ramifications for the achievement and affluence of children, their families, and entire communities. For example, the case[109] concerns the applicant's alleged harassment by a teacher in a public school and failure on the part of the State authorities to respond effectively to his complaints of harassment. the inhumane and degrading treatment of a boy of Roma origin by the police[110], exclusion from school of two children of Albanian origin, aged 7 and 11, who were misdiagnosed of leprosy[111], the disciplinary measure of suspension ordered by the school authority against the student who refuses to participate in a school moment commemorating a war event does not violate art. 2 of the first additional Protocol to the ECHR,[112] the schooling of Roma children.[113]

9) The right to education. Education is a fundamental entitlement. Article 2 of Protocol No. 1 to the ECHR guarantees everyone the right to education, and its interpretation by the ECtHR demonstrates a difficult balance between the discretion of states and ensuring this right without discrimination, especially against children. Every child has the right to education, but ECtHR judgments emphasise that the right to education is not absolute and may be subject to restrictions if they are provided for by law, pursue a legitimate aim, and are proportionate. However, it should be borne in mind that the Court has final jurisdiction to determine the compliance of such restrictions with the Convention. Education has a crucial role in the overall growth and progress of a child. It is imperative that every child has the chance to acquire a high-quality education. *The Memlika v. Greece* case in 2015[114] demonstrated a case of the improper application of restrictions. The applicant's children were suspended from school due to a misdiagnosis of leprosy in their father. Although the suspension was for the purpose of protecting public health (a legitimate aim), the Court found a violation of Article 2 of Protocol No. 1. The cause was the ineffectiveness of the

109 *F.O. v. Croatia*, 2021.
110 *Stefanou v. Greece*, 2010.
111 *Memlika v. Greece*, 2015.
112 *Valsamis v. Greece*, 1996.
113 *Lavida and Others v. Greece,* 2013; *Sampani and Others v. Greece*, 2012; *Sampanis and Others v. Greece*, 2008.
114 *Memlika v. Greece*, 2015.

medical assessment procedure, resulting in a prolonged delay in the children's reintegration into school. The Court emphasised that national legislation did not provide sufficient regulation of these issues, and the absence of a timely commission to assess the health of students led to a violation of the right to education. This underlines the obligation of the state not only to have legal grounds for restrictions, but also to ensure that procedures are effective and efficient in order to minimise the impact on the exercise of the right. The Court highlights that Article 2 of Protocol No. 1 to the Convention ensures that everyone has the right to attend educational institutions that already exist.[115] Due to the need for governmental regulation, this right is not absolute and can be subject to limitations. The Court has the ultimate authority to determine compliance with the Convention, although national authorities may establish specific regulations for educational institutions. The Court is responsible for ensuring that the limitations placed on individuals are clear and may be anticipated by all involved in the legal proceedings. These restrictions must have a valid purpose and be designed to be successful in achieving their intended goals, while still respecting the fundamental right to education.

The absence of a committee to assess the health of pupils, which was later formed, violated the right to education granted by the Convention. Also, in the *case of Ponomaryovs v. Bulgaria*,[116] the Court explained that Article 2 of Protocol 1 could not be interpreted as providing for a state obligation to establish and finance specific educational institutions, but each state was obliged to provide access to existing educational institutions.

Every child shall not be discriminated against in relation to education, and the right to inclusive education, especially for persons with disabilities and ethnic minorities, is the subject of special attention of the ECtHR through Articles 14 of the ECHR (prohibition of discrimination) and 2 of Protocol No. 1 (right to education). The Court applied the principle of "positive obligations" of the state to provide reasonable accommodation and inclusion. In the case of *G.L. v. Italy*,[117] the case included a girl with non-verbal autism who was denied legal specialised educational support in her first two years of elementary school. This clause is called "Measures for school attendance" under Italian Law No. 118/71 (Article 28). The second provision on compulsory education requires public schools to educate disabled schoolchildren. Decision No. 215 of the Italian Constitutional Court in 1987 established that disabled pupils should attend regular schools. Italian law guarantees disabled children the right to inclusive education in regular schools. The government must work to improve inclusive education in schools. G.L. claimed her education rights were violated. She did not receive specialised support for two years as required by law. She believed the state had failed to meet its Council of Europe responsibility to provide equal opportunity for disabled individuals. Article 2 of Protocol No. 1 specifies that no one shall be denied

115 Fenton-Glynn, 2021.
116 *Ponomaryovi v. Bulgaria*, 2009.
117 *G.L. v. Italy*, 2020.

the right to education, and Article 14 of the European Convention on Human Rights prohibits discrimination. It should be noted that in Italy,[118] schools must allow access for disabled pupils. They should promote the inclusion of disabled children in their admission arrangements and in all aspects of school life, as established by law.

The Court reiterated its position, which it has already stated before (case *Velyo Velev v. Bulgaria*[119] and in the case of *Stoian v. Romania*[120] that in a democratic society, the right to education is essential for the promotion of human rights and plays a fundamental role. It also noted that education is one of the most important public services in a modern state. A child with non-verbal autism was provided with no specialist assistance in at least her first two years at primary school, apart from what her parents paid for. The ECtHR in Strasbourg held that there was a failure to make reasonable accommodation, in breach of Article 14 of the European Convention on Human Rights. The Italian authorities had prioritised support for a different condition, which they considered more serious. However, the ECtHR considered that under the circumstances – Italy's inclusive schooling model and case law of the Italian courts – any budgetary restrictions should affect educational provision in an identical manner for both disabled and non-disabled pupils. The authorities had not done enough to consider the claimant's needs and possible solutions.

A blind person who passed the entrance exam was denied registration at a conservatoire in the case of *Çam v. Turkey*.[121] The applicant, a blind person, was denied admission to a conservatoire because of her visual impairment. The ECtHR found a violation of Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 1, as the refusal was based solely on the applicant's disability without objective and reasonable grounds and without an analysis of individual needs. The Court clearly stated that the refusal to provide reasonable accommodation is a form of discrimination. The ECtHR also recognised a violation of Article 14 of the ECHR in *Enver Şahin v. Turkey*,[122] where a student with paraplegia was unable to access a university building because the university had failed to make reasonable adjustments, highlighting the importance of individualised needs assessment and autonomy of the individual. In another case, *Oršuš and Others v. Croatia*,[123] the Grand Chamber of the ECHR found discrimination against Roma applicants in the exercise of their right to education through placement in segregated "Roma" classes. The Court emphasised that such measures, even if they seem to be aimed at helping (through the language barrier), had created hidden (indirect) discrimination since they did not improve integration and were not proportionate. The state should actively remove linguistic and cultural

118 *Protection and Legal Rights for Disabled People: From Constitutional Rights to Further Legal Claims*, 2023, p. 31.
119 *Velyo Velev v. Bulgaria*, 2014.
120 *Stoian v. Romania*, 2019.
121 *Çam v. Turkey*, 2016.
122 *Enver Şahin v. Turkey*, 2018.
123 *Oršuš and Others v. Croatia*, 2010.

barriers to the integration of minorities into the mainstream education system, rather than segregate them. The Strasbourg Court has never stated this so clearly.

ECHR judgment in the case of *Bettina Dupin v. France* (2016)[124] та *Ozan Barış Sanlısoy v. Turkey*,[125] concerning the denial of access to mainstream schools for children with autism demonstrates that the Court does not always find a violation if national authorities decide on specialised education on the basis of the child's unique needs and the absence of systematic discrimination or complete exclusion from education. The Court requires the state to strike a fair balance between individual needs and the limited capacity of the state, but this does not remove the obligation of individualised assessment. The judge denied the request for ordinary schooling and instead recommended specialised instruction.

The Court found no systematic denial of the applicant's right to education due to his autism and the State's inability to comply with Article 2 of Protocol No. 1 and Article 14 of the Convention.[126] The Court ruled that disabled children in Turkey have the right to special education at special institutions or inclusive education in regular schools. The Court did not abstractly rule on national law and practice. It indicated the file did not contain documentation about school registration refusals other than this one. The applicant was refused private school registration after two teacher interviews. Naturally, the Court noted that the criminal proceedings demonstrated that the school's lack of trained teachers could not educate the applicant. The petitioner could not claim denial of admission to a public school if he claimed he was entirely excluded for a certain time, the Court ruled. The case documents demonstrated that the applicant later studied in public institutions, where he hoped to continue his critical education. The Court denied the application because the petitioner had attended public schools and had no proof that his autism would prohibit him from learning.

Catan and Others v. Moldova and Russia[127] concerned the violation of the right to education of children or parents of children from Latin-script schools located in the Transnistrian region of the Republic of Moldova. The Court found that the Russian Federation exercised effective control over the Transnistrian region of Moldova during the period in question and the Russian Federation incurred responsibility under the Convention for the violation. Again, this is a case where the Russian Federation sought to contest the judgment and responsibility for implementing the judgment, notwithstanding the final binding judgment of the ECtHR.[128]

Despite interim resolutions, problems remain. The Committee of Ministers considered the case in 2021 and deeply deplored that, some nine years after the judgment became final, the Russian authorities had failed to provide the Committee with any information on the concrete measures taken or foreseen to execute the judgments in the group to which this case belonged. The Committee of Ministers took the unusual

124 *Dupin v. France*, 2018.
125 *Ozan Barış Sanlisoy v. Turkey*, 2016.
126 Protection of Persons with Disabilities in Turkish Law, 2022, pp. 362–363.
127 *Catan and Others v. Moldova and Russia*, 2012; *Bobeico and Others v. Russia*, 2018.
128 *Implementation of Judgments of the European Court of Human Rights*, 2023.

step of instructing the Secretariat to prepare an analysis of the measures required, in the light of the ECtHR findings and the current factual conditions concerning the functioning of the Latin-script schools. Although unusual, the instructions given to the Secretariat reflected the Committee of Ministers' recognition that measures were needed to implement Court judgments. In December 2022, the Committee of Ministers noted that after ten years, the Russian authorities had continued to fail to pay the just satisfaction and to provide the Committee with an action plan or to comply with the final binding judgment of the Court, contrary to Article 46(1).[129] The concept of "just" satisfaction did not lend itself to a clear definition. According to Article 41 ECHR, 'if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'.[130]

In Hungary there is a case concerning the discrimination against Roma children in education.[131] Two Roma males claimed they received an inaccurate mental health diagnosis in their application. They were sent to a special school for children with mental impairments despite attending a regular school due to their diagnoses. After independent intellectual disability assessments, Mr. Horvat had a Raven Test IQ of 83, which was below average but did not indicate mental handicap; hence, he was not mentally retarded. Mr. Kiss had a 90 Raven Test IQ. The specialists stressed that he was mentally sound and could follow a curriculum. They advised the government to immediately move him to a regular school and educate him. The applicants claimed in the domestic court that the Expert Commission had discriminated against them and misdiagnosed them with mild mental deficiency based on their ethnicity, socioeconomic status, and then placed them in a special school despite their normal abilities. The applicants requested that the European Court of Human Rights rule that their placement in a correctional school was ethnic discrimination and violated their right to education under Article 2 of Protocol No. 1 to the Convention and Article 14 of the Convention. Roma are particularly vulnerable and disadvantaged due to their complex history and continuous expulsions, the Court found. Their vulnerability necessitates emphasising their demands and lifestyle in legislation and individual circumstances. Protocol No. 1 Article 2 defines "respect" as more than "recognise" or "take into account". The Court underlined that the state has a positive and a negative obligation. Uneven treatment is discriminatory if it is not supported by objective or reasonable factors like a legitimate goal or proportionality, according to the ECtHR. Treatment based on race, colour, or ethnicity is harsh. The ECtHR considered the applicants' tests insufficient to prevent misdiagnosis. When ethnic minority children were discriminated against, the state should have taken these beneficial steps. This case showed that Roma applicants with mild mental or learning problems were not

129 Decision CM/Del/Dec(2022)1451/H46-30, 2022.
130 Lambert and Özlü, 2019.
131 *Horváth and Kiss v. Hungary*, 2013.

adequately protected by the State in education. Candidates were misdiagnosed and sent to mental impairment schools, where they learned a basic curriculum alone. Instead of helping children integrate into mainstream schools and gain skills for mainstream life, schooling may have worsened their difficulties and harmed their personal development.

Thus, the ECtHR case law clearly confirmed the fundamental nature of the right to education (Article 2 of Protocol No. 1) and its inextricable link to the prohibition of discrimination (Article 14 of the ECHR). The Court required states not only to refrain from arbitrarily restricting this right, but also to fulfil positive obligations to ensure effective access to education, in particular for vulnerable groups (children with disabilities, minorities), by providing reasonable accommodation and an individualised approach. Taking into account these decisions of the European Court of Human Rights, it is necessary to strengthen the mechanism of individualised assessment of the needs of children with special educational needs and vulnerable groups to ensure adequate access to inclusive education, minimising the justification of restrictions by budgetary or other factors that may lead to discrimination, and to develop effective mechanisms for prosecuting discrimination in education, including the creation of more accessible and effective judicial and non-judicial remedies for victims, all of which will allow European countries to meet international standards and build a fair and inclusive education system that truly serves the best interests of every child.

10) The right to freedom of religion. For instance, several memoranda in Italy issued between 1985-86, subsequent to the agreements between the Ministry of Education in Italy and the Italian Episcopal Conference, designated religion as an optional subject, stipulating that students who opted not to participate in these classes were required to engage in an alternative activity. In 1987, the Regional Administrative Court of Lazio ruled that religion was an entirely optional topic, categorising it as an additional course beyond the mandatory school hours (Decision no. 1273/1987). Two years later, the Constitutional Court affirmed that students opting out of Catholic religion studies would be considered in a state of non-obligation (Decision 203/1989).[132]

In the Greek system for exempting students from religious education, parents were required to file a formal declaration indicating their children were not Orthodox Christians.[133] The expulsion of two children, who were Jehovah's Witnesses and declined to participate in the school parade on October 28th, a national holiday in Greece, due to their religious beliefs.[134] The provisions of Article 14 were invoked to assert the incompatibility of Poland's policy on religious instruction in schools with the ECHR in the case of *Grzelak v. Poland*: nonreligious pupils cannot be discriminated against for abstaining from religious lessons. In *Grzelak v. Poland*,[135] an atheist student and parents condemned the school curriculum's prejudice against religious

132 The Rights of Children in Italy: Perspectives, 2009.
133 *Papageorgiou and Others v. Greece*, 2020.
134 *Efstratiou v. Greece*, 1996.
135 *Grzelak v. Poland*, 2010.

freedom. They had been requesting an alternative to the religion course for years in accordance with the Minister of Education's Ordinance on religious instruction in State institutions. The applicant could have faced further discrimination because the appropriate line in his school reports was crossed out. Transcripts are official paperwork. Polish law prevented him from freely deciding whether he believed in God or with his parents, and the requirement to make a declaration that he would not pursue religious instruction humiliated him. A third-party intervener supported the petitioner and used statistical data to prove that choosing ethics over religious instruction was just theoretical. While the number of professors and students in ethics was small, the Ordinance's requirement of seven students for inter-class teaching indirectly discriminated against religious and non-religious minorities. Considering the Polish Constitutional Court's jurisprudence, the ECtHR found the application valid notwithstanding the government's objections to the Ordinance's non-compulsoriness and the non-exhaustion of domestic remedies. The inclusion of religion grades in school reports and their impact on the annual grade average was not deemed unconstitutional, as it violated the principles of separation of Church and State and freedom of religion and expression in Article 53 of the Polish Constitution, with multiple opportunities to do so. The right not to reveal one's ideas was not affected by such grades.

11) Juveniles offenders – mistreatment of children by the police children the parents of whom have been incarcerated or have been convicted of criminal offences: the right to a fair hearing and the right to examine witnesses regarding a case where a child had been sexually abused by his father,[136] the obligation to leave Greece and the lifetime ban on returning there imposed on an Albanian national of Greek origin, father of a six year old boy (who was a Greek national), because he had been sentenced to seven years' imprisonment for purchasing drugs.[137]

On 4th May 2023, the European Court of Human Rights delivered three rulings concerning the confinement of families with children in administrative detention centres (CRA). These rulings concerned seven children, aged between seven months and thirteen years, who were locked up in 2020 and 2021 at the Mesnil-Amelot and Metz detention centres. Two new adverse rulings, part of an entirely predictable sequence, have thus been delivered against France. Since 2012, the ECHR has maintained the same line: the confinement of families with children in detention centres constitutes inhuman and degrading treatment. In 2020, it described this practice as a "flagrant lack of humanity".[138]

In one of today's ECHR verdicts, the Court found that

136 *Georgios Papadopoulos v. Greece*, 2003.
137 *Kolonja v. Greece*, 2016.
138 Detention of Children: European Court of Human Rights Rules against France 11 Times, 2023.

> competent authorities subjected minors, including an infant, to [inhuman or humiliating] treatment due to their age, Mesnil-Amelot detention centre conditions, and detention duration. Given the unbreakable bond between a mother and her eight-month-old baby and their shared feelings, the Court finds the same for petitioner A.M., who was alone with her three minor children.

A third judgement issued today by the ECHR found that keeping two children aged six and two at the time of the events for less than 10 days 'does not meet the threshold of severity required to constitute treatment contrary to Article 3 of the Convention'. Child confinement, a major cause of stress and anxiety, is painful, distressing, and inhumane, says Cimade. This applies regardless of child age or incarceration. These verdicts brought the European Court of Human Rights' total against France to eleven. Actors, institutions, independent administrative organisations, and politicians have questioned the French government about such scenarios for years. However, France's interior ministry ignored a nationwide child imprisonment ban, including Mayotte. CRAs held 94 Metropolitan France juveniles and 2,905 Mayotte children in 2022, according to the national data. At least 129 unaccompanied children were kept in metropolitan France's CRAs without a juvenile court's approval, breaking the law and the minority presumption. This brutal and horrible captivity has affected hundreds of youngsters. Over 35,000 children have been held in French detention facilities since 2012 for cruel treatment. The immigration measure creates a flawed framework for family detention, but France must abolish administrative child imprisonment nationally.[139]

The European Court of Human Rights ruled against Hungary for arbitrarily detaining unaccompanied children. *M.H. from Afghanistan and S.B. from Pakistan* were two such children, yet they were detained for months unlawfully. They were both 16 years old at the time. The Hungarian state detained M.H. and S.B. unlawfully in 2016.[140] Since then, the situation of asylum-seeking children in Hungary has deteriorated considerably, and the new Act on the Entry and Stay of Third Country Nationals, which entered into force in 2024, now classifies the detention of unaccompanied minors over 16 years of age as "lawful". The Hungarian Helsinki Committee considers this a severe violation of the law, which it pointed out to the legislator during the social consultation, but in vain. The Government propaganda speaks loudly and often about 'protecting children above all else', but, in fact, the government often fails to comply even with domestic laws keeping children safe, especially when it comes to children in need of protection. 'The Strasbourg ruling in the case of two children will be a legal benchmark on the detention of children that the Hungarian state cannot go against.'

In the judgment on the case *Darboe and Camara v. Italy* (Application No. 5797/17)[141] delivered on 21st July 2022, the ECtHR ruled for the first time on the impact of age

139 Detention of Children, 2023.
140 *M.H. and S.B. v. Hungary*, 2024.
141 *Darboe and Camara v. Italy*, 2022.

assessment methods and procedures on the fundamental rights of young migrants who claimed to be underage. The case concerns facts that occurred in 2016, under Italian legislation now superseded by Law No. 47 of 7th April 2017 on unaccompanied minors. Nonetheless, the decision is relevant for the important principles it states. The Court found that the procedural shortcomings carried out by the Italian authorities had hindered the access of a juvenile migrant to international protection and ultimately led to his prolonged detention in an adult reception centre in poor conditions, resulting in a breach of Article 8 and 3 of the Convention. Italy has also been held to have violated Article 13 of the Convention, due to the lack of remedies by which the applicant could have complained about conditions in the adult reception centre and to the ineffectiveness of the remedies concerning the age-assessment procedures. The ruling on the Darboe and Camara case certainly marked a cardinal point for the effective protection of juvenile migrants and asylum seekers by affirming the existence of a positive obligation under Article 8 ECHR to apply the presumption of minor age to age determination procedures and thus avoid doubtful cases resulting in serious detriments for (where not a deprivation of) children's fundamental guarantees.

The court upheld COPE's intervention in the *Deltuva v. Lithuania* case, stating that all decisions concerning children should take their best interests as a prior consideration and that children have a right when separated from a parent in prison to regular, ongoing contact with the parent. COPE had filed an amicus brief jointly with the UK-based AIRE Centre. A ruling by the ECtHR that safeguarded a child's right to regular contact with a parent in detention, specifically in this case pre-trial detention, marked a major development in European case law. This ruling supports advocacy for children with imprisoned parents both at the national and European levels. The Court specifically cited the Council of Europe Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents in its section on relevant international material. This decision was in line with an amicus brief jointly submitted to the ECtHR by Children of Prisoners Europe (COPE) and The AIRE Centre.[142]

The ECtHR based its ruling on Article 8 of the ECHR, which protects the right to private and family life. It also referred to the Council of Europe Recommendation concerning children with imprisoned parents CM/Rec(2018)5.[143] These are the same principles that underpin two recent European Union policy instruments. The first is the EU Child Rights Strategy adopted by the EU Council of Justice Ministers on June 9th 2022. The second is a Recommendation by the European Commission on pre-trial detention issued on December 8th 2022. Both recognise the potential vulnerability of children with imprisoned parents. States must take children's rights into consideration when it comes to decisions regarding parents in prison.

12) Disclosure of children's personal data. This is the most sensitive and ethically complex area within contemporary data protection and children's rights law. Due to

142 *Deltuva v. Lithuania*, 2023.
143 Recommendation CM/Rec, 2018.

children's inherent vulnerability, obfuscation capacities, and often limited understanding of the long-term implications of data sharing, their personal data requires high protection. In a progressively digitalised environment where children actively interact with online platforms, educational tools, and social media, the extent and nature of data collection and subsequent disclosures have significantly increased. Therefore there are needs to learn the legal frameworks governing such disclosure, the protective mechanisms in place, and the persistent challenges in balancing the child's right to privacy with legitimate interests in data processing, all under the main principle of the "best interests of the child". Several provisions of the EU Charter of Fundamental Rights[144] apply, particularly those concerning private and family life (Article 7), protection of personal data (Article 8), freedom of expression and information (Article 11), and the rights of the child (Article 24). Article 16 of the Treaty on the Functioning of the European Union (TFEU)[145] notes that 'everyone has the right to the protection of personal data concerning them'.

With regards to the disclosure of personal data in the printed or audiovisual media, the Court has found a violation of Article 10 in case *N. Š. v. Croatia,* 2020[146] (§§ 92–117), where the applicant was convicted for disclosing on television supposedly confidential information she had obtained during administrative proceedings concerning custody of a child. The Court held that, owing to children's vulnerability, the protection of their personal data was essential (§ 99). However, the unduly formalistic approach taken by the national courts, which did not take account of the background to the disclosure and, in particular, the fact that the information was already in the public domain, was incompatible with Article 10 (§§ 115–116). But in the case of *Kahn v. Germany*, 2016 (§§ 63–76), the Court found no violation of Article 8 where a publisher had not been ordered to pay any sum for having breached a ban on the publication of photos of two children of a former goalkeeper of the German national football team. The Court clarified that it was not possible to deduce from Article 8 of the Convention a principle whereby, in order to protect a person's private life in an effective manner, an order requiring a publisher to pay a sum for failing to comply with an injunction not to publish would suffice only if the sum in question went to the victim. This was true provided that the State, in the exercise of its margin of appreciation, afforded to injured parties other potentially effective remedies that could not be said to restrict in a disproportionate manner the opportunities for obtaining redress for the alleged violations (§ 75). In several cases the Court assessed measures entailing the disclosure of an individual's personal data by the data processor, to the public in the case *Bogomolova v. Russia*, 2017,[147] §§ 54–58, concerning the publication of a photograph of a child on the cover page of a booklet entitled "Children need a family", published by a Centre for Psychological, Medical and Social Support).

144 Charter of Fundamental Rights of the European Union.
145 Consolidated Version of the Treaty on European Union, 2016.
146 *Š. v. Croatia*, 2020.
147 *Bogomolova v. Russia*, 2017.

In the case *D.L. v. Bulgaria*,[148] the applicant alleged that her placement in a correctional boarding school (възпитателно училище – интернат) had been in breach of Article 5 §1 of the Convention and that she had been unable to have it reviewed by a court at regular intervals in accordance with Article 5 §4 of the Convention. The applicant alleged that the authorities' decision to place her in the school had not been taken for educational purposes but as a punishment, that the system for teaching and support at the Podem school did not comply with the requirements of Article 5 § 1 (d) of the Convention, and that the choice of the measure had been arbitrary. She also complained, under Article 8, of the automatic monitoring of her correspondence and telephone calls at the correctional boarding school in which she had been placed. In conclusion, the Court considered that the measures to which the applicant was subjected in the Podem school, namely the system of automatic monitoring of correspondence, with no distinction as to the type of correspondence, and the supervision of telephone conversations, without any confidentiality, could not be regarded as necessary in a democratic society. There had therefore been a violation of Article 8 of the Convention, but no violation of Article 5 § 1 of the Convention. Also, in the case of children born anonymously, the issue of access to one's origins and to information on the identity of one's biological parents is different from that of access to a case record concerning a child in care or to evidence of alleged paternity (*Odièvre v. France, 2003*,[149] *§ 43; Godelli v. Italy, 2012, § 62*).[150] A national system which provided an applicant with access to non-identifying information on his mother and his biological family, enabling her to establish some her past history, without prejudice to third-party interests, accompanied by the possibility under recently enacted legislation to call on the services of an independent body mandated to help individuals to find their biological origins in order to secure the disclosure of her mother's identity, subject to the latter's consent, was deemed compatible with Article 8 (*Odièvre v. France*, 2003, § 49). Conversely, a system which gave blind preference to a mother's wish to remain anonymous and provided no means for an adopted child who had not been recognised at birth of applying for either access to non-identifying information on her origins or disclosure of her mother's identity, was found to be incompatible with the requirements of Article 8 (*Godelli v. Italy*, 2012, §§ 70–72).

And finally, in order to engage in the digital realm, which has become an integral part of children's lives, users may occasionally need to grant permission for their personal data (such as their name and date of birth) to be utilised by individuals, organisations, or governmental entities. This encompasses the manipulation of data for the specific intention of promoting products or services, as an illustrative example. Prior consent is necessary when utilising an individual's personal information. Parental consent is typically necessary for the collection and processing of children's data. After reaching a particular age, children may be required to give their

148 *D.L. v. Bulgaria*, 2016.
149 *Odièvre v. France*, 2003.
150 *Godelli v. Italy*, 2012.

consent either with their parents or on their own. National provisions will be replaced by new rules introduced with the General Data Protection Regulation. The European Data Protection Regulation[151] is applicable as of May 25th 2018 in all member states to harmonise data privacy laws across Europe. An outline of the current national rules, therefore provides a helpful basis for comparing future national regulations enacted by Member States. According to Article 8 of the GDPR, when processing personal data in relation to information society services offered directly to children under 16, consent shall be given or authorised by the holder of parental responsibility. Member States however, may provide for a lower age, though not below 13 years.[152]

Thus, the European Court of Human Rights requires that any collection, storage, or disclosure of personal data must be "in accordance with the law", pursue a "legitimate aim" and be "necessary in a democratic society", i.e., proportionate to the aim pursued and subject to effective safeguards against abuse.

13) Right to be heard and to express views. This matter is based on the principle that children have the right to express their views in any legal actions that impact their lives. Furthermore, it is a fundamental component of children's entitlement to get legal recourse. As stated in Article 12 (2) of the Convention on the Rights of the Child, individuals have the right to participate in legal processes either by themselves, through a representative, or through a suitable organisation, following the procedural regulations of their country. Therefore, it is the responsibility of the Member States to provide the necessary legislative provisions, while taking into account the principle of prioritising the child's best interests and their right to express their views. The ECtHR has made landmark rulings on child abuse and migrant child detention. This protection must be accessible, relevant, and guarantee application effectiveness, according to the European Court. Remember that the European Court considers national judicial remedies exhausted if a person has applied for rights protection to the first and second instance courts. Only when national institution appeals have failed to restore breached rights can state entities and their representatives be appealed to the European Court of Human Rights. The respondent state must enforce the judgment and strengthen its laws and courts once the Court has found a Convention violation. If the Court finds a violation of the Convention and its Protocols and the domestic law of the High Contracting Party provides only partial compensation for damages, the Court may award just satisfaction to the injured party, including expenses, material damage, and non-pecuniary damage (within reasonable limits). For purposes of the Convention proceedings, the term "just satisfaction" includes monetary awards to compensate an applicant's 1) pecuniary damage, i.e. financial losses which have actually been sustained by the applicant as a direct consequence of the violation; 2) non-pecuniary damage, i.e. those based on the applicant's mental suffering and distress stemming from the actions that violated the Convention; and finally, 3) the costs and expenses associated with bringing the Convention complaints to the attention of

151 Regulation (EU) 2016/679, 2016.
152 Consent to Use Data on Children, 2017.

the national authorities and the Court in Strasbourg.[153] The ECtHR will examine how the European Court of Human Rights applies the main principles – the priority of the child's best interests, including hearing the child – to the State's duty to children in various situations. A democracy must have a strong mechanism to promote and safeguard children's rights. Society cannot uphold the rule of law without it. As the most vulnerable members of society, children need special protection and respect in law and practice. The assessment should begin with family reunification whenever possible. Additionally, authorities cannot ask a Member State to be liable without first considering the child's best interests.[154] Judges should uphold the principle of affording children the opportunity to express their views on all topics that impact them, or at the very least, where they are considered to possess a satisfactory comprehension of the issues at hand. The methods employed for this objective should be tailored to the child's cognitive capacity and communication skills, while also considering the specific conditions of the situation. It is important to seek the input of children regarding how they would like to express their opinions.

The principle of 'ascertaining the views of the child'. Paragraph 72 of the case *N.T. and Others v. Georgia*[155] and paragraph 59 of the case *Saviny v. Ukraine*[156] provide as follows:

1. 'Article 12 of the Convention on the Rights of the Child – States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child';
2. 'In General Comment No. 12, "The right of the child to be heard", CRC/C/GC/12 of 20th July 2009, the Committee noted that the right of all children to be heard and taken seriously is one of the fundamental principles of the Convention';
3. The Committee emphasises that Article 12 does not set any age limit on the right of the child to express his or her views and does not encourage States parties to introduce age limits in law or practice that would undermine the right of the child to be heard in all matters affecting his or her interests (paragraph 21).

IV. The principle of "the right of the child to be heard". In the case of *Saviny v. Ukraine*, application no. 39948/06, the Court noted that at no stage of the proceedings did the judges hear the children (including O.S., who was thirteen years old in December 2004, when the case was being heard in the court of first instance was thirteen years

153 Erdal and Bakırcı, 2006, pp. 182–184.
154 Asylum Case Law, 2020, pp. 12–13.
155 *N.Ts. and Others v. Georgia*, 2016.
156 *Saviny v. Ukraine*, 2008.

old), and that as a result of the enforcement of the decision to remove the children from their parents, they were not only separated from their family but also placed in different institutions. Two of them were being raised in another city, far from Romny, where their parents, brothers and sisters lived, which made it difficult to maintain regular contact.

In a case of inter-country adoption with Italian adopters of Romanian children (case of *Pini and Others v. Romania*[157]), the Court was very clear on the right of the children to be heard and that their views be taken seriously:

> It must be pointed out that in the instant case the children rejected the idea of joining their adoptive parents in Italy once they had reached an age at which it could be reasonably considered that their personality was sufficiently formed and they had attained the necessary maturity to express their opinion as to the surroundings in which they wished to be brought up. The children's interests dictated that their opinions on the subject should have been taken into account once they had attained the necessary maturity to express them. The children's constant refusal, after they had reached the age of 10, to travel to Italy and join their adoptive parents carries a certain weight in this regard.

The Court concluded that the positive obligation on the authorities to enable the applicants to establish family ties with their adopted children was circumscribed by the best interests of the child. In finding that there had been no violation of Article 8, the Court emphasised that in a relationship based on adoption it was important that the child's interests prevail over those of the parents, since adoption meant providing a child with a family, not a family with a child.[158]

In the case of *Hokkanen v. Finland*,[159] a father claimed custody of his daughter, who had been living with her grandparents for years. The child did not want to live with her father, and the Court agreed that 'the child had become sufficiently mature for her views to be taken into account and that access should therefore not be accorded against her wishes'. In this case and in the case of *Mamchur v. Ukraine,*[160] the European Court recognised that the length of time a child spent with a grandparent could be an important factor in ensuring the best interests of the child.

14) Modern forms of slavery. Many children are exploited far away from their families, without people to look out for them or recognise the signs that they are being exploited.

Common forms of slavery of children include[161]:

- Children abused in prostitution, pornography, or other forms of sexual exploitation

157 *Pini and Others v. Romania*, 2004.
158 The Best Interests of the Child: A Dialogue between Theory and Practice, 2016, p. 114.
159 *Hokkanen v. Finland*, 1994.
160 *Mamchur v. Ukraine*, 2015.
161 Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, 2022.

- Children forced into begging, petty crime, or the drug trade
- Forced labour exploitation in the private economy, for e.g., in agriculture, factories, construction, brick kilns, mines, bars, the tourist industry, or in private homes
- Children forced to take part in armed conflicts. This includes not only child soldiers, but also porters or girls taken as "wives" for soldiers and militia members
- Children forced to marry. Anyone under 18 who doesn't consent to a marriage (or doesn't fully understand consent), is exploited within their marriage, or is not able to leave, is living in slavery. Of the children in modern slavery, nearly nine million are in forced marriage.

The case concerns where the present applications concern the prosecution of the (then) minor applicants, both of whom were recognised as victims of trafficking by the designated Competent Authority, for criminal offences connected to their work as gardeners in cannabis factories.[162] With specific regard to the protection of victims of human trafficking, Directive 2011/36/EU[163] clarifies that the child's best interests shall be a primary consideration. The same principle is provided by Article 24(2) EU Charter, as well as by Article 25(6) of the Recast APD[164]. Directive 2011/36/EU provides also that Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support, and protection (Article13(2)).

15) Climate change. On September 26th 2023, the European Court of Human Rights heard a landmark case involving six Portuguese children and young people aged 11–24 to hold governments accountable for their climate pledges under the 2015 Paris Agreement. On September 27th the Court heard the Duarte Agostinho case, the first climate change case and the first against so many governments. It was a landmark for children's rights and the world. Save the Children filed a third-party intervention with the Court in May 2021 and has continuously monitored the matter. Six young applicants – André (15), Catarina (23), Cláudia (24), Mariana (11), Martim (20), and Sofia (18) – claimed that 32 European countries were failing to meet their 2015 Paris Agreement commitments by failing to take adequate measures to keep global warming below 1.5°C. They further claimed that the governments' inactivity undermined their European law rights to life and a healthy, protected environment. The first climate change case before the European Court of Human Rights was submitted in September 2020. If successful, governments will be legally required to confront the climate catastrophe. The Court gave the matter priority and referred it to the Grand

162 *V.C.L. and A.N. v. the United Kingdom*, 2021.
163 Directive 2011/36/EU, 2011.
164 Directive 2013/32/EU, 2013.

Chamber due to the gravity of the issues raised.[165] On April 9th 2024, the European Court declared the application inadmissible. With respect to extraterritorial jurisdiction, the Court found no grounds to expand the judicial application as requested by the applicants. Territorial jurisdiction was therefore only established with respect to Portugal, and the complaint was declared inadmissible against other respondent States. Nonetheless, because the applicants had failed to exhaust domestic remedies in Portugal, the complaint against Portugal was also deemed inadmissible.

Also, the European Court of Human Rights ruled[166] that the Ukrainian government had failed to carry out an environmental impact study before turning the street where Natalya and her family lived into a motorway. No efforts were made to reduce the road's harmful impact. Natalya was excluded from the decision-making process. This was a violation of her rights. The self-interest of young citizens – the inheritors of the environment – should be recognised in protecting the natural environment; promote and safeguard socially recognised morals and traditional values; and recognise the right of young people to reside wherever in the world.[167]

4.2. Challenges in Enforcing Children's Rights Under the ECHR

In *R.B. v. Estonia,*[168] the European Court of Human Rights stated that international instruments require investigations and criminal proceedings to protect the best interests and rights of children, which requires child-friendly and protective measures for child victims. The Court believes that ensuring children's testimony during the pre-trial investigation and trial is essential to protecting their rights under international law. The Estonian rule on advising witnesses of their responsibilities does not take age into account; hence, child witnesses are not exempt. The Council of Europe Committee of Ministers' Guidelines for Child-Friendly Justice state that the absence of an oath or similar declaration or other child-friendly procedural measures should not diminish the importance of a child's testimony or evidence. In this case, the applicant's testimony was inadmissible due to rigorous procedural standards that did not distinguish between adults and children. The Court found that the domestic authorities' "procedural response" to the applicant's allegations of rape and sexual abuse by her father did not sufficiently take into account her vulnerability and relevant needs as a young child to protect her effectively. Thus, without judging the accused's guilt, the Court found that the criminal law mechanisms were generally implemented in the present case defective, resulting in the case's procedural resolution and a breach of the State's positive obligations under Articles 3 and 8 of the Convention.[169] The ECtHR established that the Estonian justice system had failed to be child-friendly as it had not taken the child's particular vulnerability and corresponding needs into account. On the contrary, it strictly applied the rules concerning the children's testimony,

165 *Duarte Agostinho and Others v. Portugal and Others*, 2020.
166 *Grimkovskaya v. Ukraine*, 2011.
167 Shumulo, 2021.
168 *R.B. v. Estonia*, 2021.
169 Ohliad rishennia YeSPL u spravi "R.B. proty Estonii", 2021.

which do not distinguish between children and adults. This resulted in a violation of the two provisions. The judgment is important for reminding the contracting states that although they have the difficult task of dealing with very sensitive cases, they can adequately protect the rights and needs of children through an effective child-friendly justice system.

Taking Ukraine as an example, where Article 21 of the law provides for the issuance of a restraining order against the offender.[170] The victim, his or her representative, and, in the case of gender-based violence against a child, the child's parents or other legal representatives, relatives (grandparents, adult brother or sister), stepmother or stepfather, and guardianship and custody authority can apply to the court for a restraining order. Restraining orders temporarily restrict the abuser's rights or impose obligations on him or her, such as restricting communication with the affected child or prohibiting him or her from approaching the residence (stay) within a certain distance. Restraining orders last one to six months. If the offender is under 18 years of age on the day of issuance, a restraining order may not restrict their right to reside or stay at their permanent residence. Preventive registration and work with the criminal are required by law by the authorised unit of the National Police of Ukraine. The Ukrainian Ministry of Internal Affairs approves the preventative registration, work, and removal process. Article 21 of the Law requires local state administrations and self-government bodies to implement offender programmes. Offenders' programmes for child offenders take into account children's age and psychology. The child offender may be temporarily put with relatives, in a foster care family, or in a child institution to prevent gender-based violence and guarantee programme implementation. Offenders' programmes are implemented by trained specialists. The court may refer the criminal to a three-month to one-year offender programme.[171]

It was noted that the Assembly should seek to do more, in the coming years, to encourage national parliaments and parliamentarians to develop the structures and capacity to actively monitor and hold governments to account for the timely and effective implementation of ECtHR judgments and of the Convention as a whole. Constantinos Efstathiou has recommended further initiatives to develop parliamentary capacity for performing this important democratic function, in furtherance of the respect for the rule of law and human rights. As part of this, he proposed that the Assembly step up its engagement with national parliaments, including through the involvement of the work of the Sub-Committee on the implementation of judgments of the ECtHR and of the future rapporteurs dealing with this file.[172]

170 Pro zabezpechennia rivnykh prav ta mozhlyvostei zhinok i cholovikiv, 2005.
171 Ibid.
172 Efstathiou, 2023.

5. Strengths and Weaknesses of the ECHR in Protecting Children's Rights

It is appropriate to concur with Helland, T., & Hollekim, R. that quantitative findings reveal no statistical indications that the UNCRC profoundly impacts ECtHR decisions. There are no correlations between using the UNCRC actively in deliberations within the Court. Consequently, it can be concluded that the UNCRC has an active role in developing the field of children's rights within the ECtHR. When discussing the development of children's rights in the ECtHR, it is vital to keep in mind that differing positions appear to exist within the ECtHR regarding the direction judges believe the Court should move in the field of children's rights (for example, see section 5b(III)). There are also differences in the extent of the use of the UNCRC as an argument from case to case, from party to party, and from judge to judge. It is therefore to be expected that the UNCRC will have a more significant impact in some cases than in others. Regardless, as underlined by the dissenting judges in *Strand Lobben and others*[173] (para 17, 98), an understanding seems to exist among judges that the UNCRC is an essential instrument in developing children's rights in the ECtHR.[174] Through its judgment in the *Strand Lobben v. Norway* case, the judgment in Strand Lobben and *Others v. Norway* emphasized that a care order should be regarded as a temporary measure, and that reunification of the natural parents and the child should always, except in extreme cases, be an aim. This notion of reunification expresses that the bond between parents and children is a deep-rooted human value. By stressing reunification as a rule, the Court set an ethical duty frame for the Court's judgments. This message to Norway has resulted in adjustments to the country's child welfare law and policy. Even though we are in the legal realm here, the message is moral. Norway has been told that its practices have had moral shortcomings concerning respect for important family values.[175]

As a general conclusion, it should be noted that the best interests principle is presently not being used to its full potential. The European Court of Human Rights itself has undertaken an extensive study dedicated solely to examining the use of the best interests principle in its own case law. This internal analysis by the ECtHR implicitly admits its complexity and apparent inconsistencies, suggesting ways to improve its incorporation into judicial reasoning and national legal systems. Thus, a deeper investigation is needed to identify the systemic and contextual barriers to the principle's consistent application and to develop concrete, actionable recommendations for fostering its more robust, holistic, and consistent integration across all child-related decision-making processes to ensure its full and effective implementation. Over the past thirty years, the Court has repeatedly used the best interests of the child principle in its judgments, especially in relation to Article 8 of the ECHR and the

173 *Strand Lobben and Others v. Norway*, 2019.
174 Helland and Hollekim, 2023, pp. 213–233.
175 Netland, 2023, p. 221.

right to private and family life. However, due to the absence of any literal reference to the best interest principle in the ECtHR, the principle's internal high flexibility opens the way for the principle itself to be used in a controversial manner. When examining the use of this principle, an overarching problem that affects almost all decisions is clearly visible: the lack of references to the rights of the child enshrined in the Convention on the Rights of the Child. Although the Court mentions the CRC as a source of interpretation of the ECHR, it does not interpret Article 8 of the ECHR in the light of the specific rights of the child provided for in the CRC. However, when comparing different judgments, the Court, firstly, by referring to the child's right to family life, implicitly attaches different meanings to this right. However, different concepts of family life, not only actual family life, but also family life based on biological ties, give rise to different rights that may contradict each other. For example, a child's right to family life as the right to maintain ties with biological parents may conflict with a child's right to family life as the right to the legal recognition of ties with social parents. The court does not always indicate which type of right to family life is in question. The second problem with the application of the principle of the best interests of the child, which follows from the analysis of the ECtHR judgments, is that the child almost never appears as an active participant in the proceedings. In the Court's assessment of the child's individual circumstances, his or her opinion is mostly absent. While, on the one hand, it must be acknowledged that the Court has limited opportunities to hear the child, on the other hand, it is noticeable that the Court never questions the lack of participation of the child in domestic proceedings. Thus, the passive role of the child in the Court's determination of his or her best interests is evident in both substantive and procedural terms.

Much of this is due to the fact that international courts are inherently in a more ill-equipped position than national authorities to assess what is in the child's best interests in a certain situation. Underlying the suggestions that were made here is one comprehensive idea: when it comes to the use of the principle, international courts should take a more restrained position in favour of these national authorities. However, from the case law, it becomes equally clear that these national authorities do not always give proper consideration to this principle.

5.1. Recommendations for Improving Children's Rights Protection Under the ECHR

The ECtHR, together with national governments, NGOs and civil society, should ensure that the ECHR is an effective and dynamic instrument for the protection of the honour, dignity, well-being and human rights of the child in Europe. First of all, the principles of the UNCRC should be strengthened and explicitly integrated into the ECtHR's practice, i.e., the ECtHR should not only refer to the UNCRC but systematically integrate its specific provisions into its decisions (e.g., the principle of the best interests of the child). Secondly, to strengthen the participation and representation of children in judicial proceedings, taking into account their evolving capacities, by requiring the ECtHR to actively examine national judicial proceedings for the actual participation of children and to identify violations where children's views are

systematically not taken into account, in particular in cases of adoption, guardianship, or placement of children. Thirdly, to give priority to the prompt and effective resolution of cases involving children, for example in cases related to child custody, return under the Hague Convention or family reunification, which are inherently detrimental to the best interests of the child, and the ECtHR should continue to emphasise the principle of prompt resolution of cases involving children, more frequently identify violations where national authorities fail to act with due diligence, and in cases of return under the Hague Convention, promote the establishment of national mechanisms for the rapid, individualised assessment of the child's integration into the new environment, as such factors become more important over time and may justify non-return if the delay is significant. It is not uncommon for children to spend long periods of time in the asylum state while return and appeal procedures are ongoing. The more integrated a child becomes, the more difficult it is to present the issue of return as merely an indirect consequence. Therefore, proceedings under the Hague Convention, due to their specific nature, are best seen as hybrid, as they have the potential to evolve from indirect to direct impact on the children concerned. In the event of such a delay, the safeguards offered by the Hague Convention and Article 8 can no longer be considered equivalent, making it difficult to distinguish between the procedural and substantive obligations arising from the latter provision.[176] Fourthly, the ECtHR should continue to strongly enforce states' compliance with positive obligations on reasonable accommodation for children with disabilities and actively combat direct and indirect discrimination against all vulnerable children (including ethnic minorities and migrants) in access to fundamental rights such as education health and family life, and to broaden the assessment of "reasonable accommodation" beyond physical access to include adequate specialist assistance, appropriate educational environments and culturally sensitive services, and to hold the state accountable for systemic violations, not just isolated acts of discrimination. In order to prevent child rights violations, it is important that all children are brought up in an environment that upholds the principle of equal rights for all children. Their place of residence does not matter. Fifthly, in the context of complex family forms, such as cross-border surrogacy or unclear paternity, the ECtHR should consistently require states to comply with their obligations under Articles 7 and 8 of the Convention on the Rights of the Child (right to nationality and identity) and Article 8 of the ECHR, by advocating for national legislative reforms to clarify legal paternity in surrogacy agreements, ensure automatic recognition of the nationality of children born through ART, and establish mechanisms for children to access information about their biological origin, in line with the decisions in *Mitrevska v. North Macedonia* and *Odièvre v. France*. Sixthly, to strengthen the protection of children's digital rights and data privacy: given the widespread participation of children online, the ECtHR should continue to develop its Article 8 ECHR jurisprudence on children's digital privacy and data protection, building on Convention 108+ and the principles of the GDPR, and advocate for stricter

176 McEleavy, 2015, pp. 365–405.

national regulation of the collection, processing and disclosure of data concerning children, requiring clear and age-appropriate consent, robust cybersecurity and effective remedies against exploitation and breaches of privacy in the Internet. Seventhly, to promote ethical media representation of children and public awareness: children as a social group have a low profile in the media, especially the youngest children and children belonging to ethnic and linguistic minorities. Non-European children are consistently portrayed in situations of conflict, danger, abandonment, or war, and are often portrayed in a misleading light, as victims of abuse or crime, or as children in dire straits. Reports very rarely focus on the percentage of immigrant children in schools, the daily challenges of integration, the different ways in which social inclusion is promoted, or the cultural and human enrichment that these children can experience through interaction with other children.[177]

6. Conclusions

The European Court of Human Rights is the key body for the protection of children's rights in Europe, interpreting the European Convention on Human Rights as a dynamic "living instrument" to provide protection to all persons, including children, whose vulnerability requires special safeguards. This role has evolved in different stages, from early implicit protection against inhuman treatment (Article 3) to the systematic integration of the principles of the UNCRC, in particular the "best interests of the child" of Article 3, into its case law, thereby enriching the interpretation of core ECHR provisions such as Article 8 (private and family life) and Article 2 of Protocol No. 1 (right to education). There is understanding among judges that the UNCRC is an important tool for the development of children's rights within the ECHR, enriching its interpretation of the ECHR. This commitment allows the Court to develop new standards for the protection of human rights from a child's perspective, as evidenced by its decisions on family reunification (*Strand Lobben v. Norway*), which emphasise the profound human value of the bond between parents and children and which influence national legislation and policy. Thus the Court can take on a stronger role in addressing complex issues of vulnerability through case law, actively combating discrimination against children, as seen in the case of *D.H. and Others v. the Czech Republic* (2007), which emphasised a commitment to equal access to fundamental rights and clearly rejected practices that cause 'emotional, psychological and educational harm'. The stage of the 21st century includes the recognition of the inheritance rights of children born out of wedlock (*Fabris v. France* (2013)) and the continuation of a firm line against discriminatory treatment (*Marckx v. Belgium and Mazurek v. France*).

In its judgments, the ECtHR has consistently reaffirmed the fundamental nature of the rights to life of children, freedom from torture, and preservation of family ties, even for newborns and in complex family structures. It has strongly enforced

177 The Rights of Children in Italy: Perspectives, 2009, p. 22.

the prohibition of discrimination (Article 14), actively fought segregation (*Oršuš v. Croatia*), ensured access to inclusive education for children with disabilities (*G.L. v. Italy, Çam v. Turkey*), and required reasonable accommodation (*Enver Şahin v. Turkey*). In addition, the Court's position on the state's responsibility for effective investigation (*M.S. v. Ukraine*), protection from violence (*Landi v. Italy*), and provision of education in conflict zones (*Catan v. Moldova and Russia*) demonstrates its commitment to both negative and positive obligations. Importantly, the ECtHR requires national authorities to conduct a thorough, impartial analysis of family situations, prioritising the interests of the child over the claims of the parents, even if this contradicts national "presumptions in favour of the mother" in child custody disputes.

The European Court of Human Rights links the best interests of the child to the national judicial authorities, striking a fair balance between the competing interests at stake: the interests of the child, both parents, and public policy, with the best interests of the child being the priority. Importantly, the effective application of the "best interests of the child" principle often depends on accurate age and identity assessments (*M.B. v. Spain, Mohamed Jama v. Malta*), where procedural failures at national level can undermine these rights, and although children can technically submit applications to the ECtHR, practical obstacles mean that most applications are indirect. However, the ECHR's approach to the principle of the best interests of the child has weaknesses. This principle is not currently fully utilised, and the ECtHR does not provide clear and direct references to specific rights enshrined in the UNCRC when interpreting Article 8 of the ECHR. The problem also arises in the passive role of the child in ECHR proceedings, i.e. children are almost never active participants, and their opinions are largely absent from the Court's assessment of the circumstances of the cases. The Court rarely questions national proceedings without child participation. Passivity violates the child's "subjective right" to their best interests. Instead of relying solely on parental representation, national and international judicial systems must develop stronger mechanisms to ensure children's direct participation in proceedings that affect them, taking into account their evolving capacities and ensuring that their views are heard and taken seriously. All cases are considered individually by the ECtHR, but the child's age, material conditions of imprisonment, and length of detention are consistent criteria. The ECHR has undoubtedly become a key institution for the protection of children's rights in Europe. The ECtHR has created a solid base of case law that not only develops new standards but also strengthens existing ones. The ECHR also sets appropriate standards, but their effective implementation by member states at the national level remains questionable. Along with these problems, new challenges arise, such as those related to the digital environment, migration or climate change, which require constant adaptation and interpretation from the perspective of children's rights. In essence, the ECHR is an important pillar of the European child protection system, constantly interpreting the ECHR so that children's rights are not only recognised on paper but also effectively guaranteed in their everyday lives.

The right to education under Article 2 of Protocol No. 1 is extremely important, requiring states to ensure access to existing facilities (*Ponomaryovs v. Bulgaria*) and to

prevent discrimination, even if this is not explicitly stated in the ECHR; ECHR cases, including *Memlika v. Greece* (exclusion from education due to misdiagnosis), *G.L. v. Italy* (refusal to provide specialised assistance for autism), *Çam v. Turkey* (refusal of admission to a conservatory due to blindness) and *Oršuš and Others v. Croatia* (segregation of Roma children) emphasise the positive obligation to create conditions for access to education for all children and to avoid direct/indirect discrimination. Recognising the difficulties in implementing these rights, particularly in the context of migration, war (case of *Catan and Others v. Moldova and Russia*), and socio-economic disparities (discrimination against Roma children in Hungary). The protection of family life provided for in Article 8 extends not only to marriage but also to de facto relationships, with family ties existing from birth (*Keegan v. Ireland*), requiring States to promote the development of these ties (*Eriksson v. Sweden, Amanalacoyai v. Romania*), and condemning the automatic deprivation of parental rights (*M.D. and Others v. Malta*) or disproportionate interference in custody cases (*Haas v. Germany, Cînța v. Romania* for restrictions based on mental illness).

Thus, in view of the above and *de lege ferenda*, continuous improvement in the protection of children's rights is required:

1. It is necessary to develop and implement more reliable mechanisms that allow children to participate directly in court proceedings, taking into account their age and maturity. The ECtHR should actively monitor the effectiveness of such mechanisms at the national level. For example, in the case of *Saviny v. Ukraine*, application no. 39948/06, the Court noted that at no stage of the proceedings did the judges hear the children (including O.S., who was thirteen years old in December 2004, when the case was being heard in the court of first instance was thirteen years old), and that as a result of the enforcement of the decision to remove the children from their parents, they were not only separated from their family but also placed in different institutions.
2. ECtHR and National legal systems of European countries should facilitate creation mechanisms for direct participation of children in court proceedings, adapting to their abilities and establishing clear, child-friendly procedural safeguards. The state authorities, under the supervision of the ECtHR, should consistently apply the "best interests" principle by conducting thorough, individual assessments that are not undermined by procedural errors (e.g., in determining age, as in *M.B. v. Spain*, *Mahamed Jama v. Malta*) or the lack of effective remedies.
3. European states should develop strategies to protect children from discrimination and insecurity, strengthen social support (right to family), ensure access to quality education (including accommodation for children with disabilities), and actively combat with exploitation of surrogacy (as highlighted in Directive 2024/1712).
4. In cases concerning the return of children, long delays should be considered an aggravating circumstance that may violate the child's right to family life, taking into account their integration into a new environment. It is essential

that persons who make decisions concerning children (judges, social workers, police officers, mediators) receive specialised training on the application of the principle of the best interests of the child and child-centred working methods.

5. Promoting transparency and access to identity information, i.e. balancing the anonymity of the donor in ART with the right of the child to know his or her origins, and providing a reliable framework for identification and nationality, especially in complex situations such as cross-border surrogacy, to reduce the risks of statelessness and legal uncertainty (*Mennesson v. France, K.K. and Others v. Denmark*).
6. The media needs to provide information about children in a responsible manner, especially those who belong to vulnerable groups (migrants, national minorities), That is, not to emphasise that they are victims, but focusing instead on their personalities and potential. Finally, national governments should actively identify and remove systemic barriers (e.g., corruption, lack of resources, outdated legislation) that impede the effective implementation of children's rights and their protection.

Thus, the ECtHR, as a key institution for the protection of children's rights, needs to improve its internal methodology for applying the principle of the best interests of the child and to more actively encourage states to develop comprehensive, child-centred national justice systems, which are critical for the realisation of every child's rights in the changing European context.

Bibliography

Bielousov, Yu., Shvets, Z., Semeniuk, V., Chuprov, V., Shvets, S. (2016) *Dotrymannia prav vrazlyvykh hrup naselennia (narkozalezhni ta pratsivnyky komertsiinoho seksu) u diialnosti pravookhoronnykh orhaniv: analitychnyi zvit za rezultatamy doslidzhennia*. Kyiv: Palyvoda A.V.

Bittoni, G. (2023) 'Surrogacy Arrangements: Can Article 8 of the ECHR Combat Child Statelessness?', *European Network on Statelessness Blog* [Online]. Available at: https://www.statelessness.eu/updates/blog/surrogacy-arrangements-can-article-8-echr-combat-child-statelessness (Accessed: 27 July 2024).

Charter of Fundamental Rights of the European Union (2000/C 364/01) (2000) *Official Journal of the European Communities*, C 364, pp. 1–22.

Committee on Legal Affairs and Human Rights (2023) *Implementation of Judgments of the European Court of Human Rights*. Rapporteur: Mr Constantinos Efstathiou. Doc. 15742, 11 April 2023. Strasbourg: Parliamentary Assembly of the Council of Europe.

Committee on the Rights of the Child (2013) *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, adopted by the Committee at its Sixty-Second Session (14 January–1 February 2013)* [Online]. Available at: https://www.refworld.org/legal/general/crc/2013/en/95780 (Accessed: 27 May 2024).

Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016) *Official Journal of the European Union*, C 202, pp. 1–388.

Council of Europe (2010) *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* [Online]. Available at: https://rm.coe.int/16804b2cf3 (Accessed: 27 July 2024).

Council of Europe (2018) *Convention 108+: Convention for the Protection of Individuals with Regard to the Processing of Personal Data as Modernised by the Amending Protocol CETS No. 223* [Online]. Available at: https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1 (Accessed: 23 July 2024).

Council of Europe (2018) *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment: Recommendation CM/Rec(2018)7* [Online]. Available at: https://rm.coe.int/guidelines-to-respect-protect-and-fulfil-the-rights-of-the-child-in-th/16808d881a (Accessed: 23 July 2024).

Council of Europe (2022) *CM/Del/Dec(2022)1451/H46-30 – 1451st Meeting (DH), December 2022 – Catan and Others Group v. Russian Federation (Application No. 43370/04)* [Online]. Available at: https://search.coe.int/cm#{%22CoEReference%22:[%22CM/Del/Dec(2022)1451/H46-30%22],%22sort%22:[%22CoEValidationDate%20Descending%22],%22CoEIdentifier%22:[%220900001680a93866%22]} (Accessed: 23 July 2024).

Council of Europe (2022) *Council of Europe Strategy for the Rights of the Child (2022–2027): Children's Rights in Action: From Continuous Implementation to Joint Innovation* [Online]. Available at: https://search.coe.int/cm#{%22CoEIdentifier%22:[%2209000001680a5a064%22],%22sort%22:[%22CoEValidationDate%20Descending%22]} (Accessed: 23 July 2024).

Daly, A., Ruxton, S., Schuurman, M. (2016) *Challenges to Children's Rights Today: What Do Children Think? A Desktop Study on Children's Views and Priorities to Inform the Next Council of Europe Strategy for the Rights of the Child*. Strasbourg: Council of Europe [Online]. Available at: https://rm.coe.int/1680643ded (Accessed: 23 July 2024).

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2002/629/JHA (2011) *Official Journal of the European Union*, L 101, pp. 1–11.

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) *Official Journal of the European Union*, L 180, pp. 60–95.

Duarte Agostinho and Others v. Portugal and Others (Application No. 39371/20) (2020) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13724%22]} (Accessed: 23 July 2024).

Dute, J. (2008) 'ECHR 2008/8. Case of *Kearns v. France*, 10 January 2008, No. 35991/04 (Third Section)', *European Journal of Health Law*, 15(2), pp. 214–217.

Erdal, U., Bakırcı, H. (2006) *Article 3 of the European Convention on Human Rights: A Practitioner's Handbook*. Geneva: World Organisation Against Torture (OMCT).

European Union Agency for Fundamental Rights (FRA) (2017) *Consent to Use Data on Children* [Online]. Available at: https://fra.europa.eu/it/publication/2017/mapping-minimum-age-requirements-concerning-rights-child-eu/consent-use-data-children (Accessed: 23 July 2024).

European Union Agency for Fundamental Rights, Council of Europe, European Court of Human Rights (2022) *Handbook on European Law Relating to the Rights of the Child*. Luxembourg: Publications Office of the European Union [Online]. Available at: https://www.echr.coe.int/documents/d/echr/handbook_rights_child_eng (Accessed: 27 July 2024).

Fenton-Glynn, C. (2020) 'The Right to Education' in *Children and the European Court of Human Rights*. Oxford: Oxford University Press, pp. 146–187; https://doi.org/10.1093/oso/9780198787518.003.0006.

Fortin, J. (2009) *Children's Rights and the Developing Law*. 3rd edn. Cambridge: Cambridge University Press.

Freeman, M. (2020) *A Magna Carta for Children? Rethinking Children's Rights*. Cambridge: Cambridge University Press.

Havrylenko, O.A., Renov, Ye.V. (2023) 'Stanovlennia ta Rozvytok Peredumov Mizhnarodno-Pravovoho Zakhystu Vrazlyvykh Hrup Naselennia: Istoryko-Yurydychnyi Dyskurs', *Naukovyi Visnyk Uzhhorodskoho Natsionalnoho Universytetu. Seriia Pravo*, 76(2), pp. 202–211; https://doi.org/10.24144/2307-3322.2022.76.2.33.

Helland, T. (2019) *Care Order Cases in the European Court of Human Rights: Parents' vs. Children's Rights*. Master's thesis. Bergen: University of Bergen.

Helland, T., Hollekim, R. (2023) 'The Convention on the Rights of the Child's Imprint on Judgments from the European Court of Human Rights: A Negligible Footprint?', *Nordic Journal of Human Rights*, 41(2), pp. 213–233; https://doi.org/10.1080/18918131.2023.2204634.

International Divorce (n.d.) *Divorce in Europe* [Online]. Available at: https://www.international-divorce.com/europe.htm (Accessed: 23 July 2024).

International Labour Organization, Walk Free, International Organization for Migration (2022) *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* [Online]. Available at: https://cdn.walkfree.org/content/uploads/2022/09/12142341/GEMS-2022_Report_EN_V8.pdf (Accessed: 27 July 2024).

Khort, I.V. (2021) 'Zaborona katuvan ta inshi formy zhorstokoho povodzhennia chy pokarannia: natsionalni ta mizhnarodni standarty' [Online]. Available at: https://conf.ztu.edu.ua/wp-content/uploads/2021/10/48.pdf (Accessed: 30 May 2024).

Khrystova, H.O. (2019) *Doktryna pozytyvnykh zoboviazan derzhavy u sferi prav liudyny*. Doctoral dissertation. Kharkiv: Natsionalnyi Yurydychnyi Universytet imeni Yaroslava Mudroho.

Kilkelly, U. (2001) 'The Best of Both Worlds for Children's Rights: Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child', *Human Rights Quarterly*, 23(2), pp. 308–326.

Kilkelly, U. (2010) 'Protecting Children's Rights Under the ECHR: The Role of Positive Obligations', *Northern Ireland Legal Quarterly*, 61(3), pp. 245–261; https://doi.org/10.53386/nilq.v61i3.453.

Kvisberg, T.E. (2019) 'Child Abduction Cases in the European Court of Human Rights – Changing Views on the Child's Best Interests', *Oslo Law Review*, 6(2), pp. 90–106; https://doi.org/10.18261/issn.2387-3299-2019-02-02.

Lambert, E., Ozlu, C.E. (2019) 'Just Satisfaction (ECtHR)' in Max Planck Encyclopedia of International Procedural Law. Oxford: Oxford University Press.

Leloup, M. (2019) 'The Principle of the Best Interests of the Child in the Expulsion Case Law of the European Court of Human Rights: Procedural Rationality as a Remedy for Inconsistency', *Netherlands Quarterly of Human Rights*, 37(1), pp. 50–68; https://doi.org/10.1177/0924051918820986.

Letsas, G. (2012) 'The ECHR as a Living Instrument: Its Meaning and Its Legitimacy' [Online]. Available at: https://ssrn.com/abstract=2021836 (Accessed: 27 July 2024); https://doi.org/10.2139/ssrn.2021836.

Levy, R.E., Somek, A. (2001) 'Paradoxical Parallels in the American and German Abortion Decisions', *Tulane Journal of International and Comparative Law*, 9, pp. 109–166.

Lutsan, A.V. (2022) 'Zakhyst prav zhinok v umovakh zbroinykh konfliktiv', *Pravo i Suspilstvo*, 6, pp. 299–306; https://doi.org/10.32842/2078-3736/2022.6.45.

Manina, M.A. (2013) 'Osobysti prava dytyny', *Aktualni Problemy Vitchyznianoi Yurysprudentsii*, 4, pp. 49–56.

McEleavy, P. (2015) 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?', *Netherlands International Law Review,* 62(3), pp. 365–405; https://doi.org/10.1007/s40802-015-0040-z.

McGoldrick, D. (1991) 'The United Nations Convention on the Rights of the Child', *International Journal of Law and the Family,* 5(2), pp. 132–169.

Melesh, Ye. (2022) 'Rezoliutsiia Yevroparlamentu "Vplyv viiny proty Ukrainy na zhinok": ohliad' [Online]. Available at: https://jurfem.com.ua/resoluitsia-evroparlamentu-vplyv-viyny-protyukrainy-na-zhinok/ (Accessed: 27 May 2024).

Mugabi, I. (2023) *Right to Life Cases in the Jurisprudence of the European Court of Human Rights: A Critical Analysis* [Online]. Available at: https://doi.org/10.2139/ssrn.4392294 (Accessed: 27 July 2024).

Netland, G. (2023) 'Norwegian Child Welfare Cases in the European Court of Human Rights – An Ethical Perspective on the Judgments' in Nordby, H., Netland, G., Halsa, A. (eds.) *Child Welfare and the Significance of Family.* Oslo: Cappelen Damm Akademisk, pp. 203–223; https://doi.org/10.23865/noasp.209.ch9.

Oganesian, T. (2024) 'The Doctrine of the Living Instrument and Evolutionary Interpretation in the Case-Law of the European Court of Human Rights', *Proceedings of Southwest State University. Series: History and Law,* 14(1), pp. 113–122; https://doi.org/10.21869/2223-1501-2024-14-1-113-122.

Overview of the ECHR Judgment in the Case R.B. v. Estonia (Application No. 22597/16) [Online]. Available at: https://jurfem.com.ua/wp-content/uploads/2022/08/%D0%9E%D0%B3%D0%BB%D1%8F%D0%B4%D0%84%D0%A1%D0%9F%D0%9B_%D0%A0.%D0%91.%D0%BF%D1%80%D0%BE%D1%82%D0%B8%D0%95%D1%81%D1%82%D0%BE%D0%BD%D1%96%D1%97.pdf (Accessed: 27 May 2024).

Parliamentary Assembly of the Council of Europe (2014) *Resolution 2010 (2014) Child-Friendly Juvenile Justice: From Rhetoric to Reality* [Online]. Available at: https://www.publichne-pravo.com.ua/files/45/11.pdf (Accessed: 27 July 2024).

Patsianta, K. (2017) 'European Court of Human Rights and Right to Respect for Family Life: The Role of the Best Interests of the Child in Establishing Equality Between Divorced Parents', *Canadian Journal of Children's Rights,* 4(1), pp. 48–70; https://doi.org/10.22215/cjcr.v4i1.93.

Pichon, J. (2006) 'Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment *Vo v. France*', *German Law Journal,* 7(4), pp. 433–444; https://doi.org/10.1017/S2071832200004764.

Pobjoy, J.M. (2015) 'The Best Interests of the Child Principle as an Independent Source of International Protection', *International and Comparative Law Quarterly,* 64(2), pp. 327–363; https://doi.org/10.1017/S0020589315000044.

Ponomaryov and Others v. Bulgaria (Application No. 5335/05), Judgment of 10 February 2009, European Court of Human Rights (2009) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-91605%22]} (Accessed: 29 July 2024).

Pozihun, I.O. (2022) 'Mizhnarodni standarty zakhystu prav ditei', *Pivdennoukrainskyi Pravnychyi Chasopys,* 4(3), pp. 158–163; https://doi.org/10.32850/sulj.2022.4.3.26.

Pro zabezpechennia rivnykh prav ta mozhlyvostei zhinok i cholovikiv: Zakon Ukrainy vid 8 veresnia 2005 roku No. 2866-IV (2005) [Online]. Available at: https://zakon.rada.gov.ua/laws/show/2866-15#Text (Accessed: 27 July 2024).

Protection and Legal Rights for Disabled People: From Constitutional Rights to Further Legal Claims (2023) *Revista*, 2023/1, p. 31.

Recommendation CM/Rec*(2018)5 of the Committee of Ministers to Member States Concerning Children with Imprisoned Parents* (2018) [Online]. Available at: https://edoc.coe.int/en/children-s-rights/7802-recommendation-cmrec20185-of-the-committee-of-ministers-to-member-states-concerning-children-with-imprisoned-parents.html (Accessed: 27 July 2024).

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (2016) *Official Journal of the European Union*, L 119, pp. 1–88.

Re-Jus Project (2018) *Re-Jus Casebook: Effective Justice in Asylum and Immigration*. Brussels: European Union [Online]. Available at: https://www.rejus.eu/sites/default/files/content/materials/rejus_casebook_effective_justice_in_asylum_and_immigration.pdf (Accessed: 27 July 2024).

Shumilo, I.A. (2018) *Mizhnarodna systema zakhystu prav liudyny: navchalnyi posibnyk*. Kyiv: FOP Holembovska O.O. [Online]. Available at: https://nlu.edu.ua/wp-content/uploads/2021/05/msc_1_copy-1.pdf (Accessed: 23 July 2024).

Sicilianos, L.A. (2020) 'Interpretation of the European Convention on Human Rights: Remarks on the Court's Approach', *Seminar on the Contribution of the European Court of Human Rights to the Development of Public International Law*, Prague, 2020 [Online]. Available at: https://rm.coe.int/interpretation-of-the-european-convention-on-human-rights-remarks-on-t/1680a05732 (Accessed: 23 July 2024).

Simeinyi Kodeks Ukrainy (2002) *Vidomosti Verkhovnoi Rady Ukrainy*, No. 21–22, Art. 135 [Online]. Available at: https://zakon.rada.gov.ua/laws/show/2947-14#Text (Accessed: 23 July 2024).

Sormunen, M. (ed.) (2016) *The Best Interests of the Child – A Dialogue Between Theory and Practice*. Strasbourg: Council of Europe [Online]. Available at: https://rm.coe.int/1680657e56 (Accessed: 23 July 2024).

Statewatch (2023) 'Detention of Children: European Court of Human Rights Rules Against France 11 Times', *Statewatch*, May 2023 [Online]. Available at: https://www.statewatch.org/news/2023/may/detention-of-children-european-court-of-human-rights-rules-against-france-11-times/ (Accessed: 23 July 2024).

Stepanenko, K. (2022) 'Mizhnarodno-pravovi standarty zakhystu prav osib, yaki nalezhat do vrazlyvykh hrup naselennia', *Naukovyi Visnyk Dnipropetrovskoho Derzhavnoho Universytetu Vnutrishnikh Sprav*, 4, pp. 123–130; https://doi.org/10.31733/2078-3566-2022-4-123-130.

Sural, C., Omeroglu, E. (2022) 'Protection of Persons with Disabilities in Turkish Law', *Anuario Iberoamericano de Justicia Internacional*, 2022, pp. 344–369 [Online]. Available at: https://revista-aji.com/wp-content/uploads/2022/09/12.-Ceyda-Sural-Ekin-Omeroglu-pp.-344-369.pdf (Accessed: 28 July 2024).

Tomliak, T. (2022) 'Pryntsyp zabezpechennia naikrashchykh interesiv dytyny u praktytsi Yevropeiskoho sudu z prav liudyny', *Publichne Pravo*, 1(45), pp. 109–119; https://doi.org/10.32782/2306-9082/2022-45-11.

TQ v. Staatssecretaris van Justitie en Veiligheid (Case C-441/19), Judgment of the Court (First Chamber) of 14 January 2021, ECLI: ECLI:EU:C:2021:9 [Online]. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=238593&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=14616754 (Accessed: 27 July 2024).

United Nations (1959) *Declaration of the Rights of the Child: Proclaimed by General Assembly Resolution 1386 (XIV) of 20 November 1959* [Online]. Available at: https://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf (Accessed: 23 July 2024).

United Nations (1989) *Convention on the Rights of the Child: Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 44/25 of 20 November 1989* [Online]. Available at: https://www.unicef.org/child-rights-convention/convention-text (Accessed: 23 July 2024).

van Dijk, P., van Hoof, G.J.H., van Rijn, A., Zwaak, L.F. (2006) *Theory and Practice of the European Convention on Human Rights*. 4th edn. Antwerpen–Oxford: Intersentia.

Working Group on the Convention on the Rights of the Child (2001) *The Rights of Children in Italy: Perspectives in the Third Sector. Supplementary Report to the United Nations*. Rome: Working Group on the Convention on the Rights of the Child [Online]. Available at: https://gruppocrc.net/wp-content/uploads/2009/09/Italy_ngowg_report_GRUPPO_CRC_EN_-2.pdf (Accessed: 23 July 2024).

Znachennia rishennia YeSPL u spravi "M.S. proty Ukrainy" dlia pravozastosovchoi praktyky (2017) *YurLiga* [Online]. Available at: https://jurliga.ligazakon.net/ru/analitycs/162658_znachennya-rshennya-spl-u-sprav-ms-proti-ukrani-dlya-pravozastosovcho-praktiki (Accessed: 27 July 2024).

Case-Law

A, B and C v. Ireland (Application No. 25579/05), Judgment of 16 December 2010, European Court of Human Rights (2010) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-102332%22]} (Accessed: 23 July 2024).

A.B. and Others v. France (Application No. 11593/12), Judgment of 12 July 2016, European Court of Human Rights (2016) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-11264%22]} (Accessed: 23 July 2024).

A.M.V. v. Finland (Application No. 53251/13), Judgment of 23 March 2017, European Court of Human Rights (2017) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172134%22]} (Accessed: 23 July 2024).

Amanalachioai v. Romania (Application No. 4023/04), Judgment of 26 May 2009, European Court of Human Rights (2009) [Online]. Available at: https://ier.gov.ro/wp-content/uploads/cedo/Cauza-AMANALACHIOAI-%C3%AEmpotriva-Rom%C3%A2niei.pdf (Accessed: 23 July 2024).

Anagnostakis and Others v. Greece (Application No. 46075/16), Judgment of 23 September 2021, European Court of Human Rights (2021) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-211829%22]} (Accessed: 23 July 2024).

Antonyuk v. Russia (Application No. 47721/10), Judgment of 1 August 2013, European Court of Human Rights (2013) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-185082%22]} (Accessed: 27 July 2024).

Bobeico and Others v. Russia (Application No. 30003/04), Judgment of 23 October 2018, European Court of Human Rights (2018) [Online]. Available at: https://laweuro.com/?p=4920 (Accessed: 27 July 2024).

Bogomolova v. Russia (Application No. 13812/09), Judgment of 20 June 2017, European Court of Human Rights (2017) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-174420%22]} (Accessed: 27 July 2024).

Boljević v. Serbia (Application No. 47443/14), Judgment of 16 June 2020, European Court of Human Rights (2020) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-203052%22]} (Accessed: 27 July 2024).

Brauer v. Germany (Application No. 3545/04), Judgment of 28 May 2009, European Court of Human Rights (2009) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-92752%22]} (Accessed: 27 July 2024).

C.C. v. Italy (Application No. 47196/21), European Court of Human Rights (2023) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-226391%22]} (Accessed: 23 July 2024).

Çam v. Turkey (Application No. 51500/08), Judgment of 23 February 2016, European Court of Human Rights (2016) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161149%22]} (Accessed: 27 July 2024).

Carmel Cutajar v. Malta (Application No. 55775/13), Judgment of 16 July 2015, European Court of Human Rights (2015) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-156466%22]} (Accessed: 27 July 2024).

Catan and Others v. Moldova and Russia (Application Nos. 43370/04, 8252/05 and 18454/06), Judgment of 19 October 2012, European Court of Human Rights (2012) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-7212%22]} (Accessed: 27 July 2024).

Cînța v. Romania (Application No. 3891/19), Judgment of 18 June 2020, European Court of Human Rights (2020) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-201533%22]} (Accessed: 27 July 2024).

Costa and Pavan v. Italy (Application No. 54270/10), Judgment of 28 August 2012, European Court of Human Rights (2012) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-6452%22]} (Accessed: 27 July 2024).

Council of Europe (2011) *Case Law of the European Court of Human Rights in the Field of Equality Between Men and Women*. CDEG (2011) 8. Strasbourg: Council of Europe [Online]. Available at: https://rm.coe.int/1680597b14 (Accessed: 27 July 2024).

D.H. and Others v. the Czech Republic (Application No. 57325/00), Judgment of 13 November 2007, European Court of Human Rights (2007) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-83256%22]} (Accessed: 27 July 2024).

D.L. v. Bulgaria (Application No. 7472/14), Judgment of 19 May 2016, European Court of Human Rights (2016) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163222%22]} (Accessed: 27 July 2024).

Darboe and Camara v. Italy (Application No. 5797/17), Judgment of 21 July 2022, European Court of Human Rights (2022) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-218424%22]} (Accessed: 27 July 2024).

Deltuva v. Lithuania (Application No. 38144/20), Judgment of 21 March 2023, European Court of Human Rights (2023) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-223647%22]} (Accessed: 27 July 2024).

Dupin v. France (Application No. 2282/17), Judgment of 18 December 2018, European Court of Human Rights (2018) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-189671%22]} (Accessed: 27 July 2024).

Efstratiou v. Greece (Application No. 24095/94), Judgment of 18 December 1996, European Court of Human Rights (1996) [Online]. Available at: https://app.lexploria.com/document/844000-case-of-efstratiou-against-greece (Accessed: 27 July 2024).

Elsholz v. Germany (Application No. 25735/94), Judgment of 13 July 2000, European Court of Human Rights (2000) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58763%22]} (Accessed: 27 July 2024).

Enver Şahin v. Turkey (Application No. 23065/12), Judgment of 30 January 2018, European Court of Human Rights (2018) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180499%22]} (Accessed: 23 July 2024).

European Union Agency for Asylum (EUAA) (2020) *Overview of Asylum Case Law 2020*. Luxembourg: European Union Agency for Asylum (EUAA) [Online]. Available at: https://euaa.europa.eu/sites/default/files/Overview_of_asylum_case_law-2020-FINAL.pdf (Accessed: 27 July 2024).

Evans v. the United Kingdom (Application No. 6339/05), Judgment of 10 April 2007, European Court of Human Rights (2007) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-80046%22]} (Accessed: 27 July 2024).

F.O. v. Croatia (Application No. 29555/13), Judgment of 22 April 2021, European Court of Human Rights (2021) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-209331%22]} (Accessed: 27 July 2024).

Fourkiotis v. Greece (Application No. 74758/11), Judgment of 16 June 2016, European Court of Human Rights (2016) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-189385%22]} (Accessed: 27 May 2024).

G.B. v. Lithuania (Application No. 36137/13), Judgment of 19 January 2016, European Court of Human Rights (2016) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-160212%22]} (Accessed: 27 July 2024).

G.L. v. Italy (Application No. 59751/15), Judgment of 10 September 2020, European Court of Human Rights (2020) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-204685%22]} (Accessed: 27 July 2024).

Georgios Papadopoulos v. Greece (Application No. 52464/99), Judgment of 6 February 2003, European Court of Human Rights (2003) [Online]. Available at: https://jurinfo.jep.gov.co/normograma/compilacion/docs/pdf/CASE%20OF%20GEORGIOS%20PAPADOPOULOS%20v.%20GREECE.PDF (Accessed: 27 July 2024).

Godelli v. Italy (Application No. 33783/09), Judgment of 25 September 2012, European Court of Human Rights (2012) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-113460%22]} (Accessed: 27 July 2024).

Grimkovskaya v. Ukraine (Application No. 38182/03), Judgment of 21 July 2011, European Court of Human Rights (2011) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-3613336-4095112%22]} (Accessed: 23 July 2024).

Grzelak v. Poland (Application No. 7710/02), Judgment of 15 June 2010, European Court of Human Rights (2010) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-99384%22]} (Accessed: 27 July 2024).

Hokkanen v. Finland (Application No. 19823/92), Judgment of 23 September 1994, European Court of Human Rights (1994) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57911%22]} (Accessed: 27 July 2024).

Horváth and Kiss v. Hungary (Application No. 11146/11), Judgment of 29 January 2013, European Court of Human Rights (2013) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-116124%22]} (Accessed: 27 July 2024).

Ireland v. the United Kingdom (Application No. 5310/71), Judgment of 18 January 1978, European Court of Human Rights (1978) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57506%22]} (Accessed: 27 July 2024).

Johansen v. Norway (Application No. 24/1995/530/616), Judgment of 7 August 1996, European Court of Human Rights (1996) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58059%22]} (Accessed: 27 July 2024).

Kalacheva v. Russia (Application No. 3451/05), Judgment of 7 May 2009, European Court of Human Rights (2009) [Online]. Available at: https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-92572%22]} (Accessed: 27 July 2024).

Kautzor v. Germany (Application No. 23338/09), Judgment of 22 March 2012, European Court of Human Rights (2012) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109809%22]} (Accessed: 27 July 2024).

Keegan v. Ireland (Application No. 16969/90), Judgment of 26 May 1994, European Court of Human Rights (1994) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57881%22]} (Accessed: 27 July 2024).

Khadzhiev v. Bulgaria (Application No. 44330/07), Judgment of 3 June 2014, European Court of Human Rights (2014) [Online]. Available at: https://www.refworld.org/jurisprudence/caselaw/echr/2014/en/99585 (Accessed: 27 July 2024).

Khan v. France (Application No. 12267/16), Judgment of 28 February 2019, European Court of Human Rights (2019) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-191587%22]} (Accessed: 27 July 2024).

Kolonja v. Greece (Application No. 49441/12), Judgment of 19 May 2016, European Court of Human Rights (2016) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-162856%22]} (Accessed: 27 July 2024).

Kroon and Others v. the Netherlands (Application No. 18535/91), Judgment of 27 October 1994, European Court of Human Rights (1994) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57904%22]} (Accessed: 27 July 2024).

Landi v. Italy (Application No. 10929/19), Judgment of 7 April 2022, European Court of Human Rights (2022) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13632%22]} (Accessed: 27 July 2024).

Lavida and Others v. Greece (Application No. 7973/10), Judgment of 30 May 2013, European Court of Human Rights (2013) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-106912%22]} (Accessed: 27 July 2024).

Lazoriva v. Ukraine (Application No. 6878/14), Judgment of 17 July 2018, European Court of Human Rights (2018) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-182223%22]} (Accessed: 27 July 2024).

M.D. and Others v. Malta (Application No. 64791/10), Judgment of 17 July 2012, European Court of Human Rights (2012) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-112206%22]} (Accessed: 27 July 2024).

M.D. v. France (Application No. 50376/13), Judgment of 10 October 2019, European Court of Human Rights (2019) [Online]. Available at: https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-196928%22]} (Accessed: 27 July 2024).

M.H. and S.B. v. Hungary (Application Nos. 10940/17 and 15977/17), Judgment of 22 May 2024, European Court of Human Rights (2024) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-231093%22]} (Accessed: 27 July 2024).

M.K. v. Greece (Application No. 51312/16), Judgment of 1 February 2018, European Court of Human Rights (2018) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180720%22]} (Accessed: 27 July 2024).

M.N. and Others v. Belgium (Application No. 3599/18), Decision of 5 May 2020, European Court of Human Rights (2020) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-202468%22]} (Accessed: 27 July 2024).

M.S. v. Ukraine (Application No. 2091/13), Judgment of 11 July 2017, European Court of Human Rights (2017) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-175140%22]} (Accessed: 27 July 2024).

Mahamed Jama v. Malta (Application No. 10290/13), Judgment of 26 November 2015, European Court of Human Rights (2015) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-158877%22]} (Accessed: 27 July 2024).

Mamchur v. Ukraine (Application No. 10383/09), Judgment of 16 July 2015, European Court of Human Rights (2015) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-156388%22]} (Accessed: 27 May 2024).

Marckx v. Belgium (Application No. 6833/74), Judgment of 13 June 1979, European Court of Human Rights (1979) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57534%22]} (Accessed: 23 July 2024).

Mazurek v. France (Application No. 34406/97), Judgment of 1 February 2000, European Court of Human Rights (2000) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58456%22]} (Accessed: 27 July 2024).

Memlika v. Greece (Application No. 37991/12), Judgment of 6 October 2015, European Court of Human Rights (2015) [Online]. Available at: https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-163366%22]} (Accessed: 27 July 2024).

Mikulić v. Croatia (Application No. 53176/99), Judgment of 7 February 2002, European Court of Human Rights (2002) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-60035%22]} (Accessed: 27 July 2024).

Moldovan v. Ukraine (Application No. 62020/14), Judgment of 14 March 2024, European Court of Human Rights (2024) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-231547%22]} (Accessed: 27 July 2024).

Monika Haas v. Germany (Application No. 73047/01), Judgment of 17 November 2005, European Court of Human Rights (2005) [Online]. Available at: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-71527%22]} (Accessed: 27 July 2024).

N.Ts. and Others v. Georgia (Application No. 71776/12), Judgment of 2 February 2016, European Court of Human Rights (2016) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-160313%22]} (Accessed: 27 July 2024).

Neulinger and Shuruk v. Switzerland (Application No. 41615/07), Judgment of 8 January 2009, European Court of Human Rights (2009) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90480%22]} (Accessed: 27 July 2024).

Odièvre v. France (Application No. 42326/98), Judgment of 13 February 2003, European Court of Human Rights (2003) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60935%22]} (Accessed: 27 July 2024).

Olsson v. Sweden (Application No. 10465/83), Judgment of 24 March 1988, European Court of Human Rights (1988) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57548%22]} (Accessed: 27 July 2024).

Oršuš and Others v. Croatia (Application No. 15766/03), Judgment of 16 March 2010, European Court of Human Rights (2010) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-97689%22]} (Accessed: 27 July 2024).

Ozan Barış Şanlısoy v. Turkey (Application No. 77023/12), Judgment of 8 November 2016, European Court of Human Rights (2016) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-169450%22]} (Accessed: 27 July 2024).

Papageorgiou and Others v. Greece (Application Nos. 4762/18 and 6140/18), Judgment of 31 October 2019, European Court of Human Rights (2019) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-197254%22]} (Accessed: 27 July 2024).

Pini and Others v. Romania (Application Nos. 78028/01 and 78030/01), Judgment of 22 June 2004, European Court of Human Rights (2004) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61837%22]} (Accessed: 27 July 2024).

Pitsiladi and Vasilellis v. Greece (Application Nos. 5049/14 and 5122/14), Judgment of 6 June 2023, European Court of Human Rights (2023) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22appno%22:[%225049/14%22]} (Accessed: 27 July 2024).

R.B. v. Estonia (Application No. 22597/16), Judgment of 22 June 2021, European Court of Human Rights (2021) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-210466%22]} (Accessed: 23 July 2024).

Reklos and Davourlis v. Greece (Application No. 1234/05), Judgment of 15 January 2009, European Court of Human Rights (2009) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90617%22]} (Accessed: 27 July 2024).

Š. v. Croatia (Application No. 36908/13), Judgment of 10 September 2020, European Court of Human Rights (2020) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-204320%22]} (Accessed: 27 July 2024).

Saviny v. Ukraine (Application No. 39948/06), Judgment of 18 December 2008, European Court of Human Rights (2008) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90360%22]} (Accessed: 27 July 2024).

Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia (Application No. 14165/16), Judgment of 13 June 2019, European Court of Human Rights (2019) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-218984%22]} (Accessed: 27 July 2024).

Stavropoulos and Others v. Greece (Application No. 52484/18), Judgment of 25 June 2020, European Court of Human Rights (2020) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203165%22]} (Accessed: 27 July 2024).

Stefanou v. Greece (Application No. 2954/07), Judgment of 22 April 2010, European Court of Human Rights (2010) [Online]. Available at: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-98383%22]} (Accessed: 27 July 2024).

Stoian v. Romania (Application No. 289/14), Judgment of 25 June 2019, European Court of Human Rights (2019) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-194062%22]} (Accessed: 23 July 2024).

Strand Lobben and Others v. Norway (Application No. 37283/13), Judgment of 10 September 2019, European Court of Human Rights (2019) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-195909%22]} (Accessed: 27 July 2024).

Stubbings and Others v. the United Kingdom (Application No. 22083/93), Judgment of 22 October 1996, European Court of Human Rights (1996) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-1930%22]} (Accessed: 27 July 2024).

Syngelidis v. Greece (Application No. 24895/07), Judgment of 11 February 2010, European Court of Human Rights (2010) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-97271%22]} (Accessed: 27 July 2024).

Tarakhel v. Switzerland (Application No. 29217/12), Judgment of 4 November 2014, European Court of Human Rights (2014) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-148070%22]} (Accessed: 27 July 2024).

Tsvetelin Petkov v. Bulgaria (Application No. 2641/06), Judgment of 15 July 2014, European Court of Human Rights (2014) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9595%22]} (Accessed: 27 July 2024).

Tyrer v. the United Kingdom (Application No. 5856/72), Judgment of 25 April 1978, European Court of Human Rights (1978) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57587%22]} (Accessed: 23 July 2024).

Tysiąc v. Poland (Application No. 5410/03), Judgment of 20 March 2007, European Court of Human Rights (2007) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-79812%22]} (Accessed: 23 July 2024).

V.C.L. and A.N. v. the United Kingdom (Application Nos. 77587/12 and 74603/12), Judgment of 16 February 2021, European Court of Human Rights (2021) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-207927%22]} (Accessed: 23 July 2024).

V.Y.R. and A.V.R. v. Bulgaria (Application No. 48321/20), Judgment of 13 March 2023, European Court of Human Rights (2023) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-221504%22]} (Accessed: 23 July 2024).

Valsamis v. Greece (Application No. 21787/93), Judgment of 18 December 1996, European Court of Human Rights (1996) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58011%22]} (Accessed: 23 July 2024).

Velyo Velev v. Bulgaria (Application No. 16032/07), Judgment of 27 May 2014, European Court of Human Rights (2014) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9476%22]} (Accessed: 23 July 2024).

Vo v. France (Application No. 53924/00), Judgment of 8 July 2004, European Court of Human Rights (2004) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61887%22]} (Accessed: 23 July 2024).

X and Y v. the Netherlands (Application No. 8978/80), Judgment of 26 March 1985, European Court of Human Rights (1985) [Online]. Available at: https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/x%20and%20y%20v%20the%20netherlands_EN.asp (Accessed: 23 July 2024).

X v. Latvia (Application No. 27853/09), Judgment of 26 November 2013, European Court of Human Rights (2013) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-138992%22]} (Accessed: 23 July 2024).

X v. Poland (Application No. 20741/10), Judgment of 16 September 2021, European Court of Human Rights (2021) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-211799%22]} (Accessed: 23 July 2024).

X, Y and Z v. the United Kingdom (Application No. 21830/93), Judgment of 22 April 1997, European Court of Human Rights (1997) [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58032%22]} (Accessed: 23 July 2024).

Zelikha Magomadova v. Russia (Application No. 58724/14), Judgment of 8 October 2019, European Court of Human Rights (2019) [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-196416%22]} (Accessed: 23 July 2024).

| Chapter 3 |

The Protection of Children's Rights in European Union Law

Suzana Kraljić

ABSTRACT

Children's rights are rapidly evolving and gaining significance. The European Union (EU) serves as an excellent environment that has, over the past twenty years, significantly contributed to the development of children's rights. It has created a legislative framework that provides a strong foundation for all children residing within the EU. However, this legal framework extends much further, as the EU plays a crucial role as a creator and guide in the field of children's rights. The EU identifies critical areas where children and their rights are most exposed to violations and abuses. Through its legislative acts in primary and secondary EU law, the EU seeks to create a safe environment, establish mechanisms for identification, assistance, and support, and work towards the elimination of dangers facing children, particularly those from vulnerable groups. The EU is building towards ensuring the protection of children's rights in various areas, such as child-friendly justice, protection of victims of crime, ensuring that child victims receive adequate support, and child poverty alleviation. EU implements measures in the fields of education and health to provide equal opportunities for all children. EU also addresses the impact of climate change on children's rights and aims to protect children's rights in the digital environment. The paper analyses the EU framework concerning the protection of children in the EU.

KEYWORDS

child best interest, empowerment of children, primary and secondary EU law, poverty

1. Introduction

The European Union (hereinafter: EU) is an international organisation with a unique legal and political nature.[1] EU is a supranational and autonomous (*sui generis*) entity created by international treaties among sovereign states.[2] The EU, as a supranational entity, holds genuine decision-making powers that have been transferred to it by the Member States and which it exercises for the Member States within the areas of its

1 Mehmetaj, 2015, p. 87.
2 McCormick, 2020.

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competences.[3] The EU has its own legal personality, which means that it can conclude international agreements, represent its interests externally, and act as a single entity in international relations.

Following Article 3(1) of the Treaty of European Union (hereinafter: TEU), the EU aims to promote peace, its values and the well-being of its peoples (thus particularly children), incorporating respect for human rights, democracy and the rule of law. The EU ensures an area of freedom, security, and justice without internal borders frontiers. Accordingly, the EU also guarantees the free movement of persons and appropriate measures with respect to external border controls, asylum, immigration and the prevention and combatting of crime (Article 3(2) of the TEU). The EU has established an internal market and works for sustainable development, balanced economic growth and price stability, a high competitiveness of social market economy, and a high level of protection and improvement of the quality of the environment. It promotes scientific and technological advance, combats social exclusion and discrimination, and promotes social justice and protection, gender equality, solidarity between generations and protection of the rights of the child. Rich cultural and linguistic diversity is also respected and shall ensure that Europe's cultural heritage is safeguarded and enhanced (Article 3(3) of the TEU). The EU established an economic and monetary union whose currency is the euro (Article 3(4) of The TEU). The EU also upholds and promotes its values and interests and contributes to the protection of its citizens. It promotes peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as the strict observance and the development of international law, including respect for the principles of the United Nations Charter (Article 3(5) of the TEU).

EU is currently composed of 27 Member States, divergent in geographical, population, historical, cultural, religious, economic and other characteristics. Each Member State is a cohesive national entity with its own national legislation. Still, despite their diversity, they unite to form the EU and are thus bound by the fundamental principles of the EU legal order, which also apply to children as a particularly vulnerable social group of the EU population. The EU covers more than 4 million km^2 and had a population of 448.4 million on 1 January 2023, 21% of whom were aged 65 or older.[4] This included 68 million children under the age of 15 and 91 million elderly adults aged 65 and over. The composition of the population varies significantly across individual EU Member States, which is reflected in the age structure of the population of each Member State.[5] For example, in 2019, the median age was the lowest in Ireland and Cyprus (both 37.7 years), followed by Luxembourg and Malta, the only other Member States with a median age of 40 years or less. In contrast, there were EU Member States where the median age was significantly higher in 2019. For example, the median age

3 Saxer, 2025, pp. 237 et seq.
4 Eurostat, 2023.
5 Eurostat, 2022.

in Italy was 46.7 years, in Germany 46.0 years, and in Portugal 45.2 years.[6] This shows that children represent a considerable percentage of the EU population.

The EU is a significant international stakeholder in many areas today, and the area of children's rights or the protection of children's rights has undoubtedly emerged as one of its priority areas over the past twenty years. The protection and promotion of children's rights can indisputably be identified as fundamental objectives of the EU.[7]

The foundation of the EU lies in its long-standing legal and political commitments to human rights protection, which has given the EU added value in the field of children's rights. The EU is considered as one of the most favourable frameworks for the protection of children's rights, as it has the most significant potential to adapt quickly to changes in this area. This potential surpasses other international or national actors. This adaptability stems from the EU's unique legal, political, and financial authority over the Member States on which they rely.[8] Additionally, the EU has the resources to support monitoring, data collection, cross-country policy exchange, and cooperation.[9] As a result, the EU plays a significant role in advancing children's rights not only within its territory but also internationally. EU also collaborates with key global stakeholders, such as the UNICEF, the Council of Europe, the United Nations, Save the Children, and ChildONEurope, contributing to the worldwide development and protection of children's rights.

2. Children's Rights in EU Policy

2.1. First Significant Steps

Children's rights and their protection in the EU started slowly with development in 2005, when the European Commission identified children's rights as one of its key priorities. In the "Strategic Objectives 2005–2009 – Europe 2010", the Commission of the European Communities stated: 'A particular priority must be effective protection of the rights of children, both against economic exploitation and all forms of abuse, with the Union acting as a beacon to the rest of the world.'[10] In April 2005, the Group of Commissioners on Fundamental Rights, Non-discrimination, and Equal Opportunities decided to launch a special initiative to advance the promotion, protection, and fulfilment of children's rights in the EU's internal and external policies. By March 2006, the European Council called on EU Member States to 'take the necessary measures to rapidly and significantly reduce child poverty, giving all children equal opportunities, regardless of their social background'.[11]

6 Eurostat, 2022.
7 Sacur and Diogo, 2021, p. 2.
8 European Commission, 2006, pp. 5–6.
9 Kišūnaitė, 2019, p. 178.
10 European Commission, 2005.
11 European Commission, 2006, p. 2.

In 2006, children's rights gained importance and recognition within the EU. The "Towards a Strategy on the Rights of the Child"[12] (hereinafter: Strategy 2006) was adopted, proposing the development of a comprehensive EU strategy to effectively promote and protect children's rights in EU internal and external policies and to support the efforts of EU Member States in this area. Children's rights are part of human rights, which Member States and the EU are obliged to respect in accordance with international and European treaties, particularly the Convention on the Rights of the Child[13] (hereinafter: UNCRC) and its Optional Protocols,[14] as well as the European Convention on Human Rights (hereinafter: ECHR).[15]

The 2006 Strategy took a clear stance that children's rights must be recognised as a set of independent issues, not merely part of the broader efforts to promote human rights in general. This is appropriate, as certain rights apply exclusively or specifically to children (for example the right to education;[16] the right to protection from economic exploitation (child labour).[17] The EU thus explicitly identified the promotion of children's rights as a distinct issue, warranting specific actions.[18]

In 2011, the "EU Agenda for the Rights of the Child"[19] (hereinafter: Agenda 2011) was adopted, becoming the main policy document of the EU on children's rights for the period 2011-2014. The European Commission, through Agenda 2011, reaffirmed the strong commitment of all EU institutions and EU Member States to the implementation of their obligations on the rights of the child.[20] Agenda 2011 aimed to ensure the implementation of the obligations for the protection of children's rights outlined in the UNCRC, which are universal to all children, as well as rights that are specific to the unique situations of children.[21]

The EU's commitment to respecting children's rights necessitates a coordinated approach across all Member States as well as at the EU level as a whole. This goal can be achieved by using the UNCRC as a common framework for all EU actions concerning

12 European Commission, 2006, Towards a Strategy on the Rights of the Child, COM(2006) 367 final.
13 Convention on the Rights of the Child, 1989.
14 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000; Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, 2011.
15 European Convention on Human Rights, 1950.
16 The State is obligated to ensure children's education (comp. for example art. 57 of the Constitution of the Republic of Slovenia '1. Freedom of education shall be guaranteed. 2. Primary education is compulsory and shall be financed from public funds. 3. The state shall create the opportunities for citizens to obtain a proper education'; Constitution of the Republic of Slovenia, art. 57; But this obligation does not extend to adult education in the same way, since adults may only have the right to access education.
17 Children have a specific right to be protected from work that is likely to be hazardous, or bad for their education, harmful to their health or development.
18 Strategija, 2006, para. I.2.
19 European Commission, 2011, COM/2011/0060 final.
20 European Commission, 2006, p. 3.
21 Kišūnaitė, 2019, p. 173.

children, the ECHR and the "Charter of Fundamental Rights of the European Union"[22] (hereinafter: CFREU). When addressing issues concerning children and their rights, it is essential to consider and adopt a child-centred perspective, ensuring that the rights and needs of children are at the forefront of all policies and initiatives.[23] This perspective aligns with the principles established in the UNCRC, which emphasises the importance of considering the best interests of the child in all actions affecting them (Article 3 of the UNCRC).

2.2. Children's Rights in the Light of Primary EU Law

The primary EU law consists of the fundamental legal acts that set the constitutional framework of the EU and serve as the basis for its functioning. The first EU treaty that explicitly addressed children's rights was the "Treaty of Lisbon"[24] signed on 13 December 2007 and entered into force on 1 December 2009. The Treaty of Lisbon amended the "Treaty on European Union"[25] (hereinafter: TEU) and the "Treaty on the Functioning of the European Union"[26] (hereinafter: TFEU).

2.2.1. Treaty on European Union

One of the most important legal acts constituting primary EU law today is the TEU. In particular, Article 3(3) of the TEU, as amended by the Treaty of Lisbon, explicitly, for the first time, mentions the protection of children's rights as a key objective of the EU. The EU formally recognised children's rights as an EU priority within the foundational treaties.

Article 3(3)(2) of the TEU states (among others) that the EU shall combat social exclusion and discrimination and promote social justice and protection of the rights of the child.

The EU also contributes to the protection of human rights, particularly the rights of the child, as highlighted in Article 3(5) of the TEU.[27]

2.2.2. Treaty on the Functioning of the European Union

TFEU addresses children in Article 79(2). The European Parliament and the Council shall also adopt measures that shall combat trafficking in persons, in particular women and children.

Article 83(1) states that the European Parliament and the Council may, by means of directives, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension

22 Charter of Fundamental Rights of the European Union, 2016, OJ C 202, pp. 389–405.
23 European Commission, 2006, p. 4.
24 Maastricht, Amsterdam and Nice Treaties did not explicitly mention children. See Stalford and Schuurman, 2011, pp. 382–383.
25 Treaty on European Union, 2024.
26 Treaty on the Functioning of the European Union, 2008.
27 For more, see commentaries on art. 3 of the TEU in Blanke and Mangiameli, 2013, pp. 157–183; Klamert, 2019, pp. 31–34.

resulting from the nature or impact of such offences or from a special need to combat them on a common basis. One of the areas of particularly serious crime with a cross-border dimension is also trafficking in human beings and sexual exploitation of women and children (Article 83(2) of the TFEU).

2.2.3. Charter of Fundamental Rights of the European Union

The European Parliament, the Council of the European Union, and the Commission officially proclaimed the CFREU in December 2000 in Nice. Initially, it was merely a political declaration. However, with the entry into force of the Lisbon Treaty on 1 December 2009, the CFREU became legally binding, acquiring the same legal status as the founding Treaties. Thus, the CFREU gained the status of primary EU law and is now on par with the EU treaties. Today, the CFREU stands as one of the key documents of primary EU law, providing a catalogue of fundamental rights (civil, political, economic, and social) that both EU institutions and Member States must respect when implementing EU law.[28] However, unlike other human rights treaties (such as the ECHR), the scope of the CFREU is more limited, as stated in Article 51(1), which specifies that its provisions are addressed to the EU institutions, bodies, offices, and agencies and the Member States when implementing EU law.[29] The CFREU is thus used in conjunction with national and international systems of fundamental rights protection, including the ECHR. The CFREU is a catalogue of civil, political, economic, and social rights, freedoms, and principles that the EU is obliged to respect.[30]

The CFREU follows the concept of children's rights that was established globally in 1989 with the adoption of the UNCRC. The UNCRC sets human rights standards for promoting and protecting children's rights worldwide[31] and reflects a balance between the rights and responsibilities of family members and the recognition of the child as an individual with a developing capacity to make decisions that affect their life. The UNCRC marked a shift in the approach to children, moving away from viewing them merely as recipients of services or protection measures, toward acknowledging them as rights holders and active participants in matters that affect them. This child rights perspective is instrumental in empowering children, ensuring their voices are heard and respected.[32] All EU Member States have ratified the UNCRC, making it the standard for activities related to children's rights within the EU. This has significantly contributed to improving the lives of children across the EU.[33]

As referred to earlier, a significant and important step was made in the field of children's rights when the TEU incorporated the objective of protecting children's rights among its provisions. At the same time, the CFREU was adopted, which obliges both the EU and its Member States to safeguard the rights enshrined in the CFREU

28 de Búrca, 2013, p. 50.
29 Klaassen and Rodrigues, 2017.
30 Stalford and Schuurman, 2011, p. 396.
31 Dunhill, Schuurman and Tormen, no date, p. 1.
32 Erikson, 2006, p. 209.
33 Dunhill, Schuurman and Tormen, no date, p. 1.

when implementing EU law. Children's rights are explicitly mentioned in the CFREU in Article 14(2), referring to the right of children to free compulsory education; Article 21(1), which prohibits discrimination based on age; Article 32, prohibiting child labour exploitation; and Article 33, which relates to family and professional life.[34]

However, Article 24 of the CFREU contains a specific provision that explicitly addresses and defines the rights of the child:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 24 of the CFREU builds on three key principles of children's rights: I) the right to express their views freely in accordance with their age and maturity (paragraph 1); II) the right to have the best interests of the child as the primary consideration in all activities relating to the child (paragraph 2); and III) the right to maintain a regular personal relationship and direct contact with both parents (paragraph 3).[35] The CJEU has referred to Article 24 of the CFREU in several cases, especially in family reunification matters. In case *C-560/20*,[36] the CJEU ruled that a Member State must always take into account the best interests of the child when considering an application for family reunification of an unaccompanied child (Article 24 of the CFREU). If additional requirements imposed by the state prevent the child from being reunited with their family, this constitutes a violation of the child's rights. The child's welfare must always be the primary consideration in such decisions.[37] CJEU also stated that measures relating to family reunification must respect fundamental rights, in particular the right to respect for private and family life (Article 7 of the CFREU) and Article 24(2-3) CFREU, which require Member States to interpret applications for family reunification in the best interests of the child and with a view to promoting family life.[38] Similarly, the CJEU has confirmed that, where the applicant for international protection is a minor, the competent national authority must, when assessing the merits of his or her application for international protection on a case-by-case basis, take into account the best

34 Ibid., p. 2.
35 Opinion 1/15, 2016.
36 CJEU, Case *C-560/20*, 2024.
37 CJEU, Case *C-129/18*, 2019.
38 CJEU, Joined Cases *C-273/20* and *C-355/20*, 2022.

interests of that minor.[39] Also in the Case *C-365/23,*[40] we can conclude that contracts concluded with minors must be carefully considered, as according to Article 24 of the CFREU, every decision and legal act must be assessed in terms of the best interests of the child, regardless of whether the parents sign the contract.[41]

2.2.3.1. Right of Child to Express Their Views Freely

Both the UNCRC and the CFREU establish strong foundations that promote children's autonomy. These frameworks encourage children to actively participate in society and engage in decision-making at the community and national levels. Both treaties follow the principle of respecting and considering the views of the child, as outlined in Article 12(1) of the UNCRC and Article 24(1) of the CFREU. To determine what is in the best interest of the child, it is essential to listen to them, highlighting respect for the child's autonomy and personality.[42] States must ensure that children can exercise their right to express their views in all matters affecting them freely.[43] These views must be respected, considered, and given appropriate weight when shaping policies, implementing measures, and evaluating outcomes.[44]

The general principle of recognising the right to autonomy as it develops in the child is of fundamental importance. A child develops over time and thus requires different levels of protection and participation at various life stages. Both the UNCRC and the CFREU emphasise that a child's autonomy is considered according to their age and maturity. Specifically, the younger the child, the less autonomy they have. As children grow older and mature, their autonomy increases. Conversely, from the perspective of parents, their role diminishes as the child matures.[45]

This is particularly evident in relation to a child's right to express their views and participate in decision-making. This right does not mean that only children's views should be considered. A child's opinion is merely one of the circumstances to be taken into account. The fundamental guiding principle must always be the best interests of the child. The mere fact that a child expresses their views does not guarantee that it will always be taken into account. Instead, it is considered in accordance with the child's age and maturity and with the understanding that it is in the child's best interest. For example, parents and judicial authorities cannot overlook the fact that a 15-year-old has their own will. Adults must listen to children and take their wishes and needs seriously. When children are invited to express their views/opinions and are deemed mature enough to understand their significance and consequences,

39 CJEU, Case *C-646/21*, 2024.
40 CJEU, Case *C-365/23*, 2025.
41 For more cases in which CJEU addresses the topics related art. 24 of the CFREU see on webpage of FRA, no date.
42 United Nations, 2009; Detrick, 2009, pp. 213. ff.; Vandenhole, Erdem Türkelli and Lembrechts, 2024, pp. 158 et seq.
43 Kraljić and Drnovšek, 2022; Kraljić et al., 2022, pp. 400–409.
44 Erikson, 2006, p. 210.
45 Ibid.

their views must be taken into account.[46] However, if a child's opinion is disregarded because it is not in their best interest, the child should be informed about why their opinion was not considered.[47]

As children grow up, their abilities gradually increase, and they gradually take on more and more responsibilities for different areas of their lives. Parents, in turn, create conditions in accordance with their abilities to ensure the child's complete development (Article 6 of the Slovenian "Family Code"[48] (hereinafter: FC) in conjunction with Article 136 of the FC).[49]

Thus, on the one hand, there is the child's right to development and participation, which increases as the child grows up. On the other hand, children enjoy special protection and care until the age of 18 precisely because of their youth. Consequently, it is essential to establish a balance between these two rights (the right to development and participation and the right to protection) that will allow the child to develop their autonomy while ensuring sufficient opportunities to develop the necessary skills and express these rights in accordance with their age, maturity, and capacities. At the same time, all necessary mechanisms must be provided to protect the child from potential interventions and violations of their rights.[50]

Children can express their opinions freely (Article 24(2)(1) of the CFREU), but this should not be interpreted to mean that they must. They have the right, not the obligation, to form and express their opinions. Children must be allowed to express their views freely, without coercion, pressure, or influence from others. If a child does express their opinion, it should be taken into account in accordance with their age and maturity, particularly regarding matters that concern them. However, the consideration of a child's opinion should not be based solely on their biological age. Various circumstances can influence the development of a child's understanding and ability to form their views, such as experiences, the environment in which the child lives, social and cultural expectations, and the level of support they receive from parents and society etc. Maturity, therefore, refers to the child's capacity to express their views on issues reasonably and independently. The more significant the impact of the outcome (e.g., of court proceedings) on the child's life, the more critical it is to

46 Comp. for example art. 96(1-2) of the Non-Contentious Civil Procedure Act, art. 96(1)–(2): '(1) In proceedings for the protection of the best interests of the child, the court shall invite the social work centre to inform the child, who is capable of understanding the meaning of the proceedings and the consequences of the decision, in an appropriate manner of the initiation of the proceedings and of his or her right to express his or her opinion'.

47 VSL sodba IV Cp 2188/2015.

48 Family Code, 2017.

49 Similar definitions of parental reponsibility are given in the family laws of some Central European countries. Cf. Croatian Family Act, arts. 91–92; Serbian Family Act, arts. 7 and 68; *Allgemeines Bürgerliches Gesetzbuch*, sec. 158; *Burgerlijk Wetboek*, Book 1, art. 247; Romanian Civil Code, arts. 487–499; Law No. 272/2004; Polish Family and Guardianship Code, art. 95(1).

50 Erikson, 2006, p. 210.

assess the child's maturity properly.[51] Therefore, the child's views or stance, if they have formed one, should be evaluated in each individual case.[52]

2.2.3.2. The Best Interest of the Child

The principle of the best interests of the child is set out in Article 24(2) of the CFREU. The CFREU thus follows Article 3 of the UNCRC,[53] which represents the fundamental principle of protecting children's rights. In a recent case, the CJEU emphasised that the act of a person bringing minors (daughter and niece) into the EU with false passports, but who actually cares for them, does not constitute the criminal offense of illegal immigration, but rather the exercise of family responsibility. Article 24 of the CFREU imposes that in all actions concerning children, their best interests, including the right to a safe family environment, be a primary consideration. Therefore, punishing such conduct violates the rights of the child.[54]

The approach of states to developing and understanding the concept of the best interests of the child is expected by the Committee on the Rights of the Child to be holistic or integrated, encompassing the child's physical, mental, spiritual, moral, psychological, and social development. The principle of the best interests of the child should guide the systematic consideration of children's rights and their interests. This should be reflected in all actions regarding children, in judicial decisions, and in legislation,[55] including EU measures. Therefore, the concept of the best interests of the child aims to ensure the complete, comprehensive, and effective enjoyment of all rights recognised in the UNCRC and the holistic development of the child. The UNCRC does not establish a hierarchy among rights either, as all rights are determined in the best interests of the child and should never be interpreted in a way that negative interpretations undermine the best interests of the child.[56]

The best interests of the child, therefore, represent a legal standard that must be addressed on a case-by-case basis. It is only a starting point to consider that parents act in the child's interest if they, particularly considering the child's personality, age, developmental stage, and wishes, appropriately satisfy their material, emotional, and psychosocial needs through behaviour that demonstrates their care and responsibility towards the child, and provide suitable educational guidance while encouraging the child's development.[57] This is a value concept of a subjective nature, as it is tailored to the individual user in each case.[58]

51 United Nations, 2009, pp. 8–9.
52 Kraljić and Drnovšek, 2022, p. 105.
53 Committee on the Rights of the Child, 2013, p. 13; Detrick, 2009, pp. 86 et seq.; Vandenhole, Erdem Türkelli and Lembrechts, 2024, pp. 67 ff.; Alen et al., cited in Freeman, 2007, pp. 25 et seq.
54 CJEU, Case *C-460/23*, 2025.
55 Committee on the Rights of the Child, 2003, p. 4.
56 Committee on the Rights of the Child, 2013, p. 13.
57 Kraljić, 2019, p. 73.
58 Šelih, 2014, p. 16.

In all measures taken by public authorities[59] or private institutions, including EU institutions and bodies, the primary consideration must be the child's best interests. The best interests of the child represent a legal standard that courts, for example, will define in each individual case. The child's interests must always come first. Decision-making will take into account current, as well as short-term and long-term aspects of the child's benefits. The best interests of the child will thus be considered in all decisions affecting the child's protection and upbringing, as well as, for instance, in education,[60] health, social life, management of juvenile justice, placement and care of children in alternative care, asylum and refugee procedures, immigration, detention, adoption, housing, transportation, and environmental policy, allocation of budgetary resources, and employment policy development, etc.[61]

The principle of the best interests of the child is, therefore, the fundamental starting point in all vertical relationships or activities relating to the child carried out by state authorities (e.g., the courts, the social work centre, the police, etc.). However, the best interests of the child must also be the fundamental guiding principle in horizontal relationships, i.e. in parent-child relationships. In both relationships, the best interests of the child must be the paramount consideration. This is why, since the adoption of the UNCRC, the obligations of both the state and parents have increased.[62]

2.2.3.3. The Right to Maintain a Regular Personal Relationship and Direct Contact With Both Parents

The CFREU in Article 24(3) defines the importance of maintaining regular personal relationships and direct contact between the child and both parents unless this is contrary to the best interests of the child.[63] However, the contacts should be in the child's best interest and must be conducted in a manner that serves the best interests of the child. The purpose of contact is not solely for the parent deprived of the child to fulfil their emotional needs but also to prevent the alienation of the child and preserve relationships between parents and children as much as possible.[64] Therefore, it is essential to find an appropriate balance between the benefits and burdens of all parties involved when making decisions regarding contact.[65] CJEU ruled that a Member State may not automatically refuse to surrender a person (e.g., a mother with young children) on the basis of a European Arrest Warrant solely because that person has children. It may only refuse surrender if there is a real risk that the

59 In this respect, it should be noted that there is a difference regarding art. 3 of the UNCRC, as art. 24(2) of the CFREU does not explicitly mention courts. However, courts can certainly be considered as "public authorities" addressed in art. 24(2) of the CFREU.
60 Kraljić, 2020, p. 27 et seq.; Kraljić, 2024, p. 135 et seq.
61 Erikson, 2006, p. 212.
62 Kraljić and Drnovšek, 2019, p. 113 et seq.
63 CJEU, Case *C-638/22* PPU, 2023; Case *C-490/20*, 2021.
64 VSL I Ip 359/2020, 2020.
65 VSM III Cp 631/2020, 2020.

right to family life (Article 7 of the CFREU) and the best interests of the children (Article 24 of the CFREU) will be violated due to poor prison conditions or inadequate care for the children in the other country.[66]

If the child's interests so require, there may be a restriction on contact between the child and the parent. However, in this case, it cannot be a unilateral decision by one parent but must be the result of a judicial decision. The circumstances that usually lead to the cessation of contact often arise from strained relationships between the parents. This situation gains additional dimensions in the case of cross-border relationships, where further safeguards and guarantees must be provided to ensure the child's return or to prevent unlawful relocation. Such measures may include, for example, the surrender of passports or personal documents and the encumbrance of property, etc.[67]

The state may intervene in the family or the relationship between the parent and the child if the separation of the child from the parents is necessary for the protection of the child's interests. A child can be removed from the parents if there is a demonstrated probability of severe danger to the child that their interests can only be safeguarded by an immediate removal from the parents and consequently placing the child with another person, in a crisis centre, in foster care, or an institution. The court may also prohibit one or both parents from exercising certain rights from parental responsibility if the child is endangered and the child's interests will be sufficiently protected by this measure, considering the circumstances of the case. Thus, both the urgent measure of removing a child and the measure of a more permanent nature concerning the limitation of parental responsibility are intended to protect the child and their rights and freedoms. This applies in cases of both culpable (e.g., neglect, abuse) and non-culpable reasons (e.g., death, illness) that necessitate the child's separate living situation from the parents.[68]

2.3. Children's Rights in Secondary EU Law

Starting from Article 288(1) of the TFEU, regulations, directives, decisions, recommendations, and opinions are adopted to exercise the competences of the EU institutions. Secondary EU law thus consists of legal acts adopted by the EU institutions on the basis of primary law. Secondary EU law (regulations, directives, decisions, recommendations, and opinions), together with primary EU law and the case law of the CJEU, constitute the EU legal order.

2.3.1. Regulations

Regulations are generally binding and directly applicable in all Member States. Once a regulation enters into force, it automatically becomes part of the national law of EU

66 CJEU, Case C-261/22, 2023.
67 Erikson, 2006, p. 213.
68 Kraljić, 2019, p. 564.

Member States. Regulations are generally applicable, binding in their entirety, and directly applicable to all Member States (Article 288(2) of the TFEU).

Regulations represent an important instrument, as several regulations have been adopted in recent years that address children's rights. Following the provisions of paragraphs 1 to 3 of Article 288 of the TFEU and with the aim of achieving the objectives set out in Article 81 of the TFEU (judicial cooperation in civil matters), regulations have been adopted that significantly regulate and ensure the protection of children. Such regulations include, for example:

a) Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)[69] (hereinafter: Regulation 2019/1111). Regulation 2019/1111 pertains to issues of parental responsibility and child protection in cross-border family disputes, particularly in cases of international child abduction. The matters addressed include: I) rights of custody and rights of access; II) guardianship, curatorship and similar institutions; III) the designation and functions of any person or body having charge of the person or property of a child, or representing or assisting a child; IV) the placement of a child in institutional or foster care; V) measures for the protection of the child relating to the administration, conservation or disposal of the property of a child. The aim of Regulation 2019/1111 is to safeguard the interests of children in cross-border situations by ensuring that proceedings concerning their welfare are resolved quickly and effectively. Additionally, the regulation has introduced clearer rules regarding the child's right to express their views.
b) Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters[70] (hereinafter: Regulation 606/2013). Regulation 606/2013 ensures that protection measures (e.g., measures to protect children from violence or abuse) taken by one Member State are recognised and enforced in another Member State without additional procedures. It aims to increase the protection of victims, including children, in cross-border situations.
c) 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 (recast)[71] (hereinafter: Dublin regulation III).

69 Directive (EU) 2019/1158, 2019, pp. 1–115.
70 Regulation (EU) No 606/2013, 2013, pp. 4–12.
71 Regulation (EU) No 604/2013, 2013, pp. 31–59.

The Dublin Regulation III includes specific provisions for the protection of unaccompanied minors and explicitly provides that the best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation (Article 6(1) of the Dublin regulation III). Article 24 of the CFREU has been referred to by the CJEU in many cases. The CJEU perceived that transfers of unaccompanied minors in the context of the Dublin Regulation III are not in line with Article 24(2), as it is not in the minor's best interests to be transferred to another EU Member State.[72]

d) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance))[73] (hereinafter: GDPR). The GDPR also has specific provisions designed to protect children's personal data. Children may be less aware of the risks, consequences, and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child (GDPR, paragraph 38). When processing children's personal data, the GDPR also gives special consideration to protecting their rights and privacy.

e) Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[74] (hereinafter: Maintenance Regulation) address children's rights, especially in cross-border situations, ensuring that children's legal and financial interests are protected throughout the EU. The Maintenance Regulation ensures that court decisions regarding child maintenance obligations made in one EU Member State are automatically enforceable in any other EU Member State without the need for complex legal proceedings.

f) Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[75] (hereinafter: Succession Regulation) protects children's rights indirectly. The Succession Regulation addresses inheritance and

72 Klaassen and Rodrigues, 2017.
73 Regulation (EU) 2016/679, 2016, pp. 1–88.
74 Brussels IIa Regulation, 2003, pp. 1–79.
75 Regulation (EU) No 650/2012, 2012, pp. 107–134.

succession issues when a parent or relative dies, particularly in cross-border cases. The Succession Regulation does not exclusively focus on children's rights, it ensures that children's interests in inheritance matters are respected and legally protected across EU Member States.

2.3.2. Directives

Directives are also important legal acts. A directive is binding on each EU Member State to which it is addressed regarding the goal that must be achieved, but it leaves national authorities the choice of form and methods (Article 288(3) of the TFEU). Member States must transpose directives into their national law within a specified timeframe.

The EU has adopted a series of directives as sources of secondary EU law that ensure the protection of children and their rights across various fields. These areas include protecting children from abuse, ensuring workplace safety, providing protection in asylum procedures, and ensuring access to rights in legal proceedings. Some key directives are:

a) Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast)[76] (hereinafter: Directive 2024/1346) has made an essential contribution to the protection of children's rights in asylum and migration procedures.[77] Directive 2024/1346 regulates minimum standards for the conditions under which asylum seekers, including unaccompanied minors, are treated. According to Article 26(1), the best interests of the child must be the primary consideration for Member States when implementing the provisions of Directive 2024/1346 related to minors. Member States must ensure a standard of living that is adequate for the minor's physical, mental, spiritual, moral, and social development. In assessing the best interests of the child, Member States shall take due account of the following factors: I) the possibility of family reunification; II) the minor's well-being and social development, particularly considering the minor's background and the need for stability and continuity in care; III) safety and security considerations, especially where there is a risk that the minor may be a victim of any form of violence or exploitation, including trafficking in human beings; IV) the views of the minor, in accordance with their age and maturity (Article 26(2) of Directive 2024/1346). Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age, in open-air facilities within the premises and accommodation centres as well to school materials where needed (Article 26(3) of Directive

76 Regulation (EU) 2024/1346, 2024.
77 Regulation (EU) No 603/2013, 2013, pp. 96–116.

2024/1346). Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture, or cruel, inhuman or degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided where needed (Article 26(4) of Directive 2024/1346). Member States shall ensure that minor children of applicants or applicants who are minors are accommodated with their parents or with the adult responsible for them and their unmarried minor siblings, whether by the law or practice of the Member State concerned, provided it is in the best interests of the minors concerned (Article 26(5) of Directive 2024/1346). Persons working with minors, including representatives and persons suitable to provisionally act as representatives, shall not have a record of child-related crimes or offences, or of crimes or offences that lead to serious doubts about their ability to assume a role of responsibility with regard to minors, shall receive initial and continuous appropriate training concerning the rights and needs of minors, including those relating to any applicable child safeguarding standards, and shall be bound by the confidentiality rules provided for in national law in relation to any information they obtain in the course of their work (Article 26(6) Directive 2024/1346). Article 27 of Directive 2024/1346 explicitly addresses unaccompanied minors as a particularly vulnerable group. Where an application is made by a person who claims to be a minor, or in relation to whom there are objective grounds to believe that that person is a minor, Member States shall designate: I) a person suitable to provisionally act as a temporary representative until a representative has been appointed; II) a representative as soon as possible and no later than 15 working days from the date on which the application is made (Article 27(1) of Directive 2024/1346. Unaccompanied minors should be placed in child-friendly environments (e.g., foster families or special centres), and especially siblings should be placed together whenever possible. Member States should start searching for family members as soon as possible, while respecting safety and privacy. Member States may place unaccompanied minors aged 16 or over also in accommodation centres for adult applicants, if it is in their best interests (Article 27(9) of Directive 2024/1346).

b) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combatting the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA[78] (hereinafter: Directive 2011/92/EU establishes common standards for the prevention and combatting of the sexual exploitation of children and sexual abuse within the EU, including the prohibition of the production, distribution, and possession of child pornography. Directive

78 Directive 2011/93/EU, 2011, pp. 1–14.

2011/93/EU lays down minimum rules regarding the definition of offenses and penalties in this area. It also addresses the prevention of such crimes, the protection of victims, and the strengthening of cooperation among Member States in handling these cases. Furthermore, it ensures support and protection for children who are victims of sexual exploitation.

c) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA[79] (hereinafter: Directive 2011/36/EU) addresses measures for preventing and combatting human trafficking, including the protection of children from trafficking and exploitation. Children who are victims of human trafficking are entitled to special protection, which includes providing safe shelter and implementing specific measures during criminal proceedings.
d) Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[80] (hereinafter: Directive 2016/800/EU) ensures special rights for children involved in criminal proceedings. Children who are suspected or accused of crimes must be guaranteed the right to legal representation, the right to an individual assessment of their needs, the right to parental presence during the proceedings, and special protective measures during interrogations.
e) Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[81] (hereinafter: Directive 2003/86/EC) defines the conditions and procedures applicable to the entry and residence of third-country nationals in the EU for family reunification purposes. Special attention is given to the rights of children in family reunification procedures, including expedited processes for unaccompanied minors and the obligation of Member States to consider the best interests of the child (see Article 4 of Directive 2003/86/EC).
f) Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work[82] defines the protection of young workers (minors) from workplace hazards. It establishes minimum standards for safety and health at work for young people, prohibits the employment of children except under certain conditions, and regulates the working conditions for minors to prevent exploitation.
g) Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (Text with EEA relevance)[83] (hereinafter:

79 Directive 2011/36/EU, 2011, pp. 1–11.
80 Regulation (EU) 2016/679, 2016, pp. 1–20.
81 Council Regulation (EC) No 2201/2003, 2003, pp. 12–18.
82 Directive 94/33/EC, 1994, pp. 12–20.
83 Regulation (EC) No 810/2009, 2009, pp. 1–37.

Directive 2009/48/EC) establishes safety standards for toys intended for children. Toys available on the EU market must be safe for children and must not pose a risk to their health or safety. The Directive 2009/48/EC outlines the obligations of toy manufacturers and distributors, who must ensure that toys comply with safety requirements. These safety requirements also pertain to the testing and certification of toys. Toys must bear the CE marking, indicating that they meet the requirements of Directive 2009/48/EC.

h) Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA[84] establishes minimum standards for the rights, support, and protection of victims of crimes, including children. Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise those rights in a manner that takes into account their capacity to form their views (Directive 2012/29/EU, paragraph 14). Professional assistance should be provided to children as direct or indirect victims of crimes, which should include providing shelter and safe accommodation, immediate medical support, referral to medical and forensic examination for evidence in cases of rape or sexual assault, short and long-term psychological counselling, trauma care, legal advice, advocacy, (Directive 2012/29/EU, paragraph 38).

i) In June 2024, Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance)[85] was adopted. It calls on the Member States to take appropriate measures to help combat child labour, which often occurs in countries or territories with high levels of poverty.

j) It is also worth mentioning the Proposal for a Directive of the European Parliament and of the Council on combatting violence against women and domestic violence.[86] According to Article 83(1) of the TFEU, the European Parliament and the Council can establish minimum rules regarding the definition of crimes and sanctions in the area of particularly serious crimes with a cross-border dimension due to the nature or effects of such crimes or due to the special need for a common fight against them. Among such crimes, human trafficking and sexual abuse of women and children are explicitly included. The proposed Directive will strengthen the protection of numerous fundamental rights, particularly the rights of the child (Article 24 of the CFREU), for example, by recognising child victims as

84 Directive 2012/29/EU, 2012, pp. 57–73.
85 Regulation (EU) 2024/1760, 2024.
86 European Commission, 2022, COM(2022) 105 final.

direct victims of violence against women and domestic violence, setting specific measures for the protection and support of children, and requiring that the best interests of the child be taken into account in the handling of cases (Proposal for a Directive, Chapter 3).

2.3.3. Decisions

Decisions also constitute secondary EU law. A decision is fully binding. If the decision determines those to whom it is addressed, it is binding only on them (Article 288(4) of the TFEU). Decisions have a direct effect without the need for further implementation measures. Binding decisions in secondary EU law, therefore, also make a significant contribution to the protection of children's rights and interests.

Thus, in 2008, a binding decision[87] was made by the EU to accede to the "Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption"[88] (hereinafter: Hague Convention 1993). The Hague Convention 1993, which regulates intercountry adoptions, ensures that such adoptions are in the best interests of the child and prevents child trafficking. The Hague Convention obliges Member States to follow strict rules on intercountry adoptions to protect children from exploitation and to ensure that adoptions are lawful and safe.[89]

The following year, in 2009, another significant binding decision was adopted, namely the "Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities[90] (2010/48/EC)" (hereinafter: UN Convention 2006). UN Convention 2006 addresses children with disabilities in Article 7, obliging States Parties to take all necessary measures to ensure that children with disabilities enjoy all human rights and fundamental freedoms on an equal basis with other children. In all actions concerning children with disabilities, the best interests of the child must be a primary consideration. States Parties must ensure that children with disabilities have the right to freely express their views on all matters affecting them, with their views being

87 2008/431/EC: Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law – Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children; Council Decision 2008/431/EC, 2008, pp. 36–48.

88 Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption – Slovenia is contracting Party since 1999 (Uradni list RS, št. 45/99). On 4 October 2024 the Hague Convention 1993 had 106 contracting Parties; Hague Convention on Intercountry Adoption, 1993.

89 More on intercountry adoptions see Kraljić, 2007, p. 189 et seq.; Kraljić and Drnovšek, 2015, p. 183 et seq.

90 Convention on the Rights of Persons with Disabilities – Slovenia ratified UN Convention in 2008 (Uradni list RS, št. 37/2008). On 4 October the UN Convention 20008 had 104 contracting Parties; Convention on the Rights of Persons with Disabilities, 2006.

given due weight according to their age and maturity, and they must be provided with appropriate assistance to exercise these rights according to their disability and age.

The following year, in 2009, the following important binding decision was adopted, namely the "Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC)"[91] (hereinafter: UN Convention 2008). The UN Convention 2008 addresses children with disabilities in its Article 7. It obliges States Parties to take all necessary measures to ensure that children with disabilities enjoy, on an equal basis with other children, all human rights and fundamental freedoms. In all activities relating to children with disabilities, the best interests of the child must be the primary concern. States Parties shall ensure that children with disabilities have the same right as other children to express their views freely on all matters affecting them, taking into account their age and maturity, and shall provide them with appropriate assistance in accordance with their disability and age, to enable them to exercise these rights.

In 2021, a binding decision was adopted to promote the implementation of measures to protect children from poverty, violence, and discrimination while enhancing support for their integration into society and education. These measures derive from the "EU Strategy on the Rights of the Child (2021–2024)"[92] (hereinafter: Strategy 2021). Although the Strategy 2021 itself is not legally binding, the decision is crucial in ensuring that the strategy's objectives are legally supported and that Member States implement actions that are grounded in the best interests of children.

2.3.4. Recommendations and Opinions

Recommendations and opinions are not legally binding, but they give the EU institutions guidelines and views on a particular subject. Such recommendations and opinions have also been adopted in the field of child protection and children's rights.

In 2013, the "2013/112/EU: Commission Recommendation of 20 February 2013 Investing in children: breaking the cycle of disadvantage"[93] (hereinafter: Recommendation 2013/112/EU) was adopted. This recommendation established a comprehensive approach to reducing child poverty or social exclusion and improving child well-being based on three pillars: access to resources, access to affordable, quality services, and the right of children to participate. Children are generally more at risk of poverty or social exclusion than the overall population in most EU Member States. Children growing up in poverty or social exclusion are less likely to succeed in school, maintain good health, or fully realise their potential later in life compared to their more privileged peers (Recommendation 2013/112/EU, paragraph 2). Preventing the transmission of disadvantage across generations is identified as a crucial investment in Europe's future and a direct contribution to the Europe 2020 Strategy for smart,

91 Council Decision 2010/48/EC, 2010.
92 European Commission, 2021, EU strategy on the rights of the child.
93 Regulation (EU) No 181/2011, 2011, pp. 5–16.

sustainable, and inclusive growth, providing long-term benefits for children, the economy, and society as a whole (Recommendation 2013/112/EU, paragraph 3). Early intervention and prevention are essential for developing more effective and efficient policies, as public expenditures aimed at addressing the consequences of child poverty and social exclusion tend to be greater than that needed for intervening at an early age (Recommendation 2013/112/EU, paragraph 4).

The goal of prevention can be most effectively achieved through integrated strategies that combine support to parents to access the labour market with adequate income support and access to services essential to children's outcomes, such as quality (pre-school) education, health, housing, social services, and opportunities to participate and use their rights. This helps children realise their full potential and contribute to their resilience (Recommendation 2013/112/EU, paragraph 5).

In 2021, the "Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee"[94] (hereinafter: Recommendation 2021/1004) was adopted. This decision established the "European Child Guarantee", an EU initiative aimed at combatting child poverty and social exclusion. The objective of Recommendation 2021/1004 is to prevent and address social exclusion by ensuring access to a set of key services for children in need, thereby contributing to the protection of children's rights by tackling child poverty and promoting equal opportunities. Recommendation 2021/1004 advises that Member States shall guarantee for children in need: I) effective and free access to high-quality early childhood education and care, education and school-based activities, at least one healthy meal per school day, and healthcare; II) effective access to healthy nutrition and housing (Recommendation 2021/1004, paragraph 4). The focus is on ensuring that all children in the EU, regardless of their social or economic background, have access to essential services and opportunities.

3. Children's Rights in the Light of EU Non-Legislative Instruments

The EU also adopts strategies that are non-legislative instruments and thus do not fall under the category of secondary EU law, as they are not directly based on the Treaties. Strategies represent political guidelines, initiatives, and plans for future EU action in specific areas. While strategies guide EU institutions and Member States in shaping policies and legislation, they do not themselves create direct legal obligations or rights for Member States or individuals. Therefore, strategies serve as important frameworks that influence future legislative initiatives and the development of secondary EU law.

In 2021, the "EU Strategy on the Rights of the Child" (hereinafter: Strategy 2021) and the "European Child Guarantee" (hereinafter: Guarantee 2021) were adopted. Guarantee 2021 complements Strategy 2021 by supporting its goals. While Strategy

94 Regulation (EU) 2021/1119, 2021, pp. 14–23.

2021 sets out objectives and actions aimed at improving the protection of children's rights within the EU, it is not a legally binding document, unlike secondary legislation (such as a regulation or directive). The overall aim of Strategy 2021 and Guarantee 2021 is to provide children with the best possible conditions for living in the EU and worldwide. EU Member States were encouraged to implement the guidelines of both documents into practical measures.[95]

Strategy 2021 emphasises the shared responsibility to fulfil every child's rights and build together with children equal societies for all.[96] Strategy 2021 follows a holistic approach to human rights based on the understanding that all children's rights are indivisible and interdependent. Through Strategy 2021, the EU aims to fight poverty, social exclusion, discrimination, and bullying of all kinds.[97]

Strategy 2021 was developed for and with children. Children should have access to information provided in a child-friendly manner, enabling them to clearly understand their rights and what the EU intends to do for them in this context. Child-friendly versions of the Strategy 2021 were co-created by children, presenting information in an easily understandable way. Children have advised on the language, images, and examples used in the brochures. Additionally, the child-friendly version of the Strategy 2021 is accessible to visually impaired readers and can be utilised with assistive devices and technology.

Ensuring and implementing children's rights is central to *Strategy 2021*. In Strategy 2021, the Commission committed to present an initiative aimed at supporting the development and strengthening of integrated child protection systems as a key outcome in the fight against all forms of violence against children and in ensuring their protection.

The goal of *Strategy 2021* is to strengthen children's rights in the EU, create conditions for the respect and protection of all children's rights, and ensure equal opportunities for disadvantaged children.[98] The Strategy 2021 emphasises that children should also be recognised as active participants and agents of future change. Therefore, it is necessary to establish a model of participation[99] that encourages children to shape and express their opinions, which is grounded in their rights.[100]

Strategy 2021 follows the shared responsibility for the realisation of every child's rights and for building equal societies for all. In a constantly changing world, children may face various challenges, such as violence, discrimination, online abuse, and others, as emphasised by Strategy 2021. The COVID-19 pandemic has intensified these challenges and inequalities. For instance, remote learning has affected children without internet access, those with special needs (disabilities), and very young

95 Sacur and Diogo, 2021, p. 1.
96 Ibid., p. 2.
97 European Parliament, 2023.
98 Dunhill, Schuurman and Tormen, no date, p. 4.
99 For example, the 'EU Children's Participation Platform' was formed; EU Children's Participation Platform, no date.
100 Dunhill, Schuurman and Tormen, no date, p. 2.

learners. Strategy 2021 addresses multiple challenges and proposes concrete actions. Guarantee 2021 complements Strategy 2021 and targets children in distress under the age of 18 who are at risk of poverty and social exclusion.

As a commitment under Strategy 2021, the "Commission Recommendation (EU) 2024/1238 of 23 April 2024 on developing and strengthening integrated child protection systems in the best interests of the child"[101] (hereinafter: Recommendation 2024/1238) has been adopted to support EU Member States in developing and strengthening their child protection systems according to children's needs and in their best interests. It has been noted that national child protection systems vary significantly. They are designed based on specific needs and available resources and shaped by particular cultural, social, and historic factors, with different levels of decentralisation (Recommendation 2024/1238, paragraph 6). To promote a culture of zero-tolerance for all forms of violence against children, it is essential to bridge the gap between international standards, political commitments, and actions and to mobilise all relevant actors in society. The development of integrated child protection systems in the Member States is encouraged, alongside strengthening their functioning and promoting child protection as a priority for the Union in its external actions (Recommendation 2024/1238, paragraph 7). The child's best interest should be the primary consideration, with attention given to children's views. Furthermore, an integrated approach should connect prevention, early warning, reporting, cross-sectoral support, and monitoring (Recommendation 2024/1238, paragraph 8).

4. Coordinator on Children's Rights

Children represent an important social group in the EU. Therefore, it is not surprising that the protection of children and their rights, as well as the promotion of these rights, forms one of the main goals of the EU and the European Parliament. For this purpose, the institution of the "Coordinator of the European Parliament on Children's Rights" (hereinafter: the Coordinator) was created in 1987. Ewa Kopacz has held the role of Coordinator since July 2019.[102] The position of the Coordinator was established in 1987 at the initiative of Lord Plumb, who was then the President of the European Parliament. Initially, it was named the "Mediator for International Parental Child Abductions" (hereinafter: Mediator). At that time, EU Member States collaborated very little in the field of family law. The introduction of the mediator role was a pragmatic solution to the increasing demands from members of the European Parliament, who were receiving inquiries from individuals facing cross-border child abductions or issues related to access. Over the years, the role of the Mediator has evolved.

101 Regulation (EU) 2024/1238, 2024.
102 European Parliament, no date, Koordinator Evropskega parlamenta za otrokove pravice.

In April 2018, under the leadership of Elisabeth Morin-Chartier,[103] it was renamed to "Coordinator of the European Parliament for Children's Rights". The Coordinator's responsibilities were expanded to include the safeguarding and promotion of children's rights. In addition to the renaming and extension of the Coordinator's powers, a permanent office was established within the institution, demonstrating the Parliament's long-term commitment to recognising and protecting children's rights.

The role of the Coordinator includes the following responsibilities:

a) central contact point: the Coordinator acts as a central contact for monitoring and actively promoting children's rights in EU policies. This involves ensuring consistency and visibility of the Parliament's actions in this area. The Coordinator serves as a contact person regarding children's rights for institutions and organisations involved in EU policies and child rights and civil society;
b) cross-border mediation: the Coordinator promotes cross-border mediation in international family disputes and advocates for the protection of children's rights across all EU policies and legislation;
c) guidance for parents facing child abduction: the Coordinator also aims to direct individuals dealing with parental child abduction and other cross-border family disputes. This role involves serving as a central information point for EU citizens regarding international parental child abductions or other cross-border family issues.[104]

5. Final Thoughts

The EU represents one of the most favourable legal frameworks for the protection of children's rights. It has significant potential to create dramatic changes in how children's rights are perceived and managed.[105] The EU's unique strength lies in its legal, political, and financial authority over its Member States, which these states rely upon. Moreover, the EU has resources available to support monitoring, data collection, intergovernmental policy exchange, and collaboration. Overall, it possesses a unique capability to create the framework for the child protection system, which could also be applied outside the borders of the EU.

In recent years, particularly with the adoption of Strategy 2021 and Guarantee 2021, significant progress has been made in ensuring the protection of children and

103 The Mediator, or now Coordinator, function was executed by Anna Maria Corazza Bildt (2019), Elisabeth Morin-Chartier (2017–2019), Mairead McGuinness (2014–2017), Roberta Angelilli (2009–2014), Evelyne Gebhardt (2004–2009), Mary Banotti (1995–2004) and Marie-Claude Vayssade (1987–1994); See Ibid.
104 Ibid.
105 Iusmen and Stalford, 2016, p. 13.

children's rights across various areas (e.g., child-friendly justice, protection of victims of crimes, poverty alleviation, education, health, the impact of climate change on children's rights, and the protection of children's rights in the digital environment). However, the EU recognises that there are still many open areas that call for appropriate legislative frameworks and measures to protect children's rights, especially concerning ensuring the best interests of the child and children's participation.

The year 2024 is indeed a pivotal one for children's rights in the EU, as the current Strategy 2021 is coming to an end.[106] This marks the beginning of a new strategic phase, with the newly elected European Parliament preparing to set the next five-year agenda. This transition is particularly important because the field of children's rights is highly dynamic and is influenced by a wide range of factors, including political, economic, and environmental changes, as well as crises such as conflicts, health emergencies, poverty, and digitalisation challenges. EU's ability to adapt its actions to these evolving challenges will be critical. Strategic planning for the next period will need to focus on inclusive, well-thought-out policies that address the needs of all children, especially the most vulnerable, since these children face the highest risks from social and environmental factors.

Among the areas of children's rights that certainly need to be considered now and for which possible *de lege ferenda* solutions or at least improvements to existing deficient regulations need to be sought are issues related to new technologies and digitalisation, which have permeated all areas of our lives, both private and professional. Today's children leave their digital fingerprint from birth (some even before birth). Aware of the pitfalls and dangers posed by new technologies, and especially because their far-reaching consequences cannot be fully predicted (e.g., the development of artificial intelligence), this issue deserves special attention at the EU level as well. The EU has taken an important step by adopting the Artificial Intelligence Act (Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence), which is the first comprehensive legal framework on artificial intelligence in the world. The rules aim to promote trustworthy artificial intelligence in Europe, especially with regard to our children and their future.

The EU is very diverse. It brings together people from almost all over the world, making it an extremely diverse society (e.g., in terms of language, culture, religion, race), which brings and opens up new challenges, especially with regard to migration and intercountry family relations. Through its case law, the CJEU plays an important role in creating solutions based on and building on the fundamental principles of the EU. It is therefore very important that the EU's legislative framework is constantly being upgraded (e.g., recasts of regulations). It thus continually strives to ensure respect for human rights, especially children's rights, and the fundamental values of the EU. It should not be overlooked either, that environmental issues and sustainable development have raised many important questions in recent years, which the EU has actively addressed to ensure the protection of children and their rights. Central to

106 UNICEF, 2024, p. 6.

the 2030 Agenda for Sustainable Development and its Sustainable Development Goals is the commitment to "Leave no one behind", particularly children, who are vulnerable today, and need a secure pathway for their future. The EU has a responsibility to contribute to this path in the best possible way.

Bibliography

Literature

Blanke, H.J., Mangiameli, S. (2013) *The Treaty on European Union (TEU): a commentary*. Berlin–Heidelberg: Springer.

Council of Europe (2022) *Council of Europe – Strategy for the Right of the Child (2022 – 2027) – Children's Rights in Action – From Continuous Implementation to Joint Innovation*. Strasbourg: Council of Europe.

De Burca, G. (2013) 'The Domestic Impact of the EU Charter of Fundamental Rights', *Irish Jurist,* 49, pp. 49–64.

Detrick, S. (1999) *A Commentary on the United Nations Convention on the Rights of the Child*. The Hague: Springer.

Dunhill, A., Schuurman, M., Tormen, E.P. (no date) 'The EU Strategy on the Rights of the Child: What does this mean for the EU and Germany?', *Eurochild.* [Online]. Available at: https://eurochild.org/uploads/2021/06/Eurochilds-Article-_-The-EU-Strategy-on-the-Rights-of-the-child_15.06.pdf (Accessed: 24 September 2024).

Erikson, M. (2006) 'Article 24. Rights of the child' in EU Network of Independent Experts on Fundamental Rights (ed.) *Commentary of the Charter of the Fundamental Rights of the European Union*, pp. 209–215. [Online]. Available at: https://sites.uclouvain.be/cridho/documents/Download.Rep/NetworkCommentaryFinal.pdf (Accessed: 13 April 2024).

European Parliament (2023) *Children's Rights: what does the EU do to protect children?* [Online]. Available at: https://www.europarl.europa.eu/topics/en/article/20231109STO09921/children-s-rights-an-overview-of-eu-actions-to-protect-children (Accessed: 27 September 2024).

Eurostat (2022) *Archive: Being young in Europe today – demographic trends* [Online]. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Being_young_in_Europe_today_-_demographic_trends (Accessed: 11 April 2024).

Eurostat (2023) *Population and population change statistics* [Online]. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_and_population_change_statistics (Accessed: 11 April 2024).

Evropski parlament (no date) *Koordinator Evropskega parlamenta za otrokove pravice*. [Online]. Available at: https://www.europarl.europa.eu/at-%20your-service/sl/be-heard/coordinator-on-children-rights (Accessed: 14 April 2024).

Freeman, M. (2009) *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child. Vol. 3*. Leiden: Martinus Nijhoff.

Iusmen, I., Stalford, H. (2016) 'Introduction: the EU as a children's rights actor: law, policy and structural dimensions' in Iusmen, I., Stalford, H. (eds.) *The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions*. Leverkusen: Verlag Barbara Budrich, pp. 9–18; http://dx.doi.org/10.3224/978384740193f.

Kišūnaitė, A. (2019) 'Children's Rights Protection in the EU: The Need for a Contextual Perspective', *Peace Human Rights Governance*, 3(2), pp. 171–192; https://doi.org/10.14658/PUPJ-PHRG-2019-2-1.

Klaassen, M., Rodrigues, P. (2017) 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter', *European Journal of Migration and Law*, 19(2), pp. 191–218; https://doi.org/10.1163/15718166-12340007.

Klamert, M. (2019) 'Article 3 TEU' in Kellerbauer, M., Klamert, M. and Tomkin, J. (eds,) *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Online edn. New York: Oxford Academic, pp. 31–34; https://doi.org/10.1093/oso/9780198759393.003.6.

Kraljić, S. (2007) 'Mednarodna ugrabitev otrok: kdaj vrnitev, kdaj zavrnitev' in Knežević, G., Pavić, V. (eds.). *Državljanstvo i međunarodno privatno pravo: Haške konvencije: (zbornik radova)*. Beograd: Pravni fakultet: Službeni glasnik, pp. 189–204.

Kraljić, S. (2019) *Družinski zakonik: [s komentarjem]*. 1st edn. Maribor: Poslovna založba MB.

Kraljić, S. (2020) 'Implementation and protection of the child's right to education', *Šolsko polje: revija za teorijo in raziskave vzgoje in izobraževanja*, 31(3–4), pp. 27–44; https://doi.org/10.32320/1581-6044.31(3-4)27-44.

Kraljić, S. (2024) 'The right to education in a digital era' in Sannikova, L. (ed.) *Digital technologies and distributed registries for sustainable development: legal challenges*. 1st edn. Cham: Springer, pp. 135–153; https://doi.org/10.1007/978-3-031-51067-0_8.

Kraljić, S., Drnovšek, K. (2015) 'Elterliche Internationale Kindesentführung' in Župan, M. (ed.). *Private international law in the jurisprudence of European courts – family at focus*. Osijek: Pravni fakultet Sveučilišta Josipa Jurja Strossmayera, pp. 183–199.

Kraljić, S., Drnovšek, K. (2022) 'The implementation of the child's right to be heard: the Slovenian view', *Law, identity and values*, 2(2), pp. 101–116; https://doi.org/10.55073/2022.2.101-116.

Kraljić, S., Kežmah, U., Čujovič, M. (eds.) (2022) *Zakon o nepravdnem postopku – ZNP-1 – s komentarjem*. Maribor: Založba WD.

McCormick, J. (2020) *Understanding the European Union*. Bloomsbury Publishing.

Mehmetaj, I. (2015) 'International Law and the Role of the European Union as an Actor in International Dispute Settlement', *European Scientific Journal*, 11(13), pp. 87–97.

Sacur, B.M., Diogo, E. (2021) 'The EU Strategy on the Rights of the Child and the European Child Guarantee – Evidence-Based Recommendations for Alternative Care', *Children*, 8, p. 1181. https://doi.org/10.3390/children8121181.

Saxer, U. (2025) 'Supranational Organizations: The European Union' in *The Law of Global and European Organizations*. Cham: Springer, pp. 237–278; https://doi.org/10.1007/978-3-032-00067-5_4.

Stalford, H., Schuurman, M. (2011) 'Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children's Rights Agenda', *International Journal of Children's Rights*, 19, pp. 381–403.

Šelih, A. (2014) 'Konvencija o otrokovih pravicah – magna carta otrokovih pravic in njeno izvajanje v Sloveniji' in Jager Agius, I. (ed.) *Otrokove pravice v Sloveniji – od normativnih standardov do učinkovitega varstva.* Ljubljana: Fakulteta za družbene vede, Založba FDV in Ministrstvo za zunanje zadeve Republike Slovenije, pp. 3–28.

UNICEF (2024) *The State of Children in the European Union* [Online]. Available at: https://www.unicef.org/eu/media/2521/file/The%20State%20of%20Children%20in%20the%20European%20Union%20.pdf (Accessed: 4 October 2024).

Vandenhole, W., Erdem Türkelli, G., Lembrechts, S. (2024) *Children's Rights: A Commentary on the Convention on the Rights of the Child and its Protocols*. 2nd edn. Cheltenham: Edward Elgar Publishing.

Legal Sources

Charter of Fundamental Rights of the European Union (CFREU), OJ C 202, 7 June 2016, pp. 389–405.

Commission of the European Communities Communication (2006) Communication from the Commission 'Towards a Strategy on the Rights of the Child' (COM(2006) 367 final), Brussels 4 July 2006. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006DC0367 (Accessed: 14 April 2024).

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An EU Agenda for the Rights of the Child (COM/2011/0060 final) [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0060 (Accessed: 25 September 2024).

Consolidated version of the Treaty on European Union (TEU), OJ C 202, version from 1 September 2024.

Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 115 of 9 May 2008.

Constitution of the Republic of Slovenia (CRS: Slovene *Ustava Republike Slovenije):* Uradni list RS, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90, 97, 99, 75/16 – UZ70a, 92/21 – UZ62a.

Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. [Online]. Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=69 (Accessed: 4 October 2024).

Convention on the Rights of Persons with Disabilities. [Online]. Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRPD/CRPD_ENG.pdf (Accessed: 4 October 2024).

Convention on the Rights of the Child (UNCRC): Uradni list SFRJ – MP, no 15/1990 and Uradni list RS – MP, no 9/1992.

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10 January 2009, pp. 1–79.

Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), *OJ L 178, 2 July 2019, pp. 1–115.*

European Commission (2011) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An EU Agenda for the Rights of the Child, Brussels, COM(2011) 60 final, Brussels, 15 February 2011. [Online]. Available at: https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/political_declarations/europe/european_union_agenda_for_the_rights_of_the_child.pdf (Accessed: 20 September 2024).

European Commission (2021) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty – EU strategy on the rights of the child, Brussels, 24.3.2021, COM(2021) 142 final. [Online]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52021DC0142 (Accessed: 14 September 2024).

European Commission (2024) Annex to the EU Strategy on the Rights of the Child - EU aquis and policy documents on the rights of the child. [Online]. Available at: https://commission.europa.eu/document/download/e32422b2-6ba3-4dbf-931b-d3204877f78a_en?filename=childrights_annex2_2021_4_digital.pdf (Accessed: 4 October 2024).

European Commission (2024) Commission Recommendation of 23.4.2024 on developing and strengthening integrated child protection systems in the best interests of the child (SWD(2024) 98 final). [Online]. Available at: https://commission.europa.eu/document/download/36591cfb-1b0a-4130-985e-332fd87d40c1_en?filename=C_2024_2680_1_EN_ACT_part1_v8.pdf (Accessed: 25 September 2024).

European Commission (no date) The EU Strategy on the Rights of the Child and the European Child Guarantee. [Online]. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/eu-strategy-rights-child-and-european-child-guarantee_en (Accessed: 27 September 2024).

European Convention for the Protection of Human Rights and Fundamental Freedoms, retrieved from: https://www.echr.coe.int/documents/d/echr/Convention_ENG (Accessed 28 September 2024).

Family Act (CRO-FA: Croatian Obiteljski zakon): Narodne novine, no. 103/15, 98/19, 47/20, 49/23, 156/23.

Family Act (SRB-FA): Serbian Porodični zakon): Službeni glasnik RS, no. 18/05, 72/11 – dr. zakon, 6/15.

Family Code (FC: Slovene Družinski zakonik): Uradni list RS, št. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23, 34/24 – odl. US.

Komisija Evropskih skupnosti (2006) *Sporočilo Komisije – Strategiji EU o otrokovih pravicah naproti,* Bruselj, 4 July 2006, COM(2006) 367 konč.

Non-Contentious Civil Procedure Act (Slovene Zakon o nepravdnem postopku): Uradni list RS, št. 16/19.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), *OJ L 119, 4 May 2016, pp. 1–88*.

Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, *OJ L 181, 29 June 2013, pp. 4–12.*

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ L 201, 27 July 2012, pp. 107–134*.

Strategic Objectives 2005–2009 – Europe 2010: A Partnership for European Renewal Prosperity, Solidarity and Security, COM/2005/0012 final, 26 January 2005. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0012 (Accessed: 10 September 2024).

United Nations – Committee on the Rights of the Children (2003) *General Comment No. 5 – General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6). [Online]. Available at: http://docstore.ohchr.org/SelfServices/FilesHandler. ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsiQql8gX5Zxh0cQqSRzx6Zd2%2FQRsDnCTcaruSeZhPr2vUevjbn6t6GSi1fheVp%2Bj5HTLU2Ub%2FPZZtQWn0jExFVnWuhiBbqgAj0dWBoFGbK0c (Accessed: 4 October 2024).

United Nations - Committee on the Rights of the Children (2013) *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1). [Online]. Available at: https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (Accessed: 4 October 2024).

United Nations (2009) *General Comment No. 12 (2009) – The right of the child to be heard* [Online]. Available at: https://www2.ohchr.org/english/bodies/crc/docs/advanceversions/crc-c-gc-12.pdf (Accessed: 16 April 2024).

Case-Law

CJEU, C-129/18, 26 February 2019.

CJEU, C-261/22, 21 December 2023.

CJEU, C-365/23, 20 March 2025.

CJEU, C-428/15/Opinion, 16 June 2016.

CJEU, C-460/23, 3 June 2025.

CJEU, C-490/20, 14 December 2021.

CJEU, C-560/20, 30 January 2024.
CJEU, C-638/22 PPU, 16 February 2023.
CJEU, C-646/21, 11 June 2024.
CJEU, Joined Cases C-273/20 and C-355/20, 1 August 2022.
VSL sklep I Ip 359/2020 (ECLI:SI:VSLJ:2020:I.IP.359.2020), 26 February 2020.
VSL sodba IV Cp 2188/2015 (ECLI:SI:VSLJ:2015:IV.CP.2188.2015), 23 May 2015.
VSM sklep III Cp 631/2020 (ECLI:SI:VSMB:2020:III.CP.631.2020), 15 September 2020.

Part II

Women

| Chapter 4 |

The International Protection of Women's Rights: The United Nations Framework

Olga Dorul

ABSTRACT

In this chapter, we aim to analyse the emergence and evolution of the United Nation's toolkit for protecting women's rights. In order to form a comprehensive view of how women's rights are protected in the United Nations System, we intend to follow the traditional dual approach of legal analysis in the field of international protection of vulnerable categories: the normative framework and the institutional framework in the field.

We have deemed it appropriate to invoke the case law of the bodies empowered to examine issues related to the protection of women's rights in contentious proceedings, as well as the monitoring bodies, in order to deduce reasoning that is essential for both states and regional systems to follow in this area. We also indicate that the list of UN bodies and institutions with mandates in the field of women's rights protection, presented in this study, is not exhaustive, as the volume of works of this kind does not allow for an all-encompassing analysis on this topic. Today, the gender approach is recognised as a standard for the functioning and organisation of the entire UN system. We considered it appropriate to focus specifically on the most representative, normative and institutional framework, in our opinion, to illustrate the efforts made by states to develop universal standards for the treatment of women.

Regarding the legal status of women in light of the regulations adopted under the aegis of the United Nations, we will analyse also the particular situation of both the categories of women protected within the United Nations system (general protection, the situation of stateless women, women with disabilities, special protection of women affected by armed conflicts, etc.) and conduct a study of the categories of rights protected from the perspective of the generations of human rights (civil and political, economic, social, and cultural).

This study highlights the extent to which the states of Central and Eastern Europe honour their obligations to implement universal standards for the protection of women's rights, as well as the legal, procedural, socio-economic, and cultural barriers that persist in this regard. In this context, relevant studies, reports, data, opinions, and judicial rulings have been analysed and presented. We hope that this study will ultimately facilitate an understanding of the appropriate measures that must be implemented to ensure that state policies are gender-sensitive and that legal professionals are aware of the difficulties faced by women in realising their fundamental rights and freedoms.

KEYWORDS

Committee on the elimination of discrimination against women, gender equality, women's rights, United Nations

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1. Introduction

In the context of globalisation, which in a peaceful context is a factor that facilitates migratory flows, while in a regional conflictual context leads to an increase in the number of displaced persons, and given that the statistical data analysed in this study demonstrate that women and children represent more than half of the total number of individuals in both described situations, it is essential to establish the essence and scope of women's rights especially considering that many regions of the world continue to be marked by gender stereotypes and prejudices, resulting in gender-based segregation.

Discrimination is one of the most sensitive and globally relevant topics. This phenomenon is present both internationally and nationally, in various areas of life, and in connection with the exercise of civil, political, economic, social and cultural rights. The interest of the international community with regards to gender equality currently manifests itself through an awareness of the discouraging effects of discrimination and the adoption of new approaches to combat this phenomenon. Countries still have the most important mission, that of ensuring that such standards are implemented at a global level, as well as that of removing all obstacles in this regard.

Gender equality entails equal visibility, empowerment, responsibility and equal participation in all areas of public and private life. In an equal measure, equality entails equal access to various resources, as well as their fair distribution between women and men. The objective of promoting gender equality is an essential requirement for any society, and is considered a key component of the commitment to observe fundamental human rights. Therefore, equal participation of women and men with regard to sustainable development and social progress has gained increasing importance in countries promoting values related to the rule of law.

Summarising the ideas presented on the subject of the contemporary history of women's rights protection, we deduce that this concept emerged extremely late due to several factors that created real obstacles in establishing the meaning and scope of women's rights. These factors are both objective and subjective in nature.

In particular, in Eastern European societies characterised by profound patriarchal patterns[1] violence against women has always been tolerated to varying degrees. Regarding the objective factors, we will refer to the entire political, social, and ideological context, as well as the economic systems of the mid-20th century, which had the effect of an extremely different approach to the legal status of women in states belonging to the opposing blocs. The Cold War, the fall of the Berlin Wall in 1989, the implosion of the Soviet Union in 1991, the arrival of women from the post-socialist European states in Beijing in 1995 had the implicit effect of re-educating Eastern European women in the spirit of accepting Western feminist perspectives. Given that so many Eastern European women felt victimised by this new economic

1 Committee on the Elimination of Discrimination against Women, 2022, para. 7.12.

system and its competitive labour markets, it should come as no surprise that many post socialist citizens blamed their miseries on the inherent flaws of the free market and began to miss the communist era policies supporting women's participation in the formal economy. The idea that the state should take an active role in promoting women's rights by guaranteeing employment or providing generous social benefits was associated with the old communist regime and therefore soundly rejected as part of an anachronistic and failed program of social engineering.[2]

2. The Evolution and the Codification of Women's Rights in the United Nations System

On February 12th 1946, during the General Assembly session, Eleanor Roosevelt read the "Open Letter to the Women of the World", in which she called on governments to stimulate and encourage women's participation in national and global decision-making processes. Likewise, in 1946, the Commission on Human Rights (later replaced by the Human Rights Council) began its work, aiming to operate until equality between women and men was achieved in all spheres.

Alongside the events described, the greatest minds of that time were concerned with the text of the document that would become the Universal Declaration of Human Rights. The working group included several women whose names were overlooked for many years in the presentation or research of the history of the adoption of the Declaration. Bodil Begtrup (Denmark), Hansa Mehta (India), Minerva Bernardino (Dominican Republic), Begum Shaista Ikramullah (Pakistan), Marie-Hélène Lefaucheux (France), Evdokia Uralova (The Byelorussian Soviet Socialist Republic), Lakshmi Menon (India) and, of course, Eleanor Roosevelt (United States of America) are amongst those who were at the origin of both the UN system for the protection of rights and the specific provisions regarding women's rights.

It is necessary to mention at this point that the feminist movements that emerged after World War II in Western states actively advocated for the inclusion of equal rights for women in the text of the Universal Declaration of Human Rights. Roosevelt, on the other hand, taking the same stand as she had in opposing the Equal Rights Amendment, objected to spelling out the rights of women as a distinct group and argued they were included under "people". Roosevelt felt a special article would imply 'a silent recognition of the idea that women are to be regarded on a different level and that rights are to be given to them out of charity'. Nonetheless, once again the militants carried the day and equality for women was included when the Declaration passed in December, 1948. The Declaration was not binding, however, so the militant feminists continued to press for equality in the Draft Convention on Human Rights.[3]

2 Ghodsee, 2010, p. 9.
3 Pfeffer, 1985, pp. 468–469.

In 1946, as a subsidiary body of the Economic and Social Council (ECOSOC), the Commission on the Status of Women was created, which contributed significantly to the official universal codification of the protection of women's rights. Starting from the role of the Commission in promoting women's rights in 1996, the ECOSOC substantially expanded its mandate. In the early 1990s, under the aegis of the UN, the main bodies marked a new approach to the subject of women's rights protection – the gender perspective, by adopting a series of resolutions.

Because women's rights activists were becoming increasingly vocal, and states were showing greater receptiveness to initiatives in this regard, the need arose to develop common standards for all actors in international life. In this context, the United Nations has organised four world conferences on women. These took place in Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985 and Beijing in 1995. The last was followed by a series of five-year reviews. The 1995 Fourth World Conference on Women in Beijing marked a significant turning point for the global agenda for gender equality. The Beijing Declaration and the Platform for Action, adopted unanimously by 189 countries, is an agenda for women's empowerment and considered the key global policy document on gender equality. It sets strategic objectives and actions for the advancement of women and the achievement of gender equality in 12 critical areas of concern: women and poverty, education and training of women, women and health, violence against women, women and armed conflict, women and the economy, women in power and decision-making, institutional mechanism for the advancement of women, human rights of women, women and the media, women and the environment, the girl-child.[4]

Over many decades, the UN has made significant progress in advancing gender equality, including through landmark agreements such as the Beijing Declaration and Platform for Action and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Gender equality is not only a basic human right, but its achievement has enormous socio-economic ramifications. Empowering women fuels thriving economies, spurring productivity and growth. Yet gender inequalities remain deeply entrenched in every society. Women lack access to decent work and face occupational segregation and gender wage gaps. They are too often denied access to basic education and health care. Women in all parts of the world suffer violence and discrimination. They are under-represented in political and economic decision-making processes. For many years, the UN has faced serious challenges in its efforts to promote gender equality globally, including inadequate funding and no single recognised driver to direct UN activities on gender equality issues.[5] Moreover, women were underrepresented even in the United Nations, as well as in the earlier League of Nations. Although the Charter stated specifically that the 'United Nations shall not place any restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principle and subsidiary organs',

4 UN Women, no date, How we work.
5 United Nations Youth Envoy, 2013.

few women were to be found in positions of authority and the cry of discrimination quickly resounded again.[6]

3. The Legal Framework of the UN Regarding the Protection of Women's Rights

For the presentation of the content of this section, we will follow the hierarchy of acts established by International Organisations Law. Thus, after determining the provisions of primary law, we will proceed to an analysis of the secondary law of the United Nations. However, we consider it appropriate to make a clarification right from the start. The subject of human rights, including issues regarding the protection of women's rights, was intentionally neglected and not included in the content of the UN Charter (even though at that time there were voices insisting on the inclusion of a list of fundamental rights and freedoms in the text of the UN Charter itself) due to the ideological differences between capitalist and socialist states at the time of the creation of the international organisation with a universal vocation. Therefore, in the following, we will present normative provisions that directly or indirectly strengthen the system of universal protection of women's rights.

The Charter of the United Nations, the founding document of the United Nations, signed on 26th June 1945 states in the preamble:

> We the peoples of the united nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom[7]

In this regard, among purposes of the UN we find the achievement of international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.[8] In developing the indicated provisions the UN Charter explicitly establishes:

6 Pfeffer, 1985, p. 469.
7 Charter of the United Nations, 1945.
8 Ibid., art. 1(3).

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[9]

These are the only provisions in the Charter of the United Nations where we find the explicit concern of the founding states of the organisation regarding issues of equality and non-discrimination based on person's sex.

Having last been amended in 1973, there is a greater need than ever to substantially modify the provisions of the UN Charter to explicitly stipulate in the operative part of the international treaty the principle of non-discrimination based on sex (today understood also in terms of gender). This would subsequently be considered a normative provision that would impose universal positive and negative obligations on states regarding gender equality.

Once the UN was established, it made sure to adopt a comprehensive normative framework to expand the protection offered to women. We will begin this section by recounting the content of the International Bill of Human Rights.

The Universal Declaration of Human Rights[10] adopted in 1948 is rooted in the faith of the peoples of the United Nations in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women [...] The text of the Universal Declaration contains the explicit provision regarding the exercise of the rights and freedoms stipulated in the Declaration without distinction of any kind, such as race, colour, sex, etc. (art. 2). And specifically, the Declaration grants the equal right of men and women to form a family, with both having equal rights during marriage and in the event of its dissolution. (art. 16)

Having been adopted through a resolution of the UN General Assembly and thus not initially endowed with legal force, the standards of the Universal Declaration of Human Rights was partially incorporated into the two international covenants on human rights almost 20 years later.

The International covenant on civil and political rights adopted in 1966 provides for the obligation of states to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, the Covenant explicitly provides for the obligation to ensure equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant (art. 3). Another guarantee, contained in art. 6, para. 5, refers to the inadmissibility of applying the death penalty to pregnant women. Other provisions of the Covenant in

9 Ibid., Art. 55.
10 Universal Declaration of Human Rights, 1948.

the context of this research refer to the right of men and women of marriageable age to marry and to found a family (art. 23 para.2), political rights (art. 25), equal protection of the law (art. 26).[11]

In the International covenant on economic, social and cultural rights, which was also adopted in 1966 we find the same general provision for the recognition of the rights guaranteed by the Covenant without any distinction based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (art. 2), and the provision regarding the assurance of the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant (art.3). The Covenant explicitly enshrines the obligation of States to recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

> (a) Remuneration which provides all workers, as a minimum, with: (I) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work. (art. 7)[12]

The United Nations Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature by the UN General Assembly on December 18th 1979, became a *lex specialis* in the normative system of the United Nations in the field of women's rights protection. The development of this document took place against the backdrop of feminist movements that gained momentum in Western countries, but also in the context of the reluctance of countries with traditional systems to ratify and implement instruments adopted under the UN's auspices aimed at protecting certain categories of women's rights, such as for example, the Convention on the Nationality of Married Women, adopted in New York on February 20th 1957. It is important to note that the text of the Convention stands as the first universal international treaty in which the signatory states proclaimed that discrimination against women is a challenge to human dignity and linked the need for women's rights protection to the establishment of the new international economic order, the strengthening of international peace and security, and the welfare of the world. The merit of the Convention was to explicitly evoke the list of both positive and negative obligations of states in the process of realising the rights regulated by the Convention. The text of the United Nations Convention on the Elimination of All Forms of Discrimination against Women was supplemented on October 6th 1999, by the Optional Protocol, which introduced two new procedures into the Convention's mechanism: the complaint procedure and the confidential inquiry procedure.

Among other international instruments adopted within the UN that have impacted the fate of women worldwide, the following are worth mentioning:

11 International Covenant on Civil and Political Rights, 1966.
12 International Covenant on Economic, Social and Cultural Rights, 1966.

- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on December 10th 1984 does not specifically refer to women in defining torture, using the phrase "discrimination of any kind":

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[13]

- The Convention on the Rights of the Child, adopted on November 20th 1989[14] establishes the obligation of member states to ensure, *inter alia*, appropriate prenatal and postnatal health care for mothers (art. 24 para. 2).
- In addition to the aforementioned, there are a number of international treaties with the indirect objective of regulating substantive rights and establishing mechanisms for the protection of women in vulnerable situations: the Geneva Conventions on the protection of victims of armed conflicts (1949), the Convention relating to the Status of Refugees (1951), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the Convention on the Rights of Persons with Disabilities (2006), etc.

We deem it appropriate to mention in this chapter that the organisation reacts, as needed to the challenges in ensuring the equal treatment of women and men. When dangerous phenomena arise that cannot be immediately addressed through universal treaties, the development of which presents itself as a complex and lengthy process, the main and auxiliary organs of the UN will initiate acts of derivative law, soft law, in order to increase states' vigilance in this area and guide them in the process of national legislation

Violence against women, an action frequent within the confines of family and home, has been dealt with specifically by the United Nations.[15] Thus in 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against

13 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Art. 1.
14 Convention on the Rights of the Child, 1989.
15 Rehman, 2003, p. 347.

Women,[16] which originates from the recognition by the entire international community of the necessity to universally apply the rights and principles with regard to equality, security, liberty, integrity, and dignity of all human beings to women. The provisions of the Declaration have conceptually and formally laid the foundation for subsequent normative provisions adopted under the aegis of the UN, which expanded the list of material rights for women and established or adapted procedures to enhance the efficiency of international, regional, and national mechanisms for protecting women against physical, sexual, and psychological violence, as well as other forms of violence.

4. The UN Institutional Framework for the Protection of Women's Rights

The United Nations has a complex structure, and its main bodies have in turn, created numerous subsidiary organs. In the context of the present investigation, we will identify the role of the UN through its governing bodies, specialised agencies, programs, and funds in developing universal standards for the protection of women rights, promoting them, and monitoring how the member states of the organisation fulfil the commitments undertaken through their participation in international treaties in this field.

4.1. The Role of the Main UN bodies in the Conceptualisation and Promotion of Women's Rights

4.1.1. United Nations General Assembly

The role of the UN General Assembly in promoting and universally regulating women's rights will be deduced from the statutory responsibilities of the deliberative representative body of the UN. By virtue of the UN Charter, the General Assembly shall initiate studies and make recommendations for the purpose of promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (art. 13).

The UN General Assembly has played a crucial role in conceptualisation, promotion, and in monitoring how UN member states implement the standards in the field of women's rights. To a large extent, the described mission of the UN General Assembly culminated with the adoption on December 18th 1979 of the Convention on the Elimination of All Forms of Discrimination against Women, entered into force on September 3rd 1981. The drafting of the Convention took more than 30 years, and today 189 states are parties to it, making it one of the most comprehensive and ratified treaty in the UN system.

16 Declaration on the Elimination of Violence against Women, 1993.

Among the other achievements of the General Assembly in the field of women's rights protection, as outlined by the responsibilities established in the UN Charter, are:

- adoption of soft law instruments that establish the guiding principles for the national policies of member states in ensuring the effective protection of women's rights. In December 1977, the General Assembly adopted a resolution proclaiming a United Nations Day for Women's Rights and International Peace to be observed on any day of the year by Member States, in accordance with their historical and national traditions. Since then, the United Nations and their agencies have worked tirelessly to secure gender equality worldwide with great outcomes achieved: in 1995 the Beijing Declaration and Platform for Action, a historic roadmap signed by 189 governments, focused on 12 critical areas of concern; and the inclusion of Goal 5 "Achieve gender equality and empower all women and girls" in the 2030 Agenda for Sustainable Development.[17]

Another soft law instrument in this context is the on the Elimination of Violence against Women, mentioned earlier. Although it was not endowed with binding legal force, the Declaration had the merit of bringing to the attention of the international community in 1993 the first systematic compilation of norms concerning the protection of women from the dangerous phenomenon of gender-based violence.

In this regard, the Declaration provides a definition of the term "violence against women", which means any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life.[18]

In the terms of the Declaration, women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil domains or in any other field. These rights include, *inter alia*: the right to life; the right to equality; the right to liberty and security of person; the right to equal protection under the law; the right to be free from all forms of discrimination; the right to the highest attainable standard of physical and mental health; the right to just and favourable conditions of work; the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment.

Since 2000, the General Assembly has adopted numerous resolutions and requested the preparation of reports on various forms of violence against women. In 2006, following the launch of the Secretary-General's in-depth study on all forms of violence against women, the General Assembly adopted resolution 61/143 on the

17 United Nations, no date, History of Women's Day.
18 Declaration on the Elimination of Violence against Women, 1993.

intensification of efforts to eliminate all forms of violence against women.[19] Starting from that stage, with the aim of strengthening state cooperation in this area, resolutions of the General Assembly have been adopted on the following topics: elimination and prevention of all forms of violence against women; trafficking in women and girls; violence against women migrant workers; sexual violence; crimes committed in the name of honour; traditional or customary practices affecting the health of women and girls; protection of women and children in emergency and armed conflict etc.

- convening special sessions on the topic of women's rights protection, such as the twenty-third Special Session of the United Nations General Assembly entitled "Women 2000: Gender Equality, Development and Peace for the Twenty-First Century", which took place at the United Nations Headquarters in New York from 5th to 9th June 2000 and where was adopted the Political Declaration and outcome document entitled 'further actions and initiatives to implement the Beijing Declaration and Platform for Action'.
- creation of subsidiary bodies to facilitate the activities of codification, monitoring, and promoting universal standards regarding the treatment of women. In July 2010, the United Nations General Assembly created UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women. The creation of UN Women came about as part of the UN reform agenda, bringing together resources and mandates for greater impact. It merges and builds on the important work of four previously distinct parts of the UN system, which focused exclusively on gender equality and women's empowerment: Division for the Advancement of Women (DAW); International Research and Training Institute for the Advancement of Women (INSTRAW); Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI); United Nations Development Fund for Women (UNIFEM).[20]

In 2013, the UN General Assembly set up an Open Working Group to develop a proposal on the Sustainable Development Goals. In January 2015, the General Assembly began the negotiation process on the post-2015 development agenda. The process culminated in the subsequent adoption of the 2030 Agenda for Sustainable Development, with 17 SDGs at its core, at the UN Sustainable Development Summit in September 2015.[21] Goal No. 5, entitled Gender Equality, aims at the achievement of gender equality and the empowerment of all women and girls.

19 United Nations, no date, Work of the General Assembly on violence against women.
20 United Nations Youth Envoy, 2013.
21 United Nations, no date, History of SDG.

4.1.2. Security Council

Under art. 24, para. 1 of the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security. In this regard, the Council may take appropriate measures for the peaceful settlement of disputes or undertake actions with respect to threats to the peace, breaches of the peace, and acts of aggression. It should be noted that since 1999, the Security Council has adopted a series of resolutions condemning the involvement of children in hostilities, and all parties to armed conflicts have been urged to take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict, and to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance.[22]

Also, the Security urged the regional and subregional organisations to consider including child protection staff in their peace and field operations and providing training to members of their peace and field operations on the rights and protection of women and children, and to integrate a gender perspective into all policies, programmes and projects.[23]

The Security Council adopted resolution (S/RES/1325) on women and peace and security on 31st October 2000. The resolution reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security. Resolution 1325 urges all actors to increase the participation of women and incorporate gender perspectives in all United Nations peace and security efforts. The resolution provides a number of important operational mandates, with implications for Member States and the entities of the United Nations system. In order to ensure collaboration and coordination throughout the United Nations system in the implementation of the Security Council resolution, the Interagency Network on Women and Gender Equality established the Interagency Taskforce on Women, Peace and Security which is chaired by the Special Adviser on Gender Issues and Advancement of Women.[24]

In the following, the Security Council adopted a series of resolutions that firmly condemn gender-based violence and call on states to strengthen cooperation in this area and enhance national tools for the protection of women's rights. The Security Council noted that the changing global context of peace and security, in particular relating to rising violent extremism, which can be conducive to terrorism, as well as the increased numbers of refugees and internally displaced persons, the impacts of climate change and the global nature of health pandemics, and with regards to these factors reiterated its intention to increase attention to women, peace and security as

22 United Nations Security Council, 1999.
23 United Nations Security Council, 2000.
24 United Nations, no date, Landmark resolution on Women, Peace and Security.

a cross-cutting subject in all relevant thematic areas of work on its agenda, including threats to international peace and security caused by terrorist acts. In this regard, Security Council urges Member States and the UN system to ensure the participation and leadership of women and women's organisations in developing strategies to counter terrorism and violent extremism which can be conducive to terrorism; to strengthen access to justice for women in conflict and post-conflict situations, including through the prompt investigation, prosecution and punishment of perpetrators of sexual and gender-based violence, as well as reparation for victims as appropriate.[25]

The attention of the Security Council, whenever it is saturated with cases that threaten international peace and security, is directed towards providing enhanced guarantees of well-being, particularly for girls and women in conflict situations. In a recent case, Resolution 2734 (2024) addressed the need to protect women from gender-based violence in the context of multiple terrorist criminal acts committed by the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al-Qaida, and associated individuals, groups, undertakings, and entities. Special attention is given to the issue of combating trafficking in women.

Similarly, the UN Security Council pays special attention to combating human trafficking, calling upon member states to consider, as a matter of priority, ratifying or acceding to and fully implementing the United Nations Convention Against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as well as all relevant international instruments. The Council also urges states to take decisive and immediate action to prevent, criminalise, investigate, prosecute, and ensure accountability of those who engage in trafficking in persons, including in the context of armed conflict, where it is particularly important that evidence of such crimes be collected and preserved so that investigations and prosecutions may occur. Additionally, it is crucial to investigate, disrupt, and dismantle networks involved in trafficking in persons in the context of armed conflict, in accordance with national legislation, including anti-money laundering, anti-corruption, and anti-bribery laws, and, where appropriate, counter-terrorism laws.[26]

4.1.3. Economic and Social Council (ECOSOC)

ECOSOC, based on the provisions of Article 62 of the UN Charter, carries out the following responsibilities: it can make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters, and may make recommendations concerning such matters to the General Assembly to the Members of the United Nations, and to the specialised agencies concerned; make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all. In the same context the ECOSOC

25 United Nations Security Council, 2015.
26 United Nations Security Council, 2016.

may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

Within the UN's first year, the Economic and Social Council established its Commission on the Status of Women as the principal global policy-making body dedicated exclusively to gender equality and advancement of women. Among its earliest accomplishments was the inclusion of gender neutral language in the draft Universal Declaration of Human Rights.[27]

The Economic and Social Council has undertaken multiple measures aimed at transitioning from *de jure* equality to *de facto* equality, recommending public actors and civil society to ensure education in this regard, particularly through campaigns for women's legal literacy, the establishment or strengthening of national ombudsperson institutions, and the involvement of women in the development process. As an example, on May 30th 1991, ECOSOC urged states to adopt appropriate administrative, social, and educational measures to protect women from various forms of physical and psychological violence.[28]

In fulfilling the responsibilities outlined in the UN Charter, the ECOSOC adopts resolutions and establishes subsidiary bodies within the context of the present study.

4.1.4. The United Nations Secretariat

In the terms of Article 98 of the UN Charter, the Secretary-General shall make an annual report to the General Assembly on the work of the Organisation. From the Report of the Secretary-General on the Work of the Organisation (2024) it follows that the United Nations continues to defend and advance fundamental human rights, including those of women and girls. The United Nations trust fund in support of actions to eliminate violence against women, the Women's Peace and Humanitarian Fund and the Joint Programme on Accelerating Progress towards the Economic Empowerment of Rural Women, collectively supported tens of thousands of women and girls around the world. The United Nations also supported eight constitutional review processes to ensure that women's views were reflected and represented.[29]

With reference to the implementation of the 2030 Agenda for Sustainable Development, the Annual Report of the UN Secretary-General states that women continue to be underrepresented in decision-making and encounter discrimination that impedes progress towards gender equality.[30] The Report also highlights the progress made by UN member states in the protection of women's rights in various contexts: participation in decision-making processes, combating human trafficking, poverty, armed conflicts, and post-conflict situations, among others.

The goals of the Secretary-General with respect to women and peace and security for the decade leading up to 2030 provide a different path forward for the construction

27 United Nations, no date, Gender Equality.
28 Economic and Social Council Resolution 1991/18, 1991.
29 United Nations Secretary-General, 2024.
30 Ibid.

and maintenance of peace. The international community has many opportunities to help implement this vision: from the proliferation of feminist foreign policies and the collective efforts of the Generation Equality campaign, to the explicit commitments on gender equality laid out in Our Common Agenda (A/75/982) and the policy brief on a New Agenda for Peace (A/77/CRP.1/Add.8), to the preparations for the Summit of the Future in 2024 and the twenty-fifth anniversary of the adoption of Security Council resolution 1325 (2000) in 2025. If governments and international organisations follow the lead of the global women's rights movement, irrepressible and undeterred by either backlash or setbacks, we can remain hopeful of seeing a radical change in direction.[31]

The Charter also empowers the Secretary-General to bring any matter which in their opinion may threaten the maintenance of international peace and security to the attention of the Security Council. These guidelines both define the powers of the office and grant it considerable scope for action. The Secretary-General would fail if they did not take careful account of the concerns of Member States, but they must also uphold the values and moral authority of the United Nations, and speak and act for peace, even at the risk, from time to time, of challenging or disagreeing with those same Member States.[32]

4.1.5. International Court of Justice

It is important to note from the outset that the International Court of Justice has not adjudicated inter-state disputes exclusively related to the legal status of women. However, the Court has reviewed certain unlawful acts that have infringed women's rights, allegedly attributable to states in the following contexts:

- The obligation to prevent and punish genocide: In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)[33] Judgment, the applicant alleged Serbia's non-compliance with the provisions of the Convention, *inter alia* manifested through: the fact that women had been subjected to degrading physical and verbal abuse, the forced transfer of the women, then torture and systematic rapes of Muslim women perpetrated as part of genocide against the Muslims in Bosnia during the conflict, and the separation of men and women. The applicant argued that rape and sexual violence against men and women had led to psychological trauma which prevented victims from forming relationships and founding a family. Also, the Applicant considered that Bosnian Muslim women who suffered

31 United Nations Secretary-General, 2023, Women and peace and security. Report of the Secretary-General.
32 United Nations, no date, The role of the Secretary-General.
33 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007, p. 43.

> sexual violence might be rejected by their husbands or not be able to find a husband.

After examining the arguments put forward by the parties regarding the aforementioned allegations and linking them to the findings of the International Criminal Tribunal for the former Yugoslavia, the International Court of Justice concluded that Serbia had not conspired to commit genocide, nor incited the commission of genocide in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and that Serbia had not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. At the same time, International Court of Justice found that Serbia had violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, with respect to the genocide that had occurred in Srebrenica in July 1995.

- Armed conflict: Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*) Judgment[34] is an interstate dispute examined by the International Court of Justice in The Hague which originate from events concerning one of the most complex and deadliest armed conflicts to have taken place on the African continent. There were numerous actors operating on the territory of the DRC between 1998 and 2003, including the armed forces of various States, as well as irregular armed forces that often acted in collaboration with the intervening States. The Court considered:

that it is impossible to derive even a broad estimate of the number of victims of rape and other forms of sexual violence from the reports and other data available to it. This absence of adequate documentation has also been recognized by various United Nations reports. The MONUC special report on the events in Ituri, for example, notes that '[t]he exact number of female victims of rape or sexual slavery is impossible to estimate at this time' (UN doc. S/2004/573 of 16 July 2004, para. 1). Similarly, the Mapping Report acknowledges its own shortcomings with regard to sexual violence:

> Aware that such a methodology prevents full justice from being done to the numerous victims of sexual violence and fails to reflect appropriately the widespread use of this form of violence by all armed groups involved in the different conflicts in the DRC, it was decided from the outset to seek information and documents supporting the perpetration of sexual violence in certain contexts rather than seeking to confirm each individual case, the victims being unfortunately too numerous and dispersed across the whole country.

34 Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), 2022, p. 13.

However, the Court finds that it is beyond doubt that rape and other forms of sexual violence were committed in the DRC on a large and widespread scale. The Mapping Report notes 'the widespread use of this form of violence by all armed groups' and reiterates that the victims were "numerous". It provides various examples of rape in Ituri during the period of occupation involving members of the UPDF and other armed groups and outside Ituri by members of the UPDF. The MONUC special report on the events in Ituri observes that in that area '[c]ountless women were abducted and became "war wives", while others were raped or sexually abused before being released'. The ICC has found that rape and sexual violence occurred in Ituri during the period in which the district was occupied by Uganda, and that they amounted to a "common armed activities practice" (*The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Judgment of 8 July 2019, paras. 293, 940-948, 1196 and 1199).

Finally, the International Court of Justice fixed US$225,000,000 in damages as the compensation due from the Republic of Uganda to the Democratic Republic of the Congo for the damage caused by the violations of international obligations by the Republic of Uganda.

It is important to mention in this context that having the competence to issue advisory opinions, the International Court of Justice has had the opportunity to address the subject of the protection of women in occupied territory.[35]

4.2. Subsidiary Organs

The Human Rights Council replaced the United Nations Commission on Human Rights, and was established in 2006 through a resolution of the United Nations General Assembly. The Council is an intergovernmental body responsible for strengthening the universal promotion and protection of human rights and for addressing situations of human rights violations, with particular attention dedicated to the protection of women's rights. The Council can make recommendations on the issues discussed within its mandate. The institution-building of the United Nations Human Rights Council can be represented by the following key instruments:

Universal Periodic Review Mechanism – an innovative instrument that allows states, once every 4.5 years, to report on the successes achieved in implementing international human rights treaties concluded under the auspices of the UN, including treaties related to the protection of women's rights.

Special Procedures – involving the appointment of human rights experts who are entrusted with mandates in specific areas or for particular countries (e.g., Special Rapporteur on trafficking in persons, especially women and children, Special Rapporteur on violence against women and girls, its causes and consequences, Working Group on discrimination against women and girls).

The Human Rights Council Advisory Committee provides expertise to the Council by preparing reports and studies in the areas established by the Council (e.g.,

35 Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, 2024, para. 195.

Representation of women in human rights organs and mechanisms, Rural women and the right to food etc.).

The Complaints Procedure of the Human Rights Council addresses consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms occurring in any part of the world and under any circumstances, cases regarding the violation of women's rights have been examined (e.g., human rights in Eritrea, including the issue of violence against women, examined in 2012).[36]

4.3. Specialized Agencies

4.3.1. World Health Organisation (WHO)

World Health Organisation (WHO) under its Constitution[37] has as its objective the attainment by all peoples of the highest possible level of health. Today the WHO, taking into account the socio-cultural factors underlying the discrimination against women, has developed a gender-based approach to addressing women's health protection, with many specific themes making up its activities: Female genital mutilation; Adolescent pregnancy; Maternal mortality; Violence against women. In this context, the following technical areas of work have been established: Maternal, Newborn, Child and Adolescent Health, and Ageing; Sexual and reproductive health Gender, equity and human rights.

4.3.2. International Labour Organisation (ILO)

The ILO Constitution was adopted in the context in which conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of its employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organisation of vocational and technical education, and

36 Resolution 21/1, 2012.

37 Constitution of the World Health Organization, 1946; Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3rd February 1977, 20th January 1984, 11th July 1994 and 15th September 2005 respectively and are incorporated in the present text.

other measures.[38] To ensure gender equality in the field of labour relations, the ILO has played a crucial role in the development and adoption of international conventions: Violence and Harassment Convention, 2019 (No. 190); Maternity Protection Convention (N° 183); Workers with Family Responsibilities Convention (N° 156); Discrimination (Employment and Occupation) Convention (N° 111) etc.

4.4. Funds and Programmes

United Nations Population Fund (UNFPA) has a mandate established by the United Nations Economic and Social Council (ECOSOC) in 1973 and reaffirmed in 1993. The goal of the UNFPA is to ensure reproductive rights for all. To accomplish this, the UNFPA works to ensure that all people, especially women and young people, are able to access high-quality sexual and reproductive health services. Currently, the UNFPA focuses its activities on four main areas: sexual and reproductive health, young people, human rights and gender equality, population matters.

4.5. Other Entities

4.5.1. Office of the United Nations High Commissioner for Refugees (UNHCR)

Office of the United Nations High Commissioner for Refugees (UNHCR) has been actively promoting gender equality for decades. The UNHCR's approach to gender equality has evolved considerably, from perceiving refugee women and girls as vulnerable to promoting their empowerment, from an isolated focus on women to gender mainstreaming, and from gender equality to an age, gender and diversity (AGD) approach which reinforces the UNHCR's longstanding commitment to ensure that forcibly displaced people are at the centre of all that we do. In recognising that women and girls are not a homogeneous group, UNHCR applies an intersectional and rights-based approach which recognises women and girls in all their differences, diversity and (dis)ability. The commitment to integrate gender equality systematically across the agency and within operations is guided by the Guidelines on the Protection of Refugee Women,[39] the UNHCR Policy on Age, Gender and Diversity (2018), which outlines obligatory core actions for advancing gender equality and accountability to affected people. This is further reinforced by the UNHCR Strategic Directions 2022–2026, which identify accountability to women and strengthen gender-based violence prevention, risk mitigation and response as priority areas for accelerated, additional and targeted action. The UNHCR' Policy on the Prevention of, Risk Mitigation, and

38 Constitution of the International Labour Organization, 1919; the Instrument of Amendment of 1945 which entered into force on 26th September 1946; the Instrument of Amendment of 1946 which entered into force on 20th April 1948; the Instrument of Amendment of 1953 which entered into force on 20th May 1954; the Instrument of Amendment of 1962 which entered into force on 22nd May 1963; the Instrument of Amendment of 1972 which entered into force on 1st November 1974; and the Instrument of Amendment of 1997 which entered into force on 8th October 2015.

39 UNHCR, 1991, Guidelines on the Protection of Refugee Women prepared by the Office of the United Nations High Commissioner for Refugees.

Response to Gender-Based Violence (2020) further institutionalises collective accountability across the organisation.[40]

4.5.2. The United Nations Entity for Gender Equality and the Empowerment of Women UN Women

The United Nations Entity for Gender Equality and the Empowerment of Women UN Women was established in 2010 as a composite entity of the United Nations System. In the context of the UN reform, the new entity replaced four subdivisions that were responsible for matters arising from the need to ensure gender equality and the protection of women's rights, namely The Division for the Advancement of Women (DAW); The International Research and Training Institute for the Advancement of Women (INSTRAW); The Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI); The United Nations Development Fund for Women (UNIFEM).

This new subdivision was tasked primarily with supporting state entities in the process of drafting legislation on ensuring gender equality. Similarly, UN Women actively advocates for expanding women's opportunities to fully engage in political, social, economic, and cultural activities at the community or national level.

Grounded in the vision of equality enshrined in the UN Charter, UN Women, among other issues, works for the: elimination of discrimination against women and girls; the empowerment of women; and the achievement of equality between women and men as partners and beneficiaries of development, human rights, humanitarian action and peace and security.[41]

UN Women works globally to make the vision of the Sustainable Development Goals a reality for women and girls and stands behind women's equal participation in all aspects of life, focusing on four strategic priorities: Women lead, participate in and benefit equally from governance systems; Women have income security, decent work and economic autonomy; All women and girls live a life free from all forms of violence; Women and girls contribute to and have greater influence in building sustainable peace and resilience, and benefit equally from the prevention of natural disasters and conflicts and humanitarian action. UN Women also coordinates and promotes the UN system's work in advancing gender equality.[42]

4.6. Advisory Bodies and Functional Commissions

4.6.1. The United Nations Permanent Forum on Indigenous Issues (UNPFII)

The United Nations Permanent Forum on Indigenous Issues (UNPFII) is a high-level advisory body to the Economic and Social Council. The Forum was established on 28th July 2000 by resolution 2000/22, with the mandate to deal with indigenous issues

40 UNHCR, 2023, Gender Equality and the Empowerment of Women and Girls.
41 United Nations Youth Envoy, 2013, UN Women: The United Nations Entity for Gender Equality and the Empowerment of Women.
42 UN Women, no date, Women Values And Competencies Framework.

related to economic and social development, culture, the environment, education, health and human rights.

4.6.2. The Commission on the Status of Women

The Commission on the Status of Women was established by United Nations Economic and Social Council resolution 2/11 in 1946 'to prepare recommendations and reports to the [Council] on promoting women's rights in political, economic, civil, social, and educational fields'. The Commission is also mandated to make recommendations to the Council on 'urgent problems requiring immediate attention in the field of women's rights'. The Commission meets once a year and issues agreed conclusions on priority themes set for each year. The agreed conclusions include an assessment of progress, gaps and challenges, as well as concrete recommendations addressed to Governments, international organisations, civil society and other stakeholders. The Commission also adopts resolutions on a variety of women's rights-related issues. Throughout its history, the Commission has played a key role in promoting women's rights, as well as actively contributing to landmark international legal and policy instruments.[43]

This includes the Commission's essential contribution to the development of legal instruments that have advanced international cooperation in the field of women's protection and the establishment of unified standards in this area: The Convention on the Political Rights of Women (1953), The Convention on the Nationality of Married Women (1957), The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), The Declaration on the Elimination of Discrimination against Women (1967), The Convention on the Elimination of All Forms of Discrimination against Women (1979) and The Optional Protocol to the Convention introduced the right of petition for women victims of discrimination (1999) etc.

Over the years, the Commission has ensured a comprehensive regulation of women's rights protection, standardising areas such as: women's political rights, nationality of married women, property rights of married women, the application of criminal law to women, violence against women, women with disabilities, and more.

4.7. Departments and Offices

The Office of the High Commissioner for Human Rights (UN Human Rights) created in 1993 by the United Nations General Assembly resolution is the leading UN entity on human rights, representing the world's commitment to the promotion and protection of the full range of human rights and freedoms set out in the Universal Declaration of Human Rights. Both the High Commissioner and the Office have a unique role to: Promote and protect all human rights; Help empower people; Assist Governments, and; Inject a human rights perspective into all UN programmes. With reference to the protection of women's rights, the responsibilities of the UN Human Rights today can be summarised as follows: reform discriminatory laws and policies which allow gender-based discrimination and bring them in line with the international human

43 OHCHR, 2014, Women's Rights are Human Rights, pp. 21–22.

rights law; transform discriminatory social norms and harmful gender stereotypes into more equal social structures and power relations for all genders; eliminate gender-based violence; guarantee the enjoyment of sexual and reproductive health and rights by all; protect and expand the civic space of women human rights defenders and feminist movements; facilitate equal participation of women, men and people of diverse gender identities in civil, political, economic, social and cultural life; and ensure gender equality within the UN Human Rights Office and the United Nations.

4.8. Treaty Bodies

The Committee on the Elimination of Discrimination against Women (CEDAW).

As a monitoring body for the progress achieved by the States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women was established. The Committee consists of 23 experts, elected with due consideration of equitable geographical distribution, representing various forms of civilisation and the main legal systems. Among the Committee's essential functions for strengthening state cooperation to enhance the protection of women's rights, the following can be highlighted:

- Examining reports submitted by states every four years concerning legislative, judicial, and other measures taken to implement the provisions of the Convention on the Elimination of All Forms of Discrimination against Women;
- Adopting general recommendations based on the examination of reports and information received from States Parties. As of October 26th 2022, the Committee has adopted 39 General Recommendations addressing both the protection of specific groups of women presenting vulnerabilities (such as elderly women, indigenous women and girls, rural women, women in conflict situations, etc.) and recommendations on specific categories of women's rights (the right to education, access to justice, labour rights, health protection, etc.);[44]
- Reviewing individual complaints alleging violations of women's rights guaranteed by the Convention by a State Party to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.[45]

As a treaty body within the UN system, the Committee will only consider individual complaints if the states have accepted its competence to examine complaints submitted by citizens of those states. By its nature, the Committee does not replace national courts in establishing facts and assessing evidence unless these have been arbitrary or based on gender stereotypes. Following the examination of complaints,

44 CEDAW Database, no date.
45 Optional Protocol to CEDAW, 1999.

the Committee has the authority to make recommendations to states. Traditionally, the recommendations concern either the author of the complaint (such as equitable compensation for material and moral damages, costs incurred, and the urgent implementation of effective measures to ensure the mental and physical integrity of victims of domestic violence) or general recommendations related to the implementation by the State Party of the Committee's recommendations under the Convention on the Elimination of All Forms of Discrimination against Women. These include adopting legislative measures, conducting gender-sensitive training for law enforcement agencies, promptly and impartially investigating allegations of gender-based discrimination, ensuring victims of domestic violence have access to justice, providing rehabilitation programs, and offering non-violent conflict resolution programs for abusers following incidents of domestic violence, among others.

> Regarding Central and Eastern Europe, the CEDAW has examined several cases where the authors of communications have alleged that states had violated the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women.

One such case examined by CEDAW originated from a complaint filed by Ms. A.S., who reported discriminatory treatment by the authorities of Hungary.[46] In this case, the author, a Hungarian citizen of Roma ethnicity, claimed that she was subjected to forced sterilisation by medical staff in a hospital in Hungary. According to the described events, the author, a mother of three children, arrived at the hospital in a critical condition. Upon initial examination, foetal death was determined, and given the mother's condition, a caesarean section was decided upon. Written consent for such an intervention was provided by signing a form, to which the doctor added a handwritten note regarding the patient's consent to the sterilisation procedure, a term that was unknown to the patient at the time.

The complainant challenged the actions of the doctors in the national legal system, asserting that the sterilisation profoundly affected her emotionally well-being. She argued that it contradicted her religion (Catholic) and her beliefs in light of traditional Roma customs. All her requests were rejected by the national courts.

The CEDAW meticulously examined each aspect of the complaint and concluded that Hungary had failed to fulfil its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women. Specifically, it did not provide the necessary information and counselling regarding family planning, nor did it furnish the required information for the patient to consent to the sterilisation, resulting in the permanent loss of her reproductive capacity.

In the case of D.S., the author of the communication claimed discrimination on the grounds of gender and marital and family status. In this instance, the author was employed by the Slovak National Library (a state-run entity). After returning from

46 Communication No. 4/2004, 2006.

maternity leave, parental leave, and subsequently annual leave, she discovered that her position had been abolished. At the same time, a pensioner was hired for a similar role. She believed that she was discriminated against due to having two small children and that her employer was concerned about her ability to balance family life with work, expressing worries that she would frequently be absent because of her children's illnesses.

In contesting her dismissal administratively, she only received a letter from the Director of the National Library apologising for the situation. D.S. then challenged the discriminatory treatment in court, where the court ruled that she had not sustained her burden of proof for prima facie discrimination, asserting that the burden of proof could not be shifted to the defendant.

Before the CEDAW, the author claimed that she had been subjected to a form of gender-based discrimination by her employer, who had terminated her labour contract on prohibited discriminatory grounds. She argued that the state party had failed to ensure her effective protection as a woman against the gender-based discrimination she had faced from the national courts and did not take all appropriate measures to eliminate discrimination against women, particularly in the field of employment.

In its observations, the state party cited the objective necessity of reducing personnel at the Slovak National Library, assuring that non-discrimination requirements based on gender had been adhered to. Ultimately, the CEDAW decided:

> even if the budget cut may have been considered a legitimate reason to abolish the post occupied by the author, the timing of her dismissal; the manner in which she was informed about her dismissal; the refusal to give her any details about the organizational change, the collective agreement and the exact wording of her dismissal; and the remarks of her superiors, which clearly indicated discriminatory treatment against her and were of such a serious nature as to result in a letter of apology sent to her by no less than the Director General of the Slovak National Library, in addition to the fact that two other persons were hired to perform her job after her employment was terminated, called for a closer scrutiny by the national courts, more particularly the court of first instance, the .. Court, of the actual reasons underlying the author's dismissal and her allegations of discrimination and violation of the principle of equal treatment. [...] from the evidence on record, there was more than a "reasonable assumption" that the principle of equal treatment had been violated.[47]

In the case of Natalia Ciobanu concerning the Republic of Moldova, the author had a child with a first-degree disability, requiring the mother's permanent assistance and care. After the death of her daughter, the author approached the national authorities to calculate her retirement (old-age) pension. In determining the amount of the

47 Communication No. 66/2014, 2016.

pension, the time during which the author had taken care of her sick daughter was not considered.

The author complained in the national legal order about discrimination in access to social insurance and social protection services compared to parents who had decided to place their children with disabilities in residential institutions and who could therefore work and secure their contribution periods. Before the CEDAW, the author claimed that having a child with a severe disability had affected her mental and physical health, as well as her private life. She believed that under such circumstances, a woman would not have the opportunity for personal or professional development.

In its assessment, CEDAW noted the author's assertion that she had the reasonable expectation that, in her old age, she would receive a sufficient social insurance pension after 20 years of providing care in the home setting for her daughter instead of placing her in a residential institution. In this context, the Committee observes in that connection that the right to social security, including in cases of the social insurance (old-age) pension, is of central importance in guaranteeing human dignity. The right to social security carries significant financial implications for States, but the latter should ensure the satisfaction of, at the very least, minimum essential levels of that right. Among other things, they are required to ensure access to a social security scheme that provides a minimum essential level of benefits, without discrimination of any kind. States should provide non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, have not completed a qualifying period of contributions or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance and who have no other source of income. Non-contributory schemes must also take account of the fact that women are more likely to live in poverty than men; that they often have sole responsibility for the care of children; and that it is more often they who have no contributory pensions.

The Committee notes that States parties have a large margin of appreciation in adopting the measures that they consider necessary to ensure that everyone enjoys the right to social security, with a view to, inter alia, ensuring that retirement pension systems are efficient, sustainable and accessible for everyone. States may therefore establish requirements or conditions that claimants must meet in order to be eligible for social security schemes or to receive a retirement pension or other benefit, provided that the conditions are reasonable, proportionate and transparent. In general, those conditions should be communicated to the public in a timely and sufficient manner so as to ensure that access to retirement pensions is predictable, in particular when the measures adopted by the States parties are regressive in character and no transitional arrangements are put in place to offset the negative consequences thereof.[48]

48 Communication No. 104/2016, 2022.

The assessments stated above, *inter alia*, have formed the basis for the CEDAW's finding that the Republic of Moldova failed to fulfil its obligations and had thereby violated the author's rights under Article 3 and Article 11 (1) (e) and (2) (c) of the Convention on the Elimination of All Forms of Discrimination against Women.

Another case regarding the legal status of women in the Republic of Moldova was examined by the CEDAW on July 9th 2020. In the case of *V.C.*[49], the author was a woman with disabilities, and extremely dependent on her husband, who had passed away at the time of the complaint due to injury and damage caused by the blows from her husband's violence. V.C., represented by a non-governmental organisation, invoked the failure of the Moldovan authorities to fulfil their obligations to protect her against domestic violence, specifically: failure to implement, failure to investigate, failure to provide information on protection and support services, and/or to make the necessary arrangements to have such services provided. During the case the CEDAW stated that the State party's compliance with its obligations under the provisions of the Convention on the Elimination of All Forms of Discrimination against Women must be assessed in light of the level of due diligence and gender sensitivity applied in handling V.C.'s case by the police, as well as the preventive and protective measures taken.

The CEDAW accepted all the author's allegations, and to substantiate its decision, the CEDAW referred to its General Recommendations. The Committee recalled that gender-based violence, which impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention.[50] Under the obligation of due diligence, States parties must adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors, including having laws, institutions and a system in place to address such violence, and ensuring that they function effectively in practice and are supported by all State agents and bodies, which diligently enforce the laws. The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, prosecute and punish perpetrators and to provide reparations to victims and survivors of such acts, provides tacit permission or encouragement to offenders to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations.[51]

Another case originating from domestic violence against a woman from the Republic of Moldova was examined by the CEDAW in 2017. The author, L.R.,[52] a victim of domestic violence (physical, psychological, economic), divorced her husband but was forced to live with him and endure further episodes of violence. Before the

49 Communication No. 105/2016, 2022.
50 General Recommendation No. 35, 2017.
51 Ibid., para. 24(2)(b).
52 Communication No. 8/2013, 2017.

national law enforcement authorities and courts, the author filed numerous complaints and requests, which, however, had no effect. Before the CEDAW, the author claimed a failure to protect her effectively from domestic violence. Her complaint revealed systemic problems in handling domestic violence cases in the Republic of Moldova. Thus, the author denounced the reserved attitude of law enforcement agencies, which consider such cases as private matters. She also pointed out that the prosecution authorities only respond if the health damages reach a higher threshold of severity. In assessing the conduct of the Moldovan authorities in light of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee considered that the manner in which the author's case was addressed by the State party's authorities constituted a violation of her rights under Articles 1, 2 (a), (c), (d), and (e), 5 (a), and 16 of the Convention. Specifically, the Committee recognised that the author has suffered moral and pecuniary damage and prejudice. She had been subjected to considerable fear and anguish when she was left without State protection and forced to live with her aggressor, and she was exposed to significant renewed trauma when the State organ that ought to have been her protector, especially the police, instead victimised and intimidated her.

5. Protection of Vulnerable Groups of Women

5.1. Trafficked Women

Trafficking in human beings can be considered a multidimensional crime and an illegal business, which can undermine the rule of law and create instability. As a global phenomenon, it is considered a modern or contemporary form of slavery, which has profound social and economic implications, affecting on the one hand, the security of the state, and on the other, fundamental human rights and the dignity of the victim. For this reason, it is referred to as a form of inhumane trade, which in turn can be present in any country. Trafficking in human beings is a crime that destroys lives, and violates the dignity, freedom and fundamental rights of the victims. It is often a violent crime committed by organised criminal networks, which should not exist in today's society. However, human trafficking is a global phenomenon. It exists in every country, in every region.[53]

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, was adopted in New York on 15th November 2000 and established universal standards that are to be incorporated into the legislations of member states in order to standardise criminal policies regarding the prevention and punishment of human trafficking.

53 Nastas, 2023, p. 6.

5.2. Women Belonging to Minority Groups

Women belonging to minority groups receive special attention within the United Nations System. Thus, the organisation, through its main or subsidiary bodies, programs, and funds, responds to cases of systematic and serious violations of the rights of Roma women in Europe, Afro-descendant women in Latin America, and women in communities affected by caste in some Asian or African nations. The actions undertaken by the UN system are based on the provisions of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, adopted on December 18th 1992, by General Assembly resolution 47/135, and the internationally adopted treaties on human rights examined in this study.

5.3. Indigenous Women

Globalisation has presented new challenges and problems for indigenous women in many parts of the world. Indigenous women's roles are often eroded as their livelihood which was built on the accessibility to natural resources disappears, ecosystems are depleted and others are transformed into cash economies. This has produced profound changes, not only at the local level and within social and decision-making structures, but within their families as well. It is important, however, to recognise that indigenous women, like women everywhere else, are not a homogeneous group. They in fact represent a wide variety of cultures with different needs and concerns. Their particular concerns should therefore be central to the design of any policy or programme. In this field, the Convention on Biological Diversity in its preamble, recognises 'the vital role that women play in the conservation and sustainable use of biological diversity' and affirms 'the need for the full participation of women at all levels of policymaking and implementation for biological diversity conservation'.[54]

5.4. Refugee Women, Stateless Women, Displaced Women

According to UNHCR's 2022 Global Trends Report 108.4 million people were forcibly displaced in 2022, the largest annual increase on record. Women and girls make up 51 per cent of forcibly displaced persons. Based on the data available for 75 per cent of the stateless population, slightly more women and girls are stateless (51 per cent) than men and boys. Gender-based violence was continuously reported as being a top protection concern across UNHCR-led protection clusters in more than humanitarian emergencies, alongside attacks on civilians including children, forced displacement, abduction and detention, and psychosocial risks – especially on women and children.[55]

The Security Council urged Member States and parties to armed conflict to provide appropriate protection and assistance to refugees and internally displaced persons, the vast majority of whom are women and children.[56]

54 United Nations, 2007.
55 UNHCR, 2023, p. 2.
56 Resolution 1314, 2000.

In order to ensure respect for the rights of women and girls affected by natural disasters, states involved in ongoing armed conflicts will ensure the implementation of the provisions of the Convention relating to the Status of Refugees adopted in 1951,[57] and the Convention relating to the status of stateless persons.[58] In this context, the UNHCR will take the necessary measures to ensure gender equality, namely: the equal and meaningful women's and girls' participation in all decision-making, community management and leadership structures, and committees of persons of concern; the individual registration and documentation for women and girls and advocates for gender equality in nationality laws to prevent statelessness; equal access to and control over management and provision of food, core-relief items, and cash-based interventions; equal access to economic opportunities, including decent work and quality education and health services; women's and girls' access to comprehensive gender-based violence prevention and response services.

5.5. Migrant Women

Women account for approximately 50 percent of the world's migrants and are responsible for sending half of the estimated USD 601 billion in remittances. Migration has the potential to stimulate the equitable, inclusive and sustainable development for countries of origin, transit and destination.[59] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[60] contains a special article dedicated to the non-discriminatory treatment of migrant workers, including on the grounds of gender, marital status, etc. (art. 7)

5.6. Women With Disabilities

In The Convention on the Rights of Persons with Disabilities,[61] adopted on 12th December 2006, states recognise that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. Among the principles of the Convention is the principle of equality between men and women. In general, the Convention fully aligns with the trends observed in the activities of UN bodies to adopt a gender-based approach to sensitive issues. This approach is reflected in the text of the Convention regarding freedom from exploitation, violence, and abuse (art. 16), as well as in the provisions concerning access for persons with disabilities to health services (art. 25).

57 Convention Relating to the Status of Refugees, 1951.
58 Convention Relating to the Status of Stateless Persons, 1954.
59 UN Women, no date, Making Migration Safe for Women.
60 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.
61 Convention on the Rights of Persons with Disabilities, 2006.

Article 6 of the Convention addresses the specific situation of women with disabilities:

> States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.
> States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

The Convention establishes a series of positive obligations for states to ensure protection, particularly for women with disabilities: to put in place effective legislation and policies, including women focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted (art. 16), and; to ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes (art. 28).

5.7. Elderly Women

Demographic change is resulting in unprecedented numbers of older people worldwide. Greater numbers of people will be affected directly by age discrimination and ageism, thereby increasing the pressure on governments and society as a whole to respond. Strengthening older people's human rights is the best single response.[62] The COVID-19 pandemic has highlighted how vulnerable older persons are to such challenges. Today, the UN has become a global coordination centre for efforts aimed at codifying the protection of the rights of older persons, which is promised to have a gender-based approach – a trend evident in the recent codifications developed under the auspices of the UN.

The United Nations Principles for Older Persons,[63] adopted in 1991, were developed with respect to the principle of equal rights of men and women. In this regard, older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

Today, within the UN system, there exists the role of Independent Expert on the enjoyment of all human rights by older persons, established under a resolution of the Human Rights Council.[64]

62 Coalition to Strengthen the Rights of Older People, 2012, p. 3.
63 United Nations Principles for Older Persons, 1991.
64 Resolution 24/20, 2013.

Recognising the need to combat the unfair treatment of aging individuals or older persons, there is currently work under the auspices of the United Nations on a project for a new international treaty in the field of human rights – the Treaty on Older People's Rights. Ageism is to be prevented and eradicated as a basis for discrimination that undermines human dignity.

5.8. Women in Situations of Armed Conflict

Civilians account for the vast majority of casualties in armed conflicts and are increasingly targeted by combatants and armed elements. Grave concern has been generated by the hardships borne by civilians during armed conflict, in particular as a result of acts of violence directed against them, especially women, children and other vulnerable groups, including refugees and internally displaced persons.[65]

Despite the progress made in some areas, international, regional and national conflicts persist, and women continue to number among their main victims.[66] The number of women and girls living in conflict-affected countries reached 614 million in 2022, 50 percent higher than the number in 2017.[67]

Under the auspices of the UN, a gender perspective has been implemented in humanitarian assistance and in addressing violence against women. This is reflected, amongst other ways, by including gender considerations in the mandates of peacemaking, peacekeeping and peace-building operations, special protection and assistance provisions for groups requiring particular attention, including women and children.[68]

The Security Council reiterates the importance of compliance with relevant provisions of international humanitarian, human rights and refugee law and of providing appropriate training in such law, including child and gender-related provisions, as well as in negotiation and communications skills, cultural awareness, civil-military coordination and sensitivity in the prevention of HIV/AIDS and other communicable diseases, to personnel involved in peace-making, peacekeeping and peace-building activities.[69]

To mitigate the impact of armed conflicts on girls and women, customary norms have been systematised and conventional norms developed. Thus, The Customary International Humanitarian Law includes the following rule: 'The specific protection, health and assistance needs of women affected by armed conflict must be respected' (Rule 134). Under the provisions of the Geneva Conventions (I–IV) of August 12th 1949, supplemented by the Additional Protocols of 1977, women benefit from special protection in armed conflicts, both international and non-international, with additional regulations specifically aimed at protecting mothers and pregnant women. Under the

65 Resolution 1265, 1999.
66 Economic and Social Council, 1990, art. 22.
67 United Nations Secretary-General, 2023.
68 Resolution 1265, 1999.
69 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974.

auspices of the UN, continuous measures are being undertaken to fully realise the principle of special protection for women in armed conflicts.

The UN Security Council, ECOSOC and the UN Commission on Human Rights do not distinguish between international and non-international armed conflicts with respect to the protection of women in armed conflicts. The UN Security Council, for example, has called for respect for the specific needs of women in the context of particular conflicts, such as in Afghanistan, but also in general. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council expressed its grave concern at the 'particular impact that armed conflict has on women' and reaffirmed 'the importance of fully addressing their special protection and assistance needs'. The UN Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law provides that 'women shall be especially protected against any attack'. The UN Special Rapporteur on Violence against Women, its Causes and Consequences and the Committee on the Elimination of Discrimination against Women have expressed concern at the violation of women's rights in international and non-international armed conflicts. In 1992, the Committee stated that gender-based violence impairs or nullifies 'the right to equal protection according to humanitarian norms in time of international or internal armed conflict'.[70]

The Security Council has requested the Secretary-General to disseminate appropriate guidance and to ensure that such United Nations personnel have the appropriate training, and has urged relevant Member States, describing the measures as necessary and feasible, to disseminate appropriate instructions and to ensure that appropriate training is included in their programmes for personnel involved in similar activities.[71]

6. Conclusions

In drafting this scientific material, we adhered to a holistic and deductive approach to elucidate the major achievements of the UN System in its mission to protect women's rights from 1945 to 2024. In this regard, we examined the historical context in which the first attempts at the universal regulation of women's rights as human rights emerged. Subsequently, we analysed the normative framework developed under the auspices of the UN concerning the protection of women's rights. The conventions and resolutions adopted by UN bodies have formed the basis of the institutional architecture of the UN in the field of women's rights. Finally, we examined specific cases of protection for several particular groups of women who are victims of multiple discrimination. The conclusion that emerges at this point is that the entire institutional system of the United Nations, developed beginning in 1946, along with UN's secondary legal framework – particularly from the 1970s onwards – is deeply rooted in the ideal of

70 International Committee of the Red Cross (ICRC), 2005.
71 Resolution 1296, 2000.

protecting women's rights. Gender equality has become a value protected both *de jure* and *de facto* by the United Nations organisation.

Nevertheless, following the analysed study and the data presented in this article, we note that despite the extremely complex architecture of the UN system in the field of women's rights protection, and despite the provisions of Article 8 of the UN Charter, which states that 'The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs", women remain underrepresented in the decision-making process of the organisation itself. This situation reflects existing global circumstances in this area. Since the establishment of the UN, the position of Secretary-General has never been held by a woman.

Another point highlighted in our study pertains to the lack of operational capacity of certain UN mechanisms competent to examine cases regarding the violation of women's rights. Thus, the numerous auxiliary and conventional bodies in this area possess, based on the decisions under which they were created, an extremely limited capacity for action. In most cases, their responsibilities are reduced to formulating recommendations addressed to states and monitoring how the member states of certain international treaties fulfil their assumed obligations through the ratification of these treaties.

Therefore it is further recommended to strengthen cooperation efforts, in order to enhance the capacity of the UN itself, as well as those of its member states, in codifying norms regarding the protection of women's rights, and in uniformly applying universal standards.

Bibliography

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (2007) Judgment, I.C.J. Reports 2007.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (2022) Reparations, Judgment, I.C.J. Reports 2022.

CEDAW Database [Online]. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=ru&TreatyID=3&DocTypeID=11 (Accessed: 12 September 2024).

Charter of the United Nations (1945), signed in San Francisco on 26 June 1945, entered into force on 24 October 1945.

Coalition to Strengthen the Rights of Older People (2012) *Strengthening Older People's Rights: Towards a UN Convention* [Online]. Available at: https://social.un.org/ageing-working-group/documents/Coalition%20to%20Strengthen%20the%20Rights%20of%20Older%20People.pdf (Accessed: 22 September 2024).

Committee on the Elimination of Discrimination against Women (2006) *Views, Communication No. 4/2004*, Thirty-sixth Session, 7–25 August 2006.

Committee on the Elimination of Discrimination against Women (2016) *Communication No. 66/2014: Views adopted at the sixty-fifth session (24 October–18 November 2016).*

Committee on the Elimination of Discrimination against Women (2017) *General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19.*

Committee on the Elimination of Discrimination against Women (2017) *Views adopted under article 7(3) of the Optional Protocol concerning communication No. 8/2013.*

Committee on the Elimination of Discrimination against Women (2022) *Views adopted under article 7(3) of the Optional Protocol concerning communication No. 104/2016.*

Constitution of the International Labour Organization (1919), as amended.

Constitution of the World Health Organization (1946), adopted by the International Health Conference, New York, 22 July 1946, entered into force on 7 April 1948.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), adopted by UN General Assembly Resolution 39/46 of 10 December 1984.

Convention on the Elimination of All Forms of Discrimination against Women (1979) [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women (Accessed: 20 September 2024).

Convention on the Rights of Persons with Disabilities (2006), adopted by UN General Assembly Resolution A/RES/61/106 of 13 December 2006, entered into force on 3 May 2008.

Convention on the Rights of the Child (1989), adopted by UN General Assembly Resolution 44/25 of 20 November 1989.

Convention relating to the Status of Refugees (1951), adopted on 28 July 1951.
Convention relating to the Status of Stateless Persons (1954), adopted on 28 September 1954.
Declaration on the Elimination of Violence against Women (1993), proclaimed by UN General Assembly Resolution 48/104 of 20 December 1993.
Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), adopted by UN General Assembly Resolution 3318 (XXIX) of 14 December 1974.
Economic and Social Council (1990) *Recommendations and Conclusions Arising from the First Review and Appraisal of the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women to the Year 2000*, Resolution 1990/15.
Economic and Social Council Resolution 1991/18 (1991), E/RES/1991/18, adopted on 30 May 1991.
Ghodsee, K. (2010) 'Revisiting the United Nations Decade for Women: Brief Reflections on Feminism, Capitalism and Cold War Politics in the Early Years of the International Women's Movement', *Women's Studies International Forum*, 33(1), pp. 3–12. https://doi.org/10.1016/j.wsif.2009.11.008.
International Committee of the Red Cross (ICRC) (2005) *Customary International Humanitarian Law*, Volume II, Chapter 39, Section A.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), adopted by UN General Assembly Resolution 45/158 of 18 December 1990, entered into force on 1 July 2003.
International Covenant on Civil and Political Rights (1966), adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976.
International Covenant on Economic, Social and Cultural Rights (1966), adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976.
Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (2024) Advisory Opinion, I.C.J., 19 July 2024.United Nations High Commissioner for Refugees (UNHCR) (2023) *Gender Equality and the Empowerment of Women and Girls* [Online]. Available at: https://www.unhcr.org/sites/default/files/2023-12/gender-equality-and-the-empowerment-of-women-and-girls.pdf (Accessed: 12 September 2024).
Nastas, A. (2023) *Specifics of Human Trafficking Crime Investigation*. Bucharest and Paris: ADJURIS – International Academic Publisher.
Office of the United Nations High Commissioner for Human Rights (OHCHR) (2014) *Women's Rights Are Human Rights*. New York and Geneva: United Nations.
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999), adopted by UN General Assembly Resolution A/RES/54/4 of 6 October 1999, entered into force on 22 December 2000.

Pfeffer, P.F. (1985) 'A Whisper in the Assembly of Nations: United States' Participation in the International Movement for Women's Rights from the League of Nations to the United Nations', *Women's Studies International Forum*, 8(5), pp. 459–471. https://doi.org/10.1016/0277-5395(85)90077-9.

Rehman, J. (2003) *International Human Rights Law: A Practical Approach*. Harlow: Pearson Education Limited.

UN Women (2023) *Gender Equality and the UN General Assembly: Facts and History to Know* [Online]. Available at: https://un-women.medium.com/gender-equality-and-the-un-general-assembly-facts-and-history-to-know-75fc32b35dd3 (Accessed: 12 September 2024).

UN Women (no date) *Making Migration Safe for Women* [Online]. Available at: https://migrationnetwork.un.org/projects/making-migration-safe-women (Accessed: 12 September 2024).

UN Women (no date) *UN Women Values and Competencies Framework* [Online]. Available at: https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/About%20Us/Employment/UN-Women-values-and-competencies-framework-en.pdf (Accessed: 22 September 2024).

UN Women (no date) *World Conferences on Women* [Online]. Available at: https://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women (Accessed: 20 September 2024).

United Nations (2007) *Indigenous Women and the United Nations System: Good Practices and Lessons Learned*. New York: United Nations.

United Nations (no date) *Gender Equality* [Online]. Available at: https://www.un.org/en/global-issues/gender-equality (Accessed: 12 September 2024).

United Nations (no date) *History of Sustainable Development Goals* [Online]. Available at: https://sdgs.un.org/goals (Accessed: 12 September 2024).

United Nations (no date) *History of Women's Day* [Online]. Available at: https://www.un.org/en/observances/womens-day/background (Accessed: 12 September 2024).

United Nations (no date) *Landmark Resolution on Women, Peace and Security* [Online]. Available at: https://www.un.org/womenwatch/osagi/wps/ (Accessed: 12 September 2024).

United Nations (no date) *The Role of the Secretary-General* [Online]. Available at: https://www.un.org/sg/en/content/the-role-of-the-secretary-general (Accessed: 22 September 2024).

United Nations (no date) *Work of the General Assembly on Violence against Women* [Online]. Available at: https://www.un.org/womenwatch/daw/vaw/v-work-ga.htm (Accessed: 20 September 2024).

United Nations High Commissioner for Refugees (UNHCR) (1991) *Guidelines on the Protection of Refugee Women* [Online]. Available at: https://www.unhcr.org/media/guidelines-protection-refugee-women (Accessed: 12 September 2024).

United Nations Human Rights Council (2012) Resolution 21/1, *Situation of Human Rights in Eritrea*.

United Nations Human Rights Council (2013) Resolution 24/20, *The Human Rights of Older Persons*.
United Nations Principles for Older Persons (1991), adopted by UN General Assembly Resolution 46/91 of 16 December 1991.
United Nations Secretary-General (2023) *Women and Peace and Security: Report of the Secretary-General*, 28 September 2023 [Online]. Available at: https://documents.un.org/doc/undoc/gen/n23/279/08/pdf/n2327908.pdf (Accessed: 12 August 2024).
United Nations Secretary-General (2023) *Women and Peace and Security: Report of the Secretary-General* [Online]. Available at: https://documents.un.org/doc/undoc/gen/n23/279/08/pdf/n2327908.pdf (Accessed: 20 September 2024).
United Nations Secretary-General (2024) *Resolve: Report of the Secretary-General on the Work of the Organization 2024* [Online]. Available at: https://www.un.org/sites/un2.un.org/files/sg_annual_report_2024_en.pdf (Accessed: 12 September 2024).
United Nations Security Council (1999) Resolution 1261 (1999), adopted at the 4037th meeting on 25 August 1999.
United Nations Security Council (1999) Resolution 1265 (1999), adopted at the 4046th meeting on 17 September 1999.
United Nations Security Council (2000) Resolution 1296 (2000), adopted at the 4130th meeting on 19 April 2000.
United Nations Security Council (2000) Resolution 1314 (2000), adopted at the 4185th meeting on 11 August 2000.
United Nations Security Council (2015) Resolution 2242 (2015), adopted at the 7533rd meeting on 13 October 2015.
United Nations Security Council (2016) Resolution 2331 (2016), adopted at the 7847th meeting on 20 December 2016.
United Nations Youth Envoy (2013) *UN Women: The United Nations Entity for Gender Equality and the Empowerment of Women* [Online]. Available at: https://www.un.org/youthenvoy/2013/07/un-women-the-united-nations-entity-for-gender-equality-and-the-empowerment-of-women/ (Accessed: 22 September 2024).
Universal Declaration of Human Rights (1948), proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948.

| Chapter 5 |

Women's Human Rights in the Jurisprudence of the European Court of Human Rights

Dženeta Omerdić

ABSTRACT

Women's rights within the protection system of the Council of Europe represent a key component of the European standard of human rights. The European Convention on Human Rights and Fundamental Freedoms (ECHR) is a key instrument in the protection of women's rights in Europe. Through a series of judgments of the European Court of Human Rights (ECtHR), legal standards related to issues of gender equality and violence against women have been set. When deciding on specific cases, the ECtHR specifically referred to the violation of the right to life, the prohibition of torture and inhumane or degrading treatment, the right to privacy, and the prohibition of discrimination. The practice of the ECtHR is extremely important, especially considering that it influences national laws and defined policies in a unique way, which results in strengthening the protection of women's rights in Europe.

In addition to the ECHR, the Council of Europe also adopted additional documents, among which the so-called The Istanbul Convention, which, in a peculiar way, supplements the ECHR and provides concrete measures for the protection of women.

When it comes to Bosnia and Herzegovina, women's rights represent a complex topic that touches many aspects of social, economic, and political life. Despite the progress achieved in recent decades, women in Bosnia and Herzegovina, just like in other parts of Europe, face numerous challenges that make it difficult for them to be equal and exercise their basic rights. Bosnia and Herzegovina is a signatory to numerous international conventions dealing with women's rights, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This convention obliges states to ensure the equality of women in all spheres of life. However, the implementation of these laws is often not at a satisfactory level. Although there are laws that protect women's rights, practice often shows a lack of adequate measures and means for their implementation.

KEYWORDS

European Convention on Human Rights and Fundamental Freedoms, European Court of Human Rights, women's rights, gender equality, prohibition of discrimination, international standards, Bosnia and Herzegovina

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1. Introduction

The promotion and observance of the principles of gender equality and non-discrimination are the focus of the social and economic policies of the United Nations, the European Union, and the Council of Europe. Accordingly, they belong to the basic principles of action of all member states.

Social and economic aspects of gender equality are two parts of one whole. Integrating gender equality into all aspects of public policies (*gender mainstreaming*) aims to create equal opportunities for women and men in all aspects of their life and work. Ensuring gender equality should not be just a slogan, but a principle of social and economic responsibility. Integrating the principle of gender equality into legal regulations indirectly affects the increase in the percentage of women's participation in social, economic, and political life, as well as the reduction of women's unemployment and the inclusion of inactive women in educational and work streams.

Gender equality means equal visibility, empowerment, responsibility, and representation of women and men in all areas of public and private life. It also refers to equal access to funds and equal distribution of funds to women and men. Although the legal status of women in Europe has undoubtedly improved over the last decades, we are still far from real equality. Progress is visible (in educational achievements, participation in the labour market, and representation in politics), but gender differences are still present in many areas. They keep men in their traditional roles while limiting women's opportunities to assert their fundamental rights and demonstrate activity. The most pronounced example of the unequal distribution of power between men and women is violence against women, which at the same time, represents a violation of human rights and a major obstacle to achieving gender equality.

Changing gender relations, empowering women, and eliminating negative traditional[1] gender stereotypes are key to achieving gender equality and benefit all of society, including men, as well as future generations. Extensive research has established that the economy and society flourish when women have the same opportunities for active participation in society and politics as men. In general, a more balanced representation of women in decision-making contributes to positive processes of societal transformation, such as changes in laws, policies, services, institutions, and social norms.

All this will be discussed more in the following sections of the paper.

1 By the resolution of the General Assembly of the United Nations (R. 3010/XXVII) of 18 December 1972, the year 1975 was declared the International Year of Women, which ultimately set the whole world 'into action to improve the position of women.' See Čok, 2010, p. 234. However, due to the so-called traditional attitude towards them, women enjoy a smaller scope of rights than men. In other words, despite the normative solutions and the evident progress made in the process of creating and realising women's rights, women are still on the margins of society.

2. The Principle of Equality: Conceptual and Content Determination

Being equal implies a kind of civilisational progress that every human being, even with different abilities and characteristics, is born free and equal in rights. Equality is a basic value of modern society, and in legal theory, it is defined as a universal moral and legal principle. In modern societies, there are numerous social groups that, unfortunately, do not enjoy equal treatment.

Formal equality, which authors like S. Fredman also call the 'symmetrical approach to equality',[2] implies the equality of all before the law, as well as the equal application of rights. In other words, formal equality implies that within a fair social order, all persons are equal holders of rights.[3] However, *the equality of uniform treatment* for all individuals conceived in this way completely ignores evident structural inequality, and as such does not enable the application of more favourable treatment in situations where it is necessary.[4]

As a kind of response to formal equality, over time, the concept of the so-called essential equality emerged. This implies an active responsibility of the state to treat equals equally and unequal unequally. Within the framework of essential equality, two directions are distinguished: *equality of opportunity* and *equality of results*. Equality of opportunity implies that positions in society, based on knowledge, merit, competence, and talents, are open to everyone. On the other hand, equality of results implies the necessity of adopting measures that promote equality achieved in practice. Unlike equality of opportunity, equality of results is based on the principle of fairness and implies 'unequal treatment when it is necessary to achieve an equal result.'[5]

3. The Principle of Equality Through the Prism of the Provisions of the ECHR

The Council of Europe is an international organisation established by the Treaty of London in 1949 by ten Western European countries (Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom).

It is responsible for the promotion of human rights, democracy, and the rule of law in Europe. The Council of Europe, as a European organisation, was established with the aim of achieving greater unity between member states to protect and realise the ideals and principles that make up their common heritage.[6] Based on Art. 3 of the Statute of the Council of Europe, each member state '*recognises the principle of the rule*

2 Fredman, 1997, p. 576.
3 Rabe, 2001, p. 290.
4 Krstić, 2018, p. 14.
5 Ibid., p. 16.
6 Softić, 2012, p. 229.

of law and the principle according to which every person under its jurisdiction must enjoy human rights and fundamental freedoms.'[7]

Within the framework of the Council of Europe, numerous conventions have been adopted for the achievement of defined goals. Among the most important is certainly the European Convention on Human Rights and Fundamental Freedoms with its protocols, which is also the most important instrument in the field of protection against discrimination.

The principle of equality is a *conditio sine qua non* for the enjoyment of human rights and fundamental freedoms, therefore the basic instrument of the Council of Europe on human rights – the ECHR – contains relevant provisions prohibiting discrimination. Namely, the ECHR – supplemented with protocols, some of which include additional rights, while others reform the implementation mechanism – contains Art. 14, which provides primary protection against discrimination.

Based on Art. 14 of the ECHR:

> '[t]he enjoyment of the rights and freedoms set forth in this Convention 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.'[8]

The term "*shall be secured*" implies a positive and negative obligation of the state with the aim of ensuring the effective enjoyment of protection against discrimination. The specificity of Art. 14 of the ECHR is reflected in its "*non-independence*."

Namely, Art. 14 of the ECHR regulates the prohibition of discrimination for the purpose of protecting individuals in the enjoyment of the rights and freedoms guaranteed by the ECHR and the protocols adopted with it.

This position was also confirmed in the case of *Marckx v. Belgium* in which the European Court of Human Rights emphasised that

> '[a]lthough Art. 14 (Art. 14) has no independent existence, it may play an important autonomous role by complementing the other normative provisions of the Convention and the Protocols: Art. 14 (Art. 14) safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions.'[9]

However, this does not mean that the Court must find a violation of a right from the Convention to establish a violation of Art. 14 of the ECHR.[10]

7 Statute of the Council of Europe.
8 Art. 14, Convention for the Protection of Human Rights and Fundamental Freedoms.
9 Case of *Marckx v. Belgium*, Application No. 6833/74, par. 32.
10 The additional specificity of Art. 14 is reflected in the fact that it does not close the list of prohibited grounds because the wording "or other status" is used.

3.1. The Principle of Equality Through the Prism of Art. 1 of Protocol No. 12 of the ECHR

The issue of equality and the prohibition of discrimination, in addition to Art. 14 of the ECHR, is also regulated by Art. 1 of Protocol 12.

Namely, member states of the Council of Europe,

> '[h]aving regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law; Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950; Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.'[11]

have agreed as follows:

> '[t]he enjoyment of any rights set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'[12]

So, from the very Preamble of Protocol 12, the fundamental importance of the principle of equality is visible, and then the need to undertake all the necessary activities to achieve the equality of all individuals is emphasised.

Furthermore, paragraph 1 of Art. 1 of Protocol no. 12 stipulates that discrimination is prohibited in connection with any right "set forth by law', which complements Art. 14 of the ECHR. When it comes to paragraph 2 of Art. 1, it prohibits discrimination against representatives of public authorities.

When it comes to the application of Art. 1 of Protocol no. 12,[13] in the Explanatory Report to Protocol 12 it is indicated:

11 Protocol No. 12 to The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 2000.

12 Ibid.

13 The first case in which the ECtHR found a violation of Art. 1 of Protocol 12 is the case of *Sejdić and Finci v. Bosnia and Herzegovina*, Application No. 7996/06 and 34836/06. In another case against Bosnia and Herzegovina (*Zornić v. Bosnia and Herzegovina*, Application No. 3681/06), the ECtHR stated that the violation occurred in the form of the failure of the B&H authorities to take measures to implement the judgement in the Sejdić and Finci case.

'[i]n particular, the additional scope of protection under Art. 1 concerns cases where a person is discriminated against:

I. in the enjoyment of any right specifically granted to an individual under national law;
II. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
III. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
IV. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).'[14]

4. Protection of Women's Rights Beyond the ECHR: An Overview of Key Documents of the Council of Europe

The issue of the protection of women's rights is also regulated by other relevant documents of the Council of Europe, among which are the European Social Charter, the Convention on Suppression of Trafficking in Human Beings and the Convention on preventing and combating violence against women and domestic violence.

4.1. The European Social Charter (ESC)

The European Social Charter is the counterpart of the ECHR in the field of economic and social rights. Namely, the signatory countries, members of the Council of Europe, considering that the goal of the Council of Europe is to achieve greater unity among its members, for the purpose of preserving and realising the ideals and principles that represent their common heritage, and enabling their economic and social progress, especially by maintaining and further realising human rights and fundamental freedoms, were adopted by the ESC.

The Charter guarantees the enjoyment of rights in the areas of housing, health, education, employment, rights from social protection and movement of persons without discrimination on any basis, including gender. The Charter was revised in 1996 to include new rights, some of which are of particular importance to women (*e.g.* the right to protection from sexual harassment in the workplace and the right of workers with family responsibilities to equal opportunities and equal treatment).

14 Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, para. 22.

At the same time, the Charter was amended to strengthen the principles of non-discrimination and improve the protection of gender equality in all areas covered by the Charter.[15]

The European Committee of Social Rights (ECSR) monitors the extent to which Member States comply with the Charter through two complementary mechanisms: a reporting system and a collective complaints procedure.

4.2. Convention on Action Against Trafficking in Human Beings

Considering that the goal of the Council of Europe is to achieve greater unity between its members, and that human trafficking is a violation of human rights as well as an attack on human dignity and integrity, as well as that human trafficking can lead to enslavement of victims, the member states adopted the Convention on combating human trafficking, which entered into force on February 1, 2008.

The Convention was adopted with the aim of preventing human trafficking, protecting victims of trafficking, prosecuting human traffickers and promoting the coordination of member states' activities and international cooperation. The Convention on the Suppression of Trafficking in Human Beings has a comprehensive scope that covers the prevention and combating of trafficking in women, men and children for the purpose of sexual, labour or other exploitation, as well as the protection of victims and the prosecution of traffickers. This includes the provision on the prohibition of discrimination and the obligation for member states to promote gender equality and use gender mainstreaming in the development, implementation and evaluation of measures for the implementation of the Convention.

In accordance with Art. 3 of the Convention:

> '[t]he implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, 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.'[16]

An independent monitoring mechanism assesses how states implement the provisions of the Convention in practice. This monitoring mechanism consists of two pillars: the Independent Group of Experts on Combating Trafficking in Human Beings (GRETA) and the Committee of the Parties.

4.3. Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)

The member States of the Council of Europe recognising that the realisation of *de iure* and *de facto* equality between women and men is a key element in the prevention of

15 European Social Charter.
16 Convention on Action against Trafficking in Human Beings.

violence against women and recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women adopted Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).[17]

The Convention is a far-reaching and comprehensive treaty dealing with human rights, gender equality and criminal law. The Istanbul Convention sets minimum standards that member states are required to implement to effectively address the issue of violence against women.

The Convention defines violence against women as

> '[a]ll acts of gender-based violence that result or are likely to result in physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private to life.'[18]

The Istanbul Convention has monitoring in two pillars: a mechanism for evaluating and improving the implementation of the Convention: the independent expert group on action against violence against women and domestic violence (GREVIO) and the Committee of the Parties. GREVIOI monitors the legislative and practical measures taken by the countries that have ratified the agreement with the aim of implementing the Convention.

In addition to the general principles of non-discrimination and gender equality, the ECtHR has developed specific standards for women's equal access to justice in numerous cases concerning violence against women, such as: the doctrine of the positive obligation of the state, the standard of due diligence, access to legal remedies, thorough and effective investigations and respect for personal integrity applicants. The standards developed through ECtHR jurisprudence in cases of violence against women have now been integrated into the Istanbul Convention and have become legally binding.

The Istanbul Convention includes numerous provisions aimed at facilitating access to justice for victims of gender-based violence, by requiring member states to: provide adequate legal information (Art. 19); encourage registration (Art. 27); provide victims with adequate civil remedies (Art.29) and compensation (Art.30); criminalise or otherwise sanction a wide range of forms of violence against women (Art. 33–40); ensure that investigations and court proceedings are conducted without unnecessary delay (Art.49); enable prosecutors to initiate and continue proceedings even if the victim withdraws the report (Art.55); ensure that evidence related to the sexual history and behaviour of the victim is allowed only when it is relevant and necessary (Art.54); ensure that it is prohibited to prescribe mandatory alternative procedures

17 Convention on Preventing and Combating Violence against Women and Domestic Violence.
18 Ibid.

for resolving disputes or sentencing, including mediation and conciliation (Art.48); ensure the protection of victims in all stages of investigation and court proceedings (Art.56); enable victims to access legal aid and free legal aid (Art.57).

Therefore, the standards of the Istanbul Convention represent a key element to ensure equal access to justice for women. The aforementioned principles and standards are and should be applied in cases that do not concern violence against women, especially in family and employment matters.[19]

5. The European Court of Human Rights (ECtHR)

The European Court of Human Rights (ECtHR) is a body to which individuals can submit a request/petition for alleged violations of their rights under the ECHR, provided they have met procedural conditions such as exhaustion of domestic remedies. Although the ECHR is a gender-neutral instrument, the ECtHR interprets the Convention as a living instrument and has established case law on women's rights, including violence against women (domestic violence, sexual violence, forced gynaecological examinations, human trafficking, reproductive rights: abortion, sterilisation, medical assisted reproduction) and gender discrimination in the areas of employment and social benefits.

The ECtHR has established several important principles of women's equal access to justice in cases of violence against women.

The European Court of Human Rights has issued a significant number of judgments that indicate the barriers that women experience in accessing legal protection and remedies and that formulate standards in the sphere of women's access to justice. Key judgements were made especially in cases of violence against women, gender equality and gender stereotypes. The ECtHR examined a significant number of cases of violence against women committed by both entities, both state actors and private individuals.

The text of the ECHR does not contain a definition of discrimination; therefore the practice of the ECtHR sets important standards in this area. Namely, in many cases, the European Court of Human Rights had the opportunity to declare the existence of discrimination, and by acting presented the elements of discrimination.

Discrimination means unequal treatment of persons in the same or similar situation, without objective and reasonable justification, when it is based on some personal characteristic.[20] Also, discrimination exists when the state applies equal treatment to individuals or groups that are in a fundamentally different situation.

When it comes to direct discrimination, the practice of the ECtHR is extremely rich. However, the issue of establishing indirect discrimination is much more

19 Ibid.

20 Case of *Okpisz v. Germany*, Application No. 59140/00; Case of *Maktouf and Damjanovic v. Bosnia and Herzegovina*, Application No. 2312/08 and 34179/08.

complex. The ECtHR recognised the existence of indirect discrimination, i.e. discrimination that exists in the case of a general policy or measure that is at first glance neutral but has a disproportionately negative effect on an individual or groups. The biggest problem with proving indirect discrimination is proving it, therefore the ECtHR finds that in such cases it is necessary to identify a group that is in the same or a similar situation, and then with the use of statistical data, the existence of obvious indications that a certain rule, although formulated neutrally, in reality it negatively affects one group. Therefore it is up to the defendant state to show that it is the result of objective factors unrelated to any discrimination.[21]

It is necessary to emphasise that when the Court finds a difference in treatment, it will not necessarily find discrimination, because a difference can be justified when it seeks to achieve a legitimate goal and if there is a balance between the goal set and the means used.[22]

Art. 14 of the ECHR and Protocol 12 prohibit discrimination in relation to any right under the Convention, as well as in relation to the "enjoyment of any right established by law." This includes the right to "free elections" established in Art. 3 of Protocol 1.[23] There are a modest number of cases from the case law of the European Court of Human Rights (ECtHR) on issues related to women's participation in elections. Although the case of *Staatkundig Gereformeerde Partij v. the Netherlands*[24] was considered unacceptable, the ECtHR took the position that a political party that forbids women from running for public office would deny women their fundamental human rights, regardless of the deep-rooted religious beliefs on which such actions would be based.[25]

In 2003, the Committee of Ministers of the Council of Europe issued a recommendation on promoting the balanced participation of women and men in political and public decision-making, so that the representation of men and women in any decision-making body should not fall below 40 percent.

The Committee urges the undertaking of

> 'special measures to stimulate and support women to participate in political decision-making and calls on the participating states to consider setting goals, with a time frame for their realisation, and to monitor and evaluate progress and regularly report on measures taken and progress achieved.'[26]

21 Case of *Hoogendijk v. The Netherlands*, Application No. 5846/00, par. 21–22.
22 See Case of *Hoffmann v. Austria*, Application No. 12875/87 para. 31, 33; Case of *Andrejeva v. Latvia*, Application No. 55707/00, para. 81.
23 Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
24 Case of *Staatkundig Gereformeerde Partij v. the Netherlands*, Application No. 58369/10.
25 Ibid.
26 Council of Europe, 2003.

This recommendation, although not legally binding, is authoritative and convincing.[27]

The fact that in an increasing number of cases, the European Court points to the role of stereotypes and prejudices in cases of discrimination is particularly interesting. In addition to cases of racial discrimination and discrimination based on sexual orientation, the issue of stereotypes also appears in cases of gender discrimination.

6. The Role of the ECtHR in Protecting Women's Rights

In several key judgments, the ECtHR has formulated or confirmed important principles that lay the foundation for ensuring equal access to justice for women. Violations of women's human rights are usually committed by private individuals, unlike men's human rights violations, which are usually committed by state actors. In this regard, the Court significantly increased women's access to justice by recognising that forms of violence against women committed by private persons/individuals constitute a violation of certain rights protected by the Convention (especially the right to life and the prohibition of torture and inhuman and degrading treatment). Furthermore, ECtHR jurisprudence illustrates the importance of the Court attaches to the development of the doctrine of positive obligations – a doctrine that applies regardless of whether the perpetrator is a natural person or a public servant.

The principle of non-discrimination is a key principle of the Convention, which includes non-discrimination in access to justice and access to legal remedies without any discrimination. The principle of non-discrimination has been confirmed in numerous decisions related to cases of domestic violence. The next important principle that emerges from the judicial practice of the ECtHR is the principle of gender equality. Discrimination based on gender has often been considered before the ECtHR.

It is particularly important to emphasise that, unlike the UN Convention on the Elimination of All Forms of Discrimination against Women, the ECHR provides the so-called symmetrical protection against discrimination. Due to the symmetrical protection against discrimination provided by the ECHR, in many cases, the applicants were precisely men who claimed that they were exposed to unequal treatment

27 One authoritative source of good practice is the Council of Europe's European Commission for Democracy through Law (Venice Commission). The Venice Commission published a series of general and thematic reports on women's participation in elections and gender equality, and several legal opinions, together with the ODIHR, regarding the electoral legislation of individual countries. The Code of Good Practice of the Venice Commission in Electoral Matters recognises that special measures which attempt to resolve the imbalances that traditionally exist in terms of universal representation are not opposed to the principle of equal suffrage. These measures may include quotas, reserved seats for certain groups and exemptions from quorum requirements, or lower thresholds. See Venice Commission, 2019; Venice Commission, 2021; Venice Commission, no date.

compared to women. Thus, for example, in the Case of *Van Raalte v. The Netherlands*[28] the court ruled on Dutch regulations that introduced taxes for men who were older than 45 and did not have children, while women of the same age were not obliged to pay that tax. The government of the Netherlands has denied treating people in a similar situation differently. Namely, the Government advocated the position that a woman aged 45 and over is fundamentally different from a man of the same age because, for biological reasons, it is less likely that she will be able to have children.[29] Also, at the time of the passing of the law, there were certain attitudes that women who do not have children and who most likely will not have them, suffer because of it, and should not be imposed an additional emotional burden to pay a contribution for child protection.[30] The ECtHR did not find that in this case there were compelling reasons that could justify the difference in treatment between men and women, especially considering that some women can give birth to children after the age of 45, while some younger men cannot have children at all.[31] Furthermore, the Court found that the argument about imposing an additional emotional burden on unmarried women without children can equally be applied to unmarried men without children or to a couple without children, and that regardless of the possible legitimacy of the goal, such a reason cannot justify the distinction in treatment in a specific case.[32]

As previously pointed out, the European Court of Human Rights has issued a significant number of judgments that indicate the barriers that women experience in accessing legal protection and remedies and that formulate standards in the sphere of women's access to justice. Key judgements were made especially in cases of violence against women, gender equality and gender stereotypes.

The first case in which discrimination based on gender was considered is the Case of *Abdulaziz, Cabales and Balkandali v. The United Kingdom*.[33] The aforementioned case discussed the practice by which married women who were legally resident in the United Kingdom were refused a request to be joined by their husbands who did not have English citizenship, while such a prohibition did not exist in the case of married men who were legally resident in the territory of that country. The British regulations in force at the time prevented the husbands of immigrant women who were legally and permanently settled in the UK from joining them, while the wives of husbands who were in a similar situation were not subject to such a restriction. The state justified the different treatment by saying that husbands had a different influence on the labour market.

In the above-mentioned case, the ECtHR pointed out that the rules on immigration have a legitimate goal – the protection of the labour market and the provision of

28 Case of *Van Raalte v. The Netherlands*, Application No. 20060/92.
29 Ibid., para. 37.
30 Ibid.
31 Ibid., para. 43.
32 Ibid., para. 44.
33 Case of *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Application No. 9214/80; 9473/81; 9474/81.

public order. However, in addition to the existence of a legitimate goal, it is necessary for the state to demonstrate a connection between that goal and the specific measure that creates unequal treatment, as well as for there to be proportionality between the goal and that measure. The ECtHR found that this element was not fulfilled and that the state has a narrower field of discretion in the case of discrimination based on gender, to justify unequal treatment.[34]

Most of the cases decided by the ECtHR illustrate the existence of stereotypes towards women and men, i.e. traditional gender roles in society and the family, which is particularly problematic if there is no justification.

While analysing the practice of the ECtHR, it is necessary to refer to case of *Juhnke v. Türkiye*.[35] In 1997 the applicant, a German national, was arrested by Turkish soldiers on suspicion of membership of an illegal armed organisation, the PKK (Workers' Party of Kurdistan) and handed over to local gendarmes. In 1998 she was convicted as charged and sentenced to imprisonment. In the meantime, she lodged a petition with a public prosecutor's office, stating that she had been subjected to a gynaecological examination without her consent. She further claimed that she had been stripped naked and sexually harassed by several gendarmes present during the examination. The applicant had requested the prosecution of both the gendarmes and the doctor. In 2002 the criminal investigation against the gendarmes was suspended by the Supreme Administrative Court.

In 2004 the applicant was released and deported to Germany. The applicant had resisted the gynaecological examination until persuaded to agree to it. Given the vulnerability of a detainee at the hands of the authorities, she could not have been expected to have resisted the examination indefinitely. She had been detained *incommunicado* for at least nine days prior to the intervention. At the time of the examination, she had apparently been in a particularly vulnerable mental state. It was not suggested that there had been any medical reason for such an examination or that it had been carried out in response to a complaint of sexual assault lodged by her. It remained, moreover, unclear whether she had been adequately informed of the nature of and the reasons for the measure. In the light of the doctor's statement, she might have been misled into believing that the examination had been compulsory. It could not be concluded with certainty that any consent given by the applicant had been free and informed. The imposition of a gynaecological examination on her, in such circumstances, had given rise to an interference with her right to respect for her private life, and her right to physical integrity. Further, it had not been shown that that interference had been "in accordance with the law", as the Government had not presented any arguments to the effect that the interference was based on and was following any statutory or other legal rule. The impugned examination had not been part of the standard medical examination applied to persons arrested or detained. Rather it appeared to have been a discretionary decision – not subject to any

34 Ibid., paras. 74–83.
35 Case of *Juhnke v. Türkiye*, Application No. 52515/99.

procedural requirements – taken by the authorities to safeguard the members of the security forces, who had arrested and detained the applicant, against a potential false accusation by the applicant of sexual assault. Even if this could, in principle, have constituted a legitimate aim, the examination had not been proportionated to such an aim. The applicant had not complained of having been sexually assaulted and no reason had been advanced suggesting that she would be likely to do so. Therefore, that aim was not such as to justify overriding the refusal of a detainee to undergo such an intrusive and serious interference with her physical integrity or seeking to persuade her to give up her express objection.

The Court considered that the gynaecological examination which had been imposed on the applicant without her free will and informed consent had not been shown to have been "in accordance with the law" or "necessary in a democratic society."[36] According to relevant facts, the Court found no violation of Art. 3 and a violation of Art. 6.[37]

In the case of *Aydin v. Türkiye*[38] the applicant, Mrs Şükran Aydın, is a Turkish citizen of Kurdish origin. She was born in 1976. At the time of the events in issue, she was a 17-year-old and living with her parents in the village of Tasit, which is about ten kilometres from the town of Derik where the district gendarmerie headquarters are located. The applicant had never travelled outside her village before the events that led to her application to the Commission. The applicant had been taken from her village along with her father and sister-in-law by the security forces on 29 June 1993 and held at Derik gendarmerie headquarters until 1 July 1993. While in custody she was tortured by being raped and severely ill-treated. She was a 17-year-old at the time of her detention. She was kept blindfolded and isolated from her father and sister-in-law throughout the period of detention. During that time, she was debased by being raped and has suffered long-term psychological damage because of that act of torture.

Furthermore, she was stripped naked, questioned by strangers, beaten, slapped, threatened and abused. She was forced into a tire, spun around and hosed with ice-cold water from high-pressure jets. Having regard to her sex, age and vulnerability she requested the Court to find that the deliberately inflicted and calculated physical suffering and sexual humiliation of which she was the victim was of such severity as to amount to an additional act of torture.[39] The Court concluded that '[t]here has been a violation of Art. 3 of the Convention'.[40]

36 Ibid.
37 Ibid.
38 Case of *Aydin v. Turkey,* Application No. 23178/97.
39 The cases related to police violence, which were decided by the ECtHR, include, among others: *Y.F. v. Turkey* Application No. 24209/94; *Maslova and Nalbandov v. Russia*, Application No. 839/02; *Y. Yilmaz v. Turkey,* Application No. 4524/06; *B.S. v. Spain* (2012), Application No. 47159/08; *Izci v. Turkey,* Application No. 42605/05; *Dilek Aslan v. Turkey,* Application No. 34364/08.
40 Case of *Aydin v. Turkey,* Application No. 23178/97.

The case against Turkey is particularly interesting, in which the Court decided whether there was a violation of Art. 14 of the ECHR in connection with Art. 8 (right to respect for private and family life).

It is about the case of Ünal *Tekeli v. Türkiye*,[41] in which, deciding on a woman's right to keep her maiden name, the Court pointed out:

> '[a]ccording to the practice of the Contracting States and the systems applicable in Europe, it was perfectly conceivable that family unity would be preserved and consolidated where a married couple chose not to bear a joint family name. The Government had not shown in the present case that concrete or substantial hardship for married partners and/or third parties or detriment to the public interest would be likely to flow from the lack of reflection of family unity through a joint family name. In those circumstances the Court considered that the obligation on married women, in the name of family unity, to bear their husband's surname – even if they could put their maiden name in front of it – had no objective and reasonable justification. A transition from the above-mentioned traditional system to other systems allowing married partners either to keep their own surname or freely choose a joint family name, would have a considerable effect on keeping registers of births, marriages, and deaths. However, society could reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they had chosen. In sum, the objective of reflecting family unity through a joint family name could not provide a justification for the difference in treatment on grounds of sex.'[42]

The Case of *Zarb Adami v. Malta* deserves special attention. In this case, deciding on discrimination based on gender during the formation of the court jury, because a much larger number of men were invited to the jury, the Court did not accept the state's argumentation.

> 'The Court observes that, if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group (see *McShane v. the United Kingdom*, No. 43290/98, § 135, 28 May 2002). Moreover, very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention.'[43]

41 Case of *Ünal Tekeli v. Türkiye*, Application No. 29865/96.
42 Ibid.
43 Ibid.

In the instant case, the Government argued that the difference in treatment depended on a number of factors. In the first place, jurors were chosen from the part of the population which was active in the economy and professional life. The Court considers:

> '[m]oreover, according to Art. 604(3) of the CC, an exemption from jury service might be granted to persons who had to take care of their family. More women than men could successfully rely on such a provision. Finally, 'for cultural reasons', defence lawyers might have tended to challenge female. The Court has doubts as to whether the factors indicated by the Government are sufficient to explain the significant discrepancy in the distribution of jury service. It notes furthermore that the second and third factors relate only to the number of women who actually performed jury service and do not explain the very low number of women enrolled on the lists of jurors. In any event, the factors highlighted by the Government only constitute explanations of the mechanisms which led to the difference in treatment complained of. No valid argument has been put before the Court to provide a proper justification for it. It has not been shown that the difference in treatment pursued a legitimate aim and that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In the light of the foregoing, the Court finds that there has been a violation of Art. 14 taken in conjunction with Art. 4 § 3 (d) of the Convention.'[44]

When it comes to the protection of women from domestic violence, the ECtHR has repeatedly found that the failure of the authorities to protect women from domestic violence constitutes a violation of the right to equal protection before the law, where such failure does not have to be intentional.

So, for example, in the Case of *T.M. and C.M. v. The Republic of Moldova* the Court points out its finding that 'the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.'[45]

In the Case of *Halima Kılıç v. Türkiye* ECtHR considered the way in which protection was provided to women against domestic violence. Namely, when she first reported the violence, the woman had been married to the abuser for 17 years, with whom she had seven children. Fearing for her own life and the lives of her children, she asked the authorities to evict him from the apartment where they lived. Although, several protection measures and restraining orders were set for the abuser, the woman was ultimately deprived of her life. The ECtHR found that the protective measures in this case were not implemented in a timely manner, and the abuser was not detained, although the conditions for this were met. Furthermore, the ECtHR concluded that

44 Case of *Zarb Adami v. Malta*, Application No. 17209/02.
45 See Case of *T.M and C.M. v. the Republic of Moldova*, Application No. 26608/11.

the widespread practice of violence against women and the passivity of the Turkish judiciary created a climate conducive to violence.[46]

In another case *Bălșan v. Romania*,[47] the (female) applicant repeatedly turned to the local authorities and asked for appropriate measures to be taken for her own protection and the protection of her four children from her ex-husband. The Court reiterates that,

> '[i]t has concluded that the domestic authorities have deprived the national legal framework of its purpose by their finding that the applicant provoked the domestic violence against her, that the violence did not present a danger to society and therefore was not severe enough to require criminal sanctions, and by denying the applicant's request for a court-appointed lawyer. In doing so, the domestic authorities have also acted in a way that was inconsistent with international standards on violence against women and domestic violence in particular.'[48]

Also, as regards the general approach to domestic violence in Romania, the Court notes:

> 'that official statistics show that that type of violence is tolerated and perceived as normal by many people and that a rather small number of reported incidents are followed by criminal investigations. Moreover, the number of victims of such violence has increased every year, most of them being women. Official data shows that as of 2017 a limited number of shelters was available nationwide for victims but that eight counties had no such shelter at all.'[49]

Furthermore, the Court notes,

> 'that these considerations are in line with previous findings by the CEDAW Committee, which found in 2006 that the general population might not be sufficiently aware of the extensive legal and policy framework developed by Romania for the elimination of discrimination against women and that women themselves might not be aware of their rights. The Committee also expressed concern about the limited availability of protection and support services for victims, in rural areas, about the limited information the Romanian Government was able to provide about the prevalence of domestic violence as well as about the insufficient implementation of the legislative and other measures adopted in the field.'[50]

46 Case of *Halime Kılıç v. Türkiye*, Application No. 63034/11.
47 Case of *Bălșan v. Romania*, Application No. 49645/09.
48 Ibid., para. 81.
49 Ibid., para. 83.
50 Ibid.

The Court observed in the current case that the authorities failed to apply the relevant legal provisions.

The lack of effective implementation of the legal framework was also pointed out by the Court in case of *E.M. v. Romania*, a similar case. Moreover, besides police statistics and a description of various activities, The Court notes that 'the Government failed to submit any data on monitoring the impact of those activities or the effects of implementing Law no. 217/2003 on preventing and combating domestic violence or the national strategy for preventing and combating domestic violence.'[51]

In the Court's opinion, the combination of the above factors demonstrates that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Romania and that their actions reflected a discriminatory attitude towards the applicant as a woman. Furthermore, in the light of the foregoing, the Court considers 'that there is *prima facie* evidence that domestic violence mainly affected women, and that the general and discriminatory passivity of the authorities created a climate that was conducive to domestic violence.'[52]

The Court has established that,

> 'the criminal-law system, as operated in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts by N.C. against the personal integrity of the applicant and thus violated her rights under Art. 3 of the Convention.'[53]

In this case, the Court considers that 'the violence suffered by the applicant can be regarded as gender-based violence, which is a form of discrimination against women'.[54] Finally, the Court concludes that '[t]here has been a violation of Art. 14 of the Convention, read in conjunction with Art. 3 in the instant case.'[55]

In the case of *Talpis v. Italy*, a Romanian citizen living in Italy sought protection for herself and her children from an alcoholic and abusive husband. During the last attack, the husband forcibly entered the apartment where she lived with the children and stabbed her several times with a kitchen knife, killing her son who tried to separate them. The husband was sentenced to life imprisonment for the murder of his son and attempted murder of his wife. The applicant stated that the Italian authorities did not protect her from domestic violence, because of which her son died.

Analysing the facts, the Court reiterates that,

> '[a]ccording to its case-law, a state's failure to protect women against domestic violence breaches their right to equal protection before the law and that this failure does not need to be intentional. [...] The Court also found that such

51 Ibid., para. 84.
52 Ibid., para. 86.
53 Ibid., para. 87.
54 Ibid., para. 88.
55 Ibid., para. 89.

> discriminatory treatment occurred where it could be established that the authorities' actions were not a simple failure or delay in dealing with the violence in question, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the complainant as a woman.'[56]

According to the Court,

> '[t]he applicant was therefore a victim of discrimination, as a woman, in breach of Art. 14 of the Convention. Furthermore, the conclusions of the Special Rapporteur on violence against women, its causes and consequences, following his official visit to Italy, those of the CEDAW and those of the National Statistics Institute demonstrate the extent of the problem of domestic violence in Italy and the discrimination suffered by women in this regard.'[57]

Furthermore, the Court considers that

> '[t]he applicant provided prima facie evidence, backed up by undisputed statistical data, that domestic violence primarily affects women and that, despite the reforms implemented, a large number of women are murdered by their partners or former partners (femicide) and, secondly, that the socio-cultural attitudes of tolerance of domestic violence persist.'[58]

In the Case of *Nurcan Bayraktar v. Türkiye*,[59] the applicant is being required to observe the 300-day waiting period provided for by the Turkish Civil Code before remarrying after her divorce. The applicant brought proceedings before the Family Court seeking exemption from that requirement. As a condition for waiving that period, she was required to produce a medical certificate to the effect that she was not pregnant. Since she refused to undergo the required medical examination, her application was dismissed. Her appeals against that decision were unsuccessful.

According to the Court, this case fell within the ambit of Art. 8 since it concerned one of the most intimate aspects of the applicant's private life as a woman. The waiting period imposed on the applicant following her divorce and the authorities' requirement that she undergo, on pain of having her application for the waiver of that period dismissed, a medical examination to verify that she was not pregnant constituted interference with her right to respect for her private life. Such interference had been in accordance with the law, namely the Civil Code, and had pursued the legitimate aims of protecting the rights and freedoms of others and preventing disorder.

The Court considers that,

56 Case of *Talpis v. Italy*, para. 141, Application No. 41237/14.
57 Ibid., para. 145.
58 Ibid.
59 Case of *Nurcan Bayraktar v. Türkiye*, Application No. 27094/20.

> 'if, as the domestic authorities had asserted, the principal aim of the waiting period and of making the waiver of this requirement conditional upon the woman's not being pregnant was to determine accurately the biological parentage of a possible unborn child, then it was necessary to distinguish biological paternity from the legal presumption of paternity. While it was true that, in most legal systems, the legal father of a child born in wedlock was presumed to be the husband, a child's biological father could nevertheless, regardless of whether the child was born in or out of wedlock, recognise or claim paternity of that child at any time upon presentation of scientific proof in support of his claim, in particular a DNA paternity test. Likewise, under the Civil Code, if a woman who had just divorced had been pregnant and gave birth to a child during the waiting period before remarrying, such a situation could not have given rise to anything more than a presumption of paternity with regard to the ex-husband and would not necessarily have affected the determination of the biological father. In this sense, the goal of enabling the determination of biological paternity seemed obsolete in a modern society.'[60]

Moreover, even assuming that the purpose of the waiting period had been to preserve the ex-husband's presumption of paternity with regard to any child born in that period, it would still have been superfluous given that other legal avenues were available under current systems of law for recognising and determining paternity. In addition, the waiting period only commenced on the date on which the divorce decision became final whereas, in most cases, the spouses no longer lived together in practice as of the start of the divorce proceedings, which could sometimes last for years.

Furthermore, the question whether a woman was pregnant had to be regarded as closely tied to the intimacy of her private life, irrespective of whether she had recently divorced. Making a divorced woman's ability to remarry, without observing the waiting period, conditional upon her producing a medical certificate to the effect that she was not pregnant amounted to violating that intimacy and placing her intimate private life, including her sex life, under the scrutiny of the authorities. The Family Court, however, did not appear to have considered the aspects of the case bearing on the applicant's private life when it had weighed up the various interests at stake.

Lastly, the Court expressed its concern as to the assumptions underlying the findings of the Family Court, which implied that divorced women, owing to the particularities of their female biology, especially the role they might play as mothers and their capacity to give birth, had a duty to society to disclose any pregnancy before remarrying and should be burdened with the disadvantage of a waiting period for the sake of protecting the interests of a possible unborn child and those of other relevant parties. That assumption reflected a traditional view of female sexuality –

60 Ibid.

as essentially being tied to the woman's reproductive function – and disregarded its physical and psychological importance for her personal fulfilment.

The Court concludes that,

> '[r]egard being had to the foregoing, the impugned interference had not met a pressing social need, had not been proportionate to the legitimate aims it had pursued and had not been justified on relevant and sufficient grounds. It had not therefore been necessary in a democratic society.'[61]

In the case of *Kontrová v. Slovakia*,[62] the applicant, Dana Kontrová, is a Slovakian national who was born in 1974 and lives in Michalovce (Slovakia). She was married and had two children with her husband. On 2 November 2002, the applicant filed a criminal complaint against her husband, accusing him of having assaulted and beaten her with an electric cable. She submitted a medical report indicating that her injuries would prevent her from working for up to seven days. She also stated that there was a long history of physical and psychological abuse by her husband.

Accompanied by her husband, she later tried to withdraw her criminal complaint. On the advice of Police Officer H., she consequently modified the complaint such that her husband's alleged actions were treated as a minor offence which called for no further action. During the night of 26 to 27 December 2002 a relative of the applicant called the emergency service of the District Police Department to report that the applicant's husband had a shotgun and was threatening to kill himself and the children. The applicant made a similar phone call later that night. The phone calls were received by Police Officer B., who instructed Police Officer P.Š., to arrange for a police patrol to visit the premises. The patrol found the applicant in the village of Tušická Nová Ves. The applicant's husband had left the scene prior to their arrival. The policemen took the applicant to her parents' home and asked her to come to the police station the following morning so that a formal record of the incident could be drawn up.

On the morning of 27 December 2002, the applicant went to Trhovište District Police Station, where she spoke to Police Officer M.Š. In the morning of 31 December 2002, the applicant and her brother went to the Michalovce District Police Station, where she talked to Police Officer H. She enquired about her criminal complaint of 2 November 2002 and mentioned the incident of 26 to 27 December 2002. On 31 December 2002, between 11 a.m. and 11.15 a.m. the applicant's husband shot dead their two children and himself.

Ultimately, the domestic courts found that the tragedy was a direct consequence of the police officers' failure to act. On 14 March 2006 police officers B., M.Š and P.Š were convicted of negligent dereliction of their duties. Criminal proceedings against H. were discontinued.

61 Ibid.
62 Case of *Kontrová v. Slovakia*, Application No. 7510/04.

The applicant's complaints to the constitutional court seeking compensation concerning the non-pecuniary damage suffered, among other things, were unsuccessful.

The Court observed that,

> '[u]nder section 2 (1) (a) and (b) of the Police Corps Act of 1993, it was one of the main tasks of the police to protect fundamental rights and freedoms, life and health. The situation in the applicant's family was known to the local police department given, among other things, the criminal complaint of 2 November 2002 and the emergency phone calls of the night of 26 to 27 December 2002.'[63]

In response to the applicant's situation, under the applicable provisions of the Code of Criminal Procedure and service regulations, The Court concludes that,

> '[t]he police were obliged, among other things, to: register the applicant's criminal complaint; launch a criminal investigation and criminal proceedings against the applicant's husband immediately; keep a proper record of the emergency calls and advise the next shift of the situation; and, take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it.'[64]

The Court considers that,

> '[t]he police failed to ensure that those obligations were complied with. On the contrary, one of the officers involved assisted the applicant and her husband in modifying her criminal complaint of 2 November 2002 so that it could be treated as a minor offence calling for no further action. As found by the domestic courts, the direct consequence of those failures was the death of the applicant's children.'[65]

In this case, the Court found that there had been a violation of Art. 2.

In the case of *Durmaz v. Türkiye*,[66] the applicant's daughter died in hospital after her husband had taken her to the emergency department, informing the doctors that she had taken an overdose of medicines. When questioned by the police, he also stated that the couple had had a row on the same day, and he had hit her. The deceased's father subsequently lodged a complaint with the prosecutor, stating that she had not been suicidal, and alleging that her husband was responsible for her death.

63 Ibid.
64 Ibid.
65 Ibid.
66 Case of *Durmaz v. Türkiye*, Application No. 3621/07.

The investigation by the prosecutor concluded that she had committed suicide. An objection by the applicant was dismissed by the domestic courts. Before the Court, the applicant complained that the investigation into the death of her daughter had been ineffective. The Court held that,

> '[t]here had been a violation of Art. 2 (right to life) of the Convention in its procedural aspect on account of the Turkish authorities' failure to carry out an effective investigation into the death of the applicant's daughter. It noted that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.'[67]

A remarkably similar situation is in the case of *Civek v. Türkiye*.[68] This case concerned the murder of the applicants' mother by their father. The applicants complained that the Turkish authorities had failed in their obligation to protect their mother's life. The Court held that there had been a violation of Art. 2 (right to life) of the Convention. It found that even though the Turkish authorities had been informed of the genuine and serious threat to the applicants' mother's life and despite her continued complaints of threats and harassment, they had failed to take the measures reasonably available to them to prevent her being murdered by her husband.

Case of *Tërshana v. Albania*[69] concerned an acid attack on the applicant in 2009. The applicant suspected that her former husband, whom she accused of domestic violence, was behind the attack. She alleged that the Albanian authorities had failed to take measures to protect her from the acid attack and to conduct a prompt and effective investigation for the identification, prosecution and punishment of her assailant.

The Court held that there had been no violation of Art. 2 (right to life) of the Convention in its substantial aspect, finding that the Albanian State could not be held responsible for the attack. It noted that, if the State had been aware of a risk to the applicant, it would have been its duty to take preventive measures. In the present case, however, the national authorities had only found out about the violent behaviour of the applicant's former husband after the incident.

On the other hand, the Court held that there had been a violation of Art. 2 in its procedural aspect, finding that the authorities' response to the acid attack had been ineffective. In this respect, it noted that the investigation into the attack, which had had the hallmarks of gender-based violence and therefore should have incited the authorities to react with special diligence, had not even been able to identify the substance thrown over her. The investigation was moreover stayed in 2010, without

67 Ibid.
68 Case of *Civek v. Türkiye*, Application No. 55354/11.
69 Case of *Tërshana v. Albania*, Application No. 48756/14.

identifying the person responsible, and the applicant had not been given any information about its progress since, despite her repeated enquiries.[70]

The case of *A.E. v. Bulgaria*[71] concerned complaints brought to prosecutors in Bulgaria that the applicant, then aged just 15, had been a victim of domestic abuse, including being beaten, kicked and strangled, by the 23-year-old man with whom she was living. The applicant complained of the state's failure to protect her from domestic violence and to investigate adequately her complaints in that regard, and that she had been discriminated against on the grounds of age and sex.

The Court held that there had been a violation of Art. 3 (prohibition of inhuman or degrading treatment) of the Convention, finding that Bulgaria had not put in place an effective system to punish all forms of domestic violence and provide sufficient safeguards for victims. It noted that, in the present case, the State had failed to protect the applicant adequately either in law – domestic-violence legislation had been deficient – or in fact – prosecutors had not opened criminal proceedings despite the applicant's vulnerable situation and the report that she had been subjected to repeated domestic violence. The Court further noted,

> '[t]hat the Bulgarian Government had failed to disprove institutional inaction on the part of the authorities. As it was not necessary for the applicant to show she had been individually a victim of prejudice on the part of the authorities, the Court concluded that there held also been a violation of Art. 14 (prohibition of discrimination) of the Convention in conjunction with Art. 3 in the applicant's case.'[72]

The case of *Valiulienė v. Lithuania*[73] concerned the complaint by a woman who was a victim of domestic violence about the authorities' failure to investigate her allegations of ill-treatment and to bring her partner to account.

The Court held that there had been a violation of Art. 3 (prohibition of inhuman or degrading treatment) of the Convention, finding that the practices at issue in the instant case and the way the criminal-law mechanisms had been implemented had not provided the applicant adequate protection against acts of domestic violence. There had been delays in the criminal investigation and the public prosecutor had decided to discontinue the investigation.

In the case of *Bevacqua and S. v. Bulgaria*,[74] the first applicant, who claimed she was regularly battered by her husband, left him and filed for divorce, taking their three-year-old son (the second applicant) with her. However, she maintained that her husband continued to beat her. She spent four days in a shelter for abused women with her son but was allegedly warned that she could face prosecution for abducting

70 Ibid.
71 Case of *A.E. v. Bulgaria*, Application No. 53891/20.
72 Ibid.
73 Case of *Valiulienė v. Lithuania*, Application No. 33234/07.
74 Case of *Bevacqua and S. v. Bulgaria*, Application No. 71127/01.

the boy, leading to a court order for shared custody, which, she stated, her husband did not respect. Pressing charges against her husband for assault allegedly provoked further violence. Her requests for interim custody measures were not treated as priority and she finally obtained custody only when her divorce was pronounced more than a year later. The following year she was again battered by her ex-husband and her requests for a criminal prosecution were rejected on the ground that it was a "private matter" requiring a private prosecution.

The Court held that there had been a violation of Art. 8 (right to respect for family life) of the Convention, given the cumulative effects of the domestic courts' failure to adopt interim custody measures without delay in a situation which had affected adversely the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to the behaviour of the first applicant's former husband. In the Court's view, this amounted to a failure to assist the applicant's contrary to the State positive obligations under Art. 8 of the Convention to secure respect for their private and family life. The Court stressed that considering the dispute to be a "private matter" was incompatible with the authorities' obligation to protect the applicants' family life.[75]

The case of *A and B v. Georgia*[76] concerned the murder of the daughter and mother, respectively, of the two applicants, by the second applicant's father, a police officer, following a troubled relationship. It also concerned the ensuing investigation. The applicants complained of a failure on the part of the authorities to protect their relative from domestic violence and to conduct an effective investigation.

7. Women's Rights in Bosnia and Herzegovina: A Case Study

Establishing overall social equality, especially gender equality, is a condition for the development of democratic state and open civil society. Gender equality is one of the types of social equality. In all spheres of life, gender equality should provide both women and men with equal rights, freedoms and opportunities. In all countries, ensuring the principle of gender equality is one of the fundamental tasks of society and the state, and therefore also in Bosnia and Herzegovina.

Bosnia and Herzegovina has ratified all major European and international instruments for human rights, most of which are included in the Constitution of Bosnia and Herzegovina. Of the 29 ratified international documents on the basis of which the domestic legal framework for the protection and promotion of human rights and gender equality was established, it is necessary to emphasise several of the most important international documents in the field of gender equality and the prohibition of gender-based violence as well as the prohibition of discrimination:

75 Ibid.
76 Case of *A and B v. Georgia*, Application No. 73975/16.

1. *The UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter referred to as the CEDAW Convention), adopted by Bosnia and Herzegovina in 1993, is mentioned in the list of international conventions on human rights in the annex to the Constitution of Bosnia and Herzegovina, so its standards are an integral part of the domestic legal order. Namely, the CEDAW Convention states that it is necessary for the signatory country to take certain measures to ensure the principles of equality and abolish discrimination against women, for example measures that lead to the inclusion of the principle of equality between women and men in their state constitutions, taking adequate measures in legislation to ensure and the practical realisation of this principle, etc.
2. *The UN Beijing Declaration and Platform for Action* (adopted at the 4th World Conference on Women, 1995) states as a main principle; that women's rights are part of human rights. The importance of the mentioned documents is a call for the harmonisation of legislation that will remove obstacles to the participation of women in all spheres of life, and gender mainstreaming is introduced as an instrument for the implementation of the principle of gender equality.
3. *The Council of Europe Convention on the Prevention and Combating of Violence against Women and Domestic Violence*[77] (hereinafter the Istanbul Convention), is the most comprehensive international document that regulates gender-based violence and recognises violence against women as a violation of basic human rights. The Istanbul Convention obliges the signatories to take the necessary legislative and other measures for the advancement of women's rights, protective measures for victims, deterrent punishments and ensuring victim support measures.
4. *UNSC Resolution 1325 "Women, Peace and Security"* (Resolution 1325, 2000),[78] calls on the signatories to increase the participation of women in the decision-making process, conflict and conflict prevention, peace processes and operations.[79]
5. *The European Social Charter,* which in Art. 11 prescribes the right to health care, and thus obligates the signatory states to ensure the implementation of the provisions concerning the realisation of the right to health care, the exercise of rights from health insurance and the establishment of an accessible and efficient system of primary health care for the population, as well as provisions that establish that special attention must be paid to more sensitive population groups.

77 Official Gazette of Bosnia and Herzegovina, No. 15/13, the Convention was adopted on 11 May 2011, in Istanbul. At the 38th regular session, held on 7 August 2013, the Presidency of Bosnia and Herzegovina adopted the Decision on the ratification of the aforementioned Convention (Official Gazette of Bosnia and Herzegovina – International Treaties No. 19/13).
78 Official Gazette of Bosnia and Herzegovina No. 92/10.
79 See more at Rošul Gajić, 2016.

6. *European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*, to which the Constitution of Bosnia and Herzegovina gives a special place in the constitutional and legal order of Bosnia and Herzegovina, stating 'that the rights and freedoms established in the European Convention and its Protocols are directly applied in Bosnia and Herzegovina and have priority over all other law.'[80] This status of the European Convention means that the principle of equality in the legal system of B&H has an important position and allows for a broad prohibition of discrimination in view of the open list of grounds for discrimination contained in Art. 14 of the European Convention. In addition, by ratifying Protocol 12 of the European Convention, Bosnia and Herzegovina also established broad protection against discrimination in the Constitution, since the Protocol prohibits discrimination in the enjoyment of all rights specified by the laws which are already in force.

Regarding discrimination in the legal system of BiH, it is prohibited primarily by the Constitution of B&H, then by the entity constitutions[81] and the Statute of the BDBiH,[82] and by the provisions of domestic legislation.

80 Constitution of Bosnia and Herzegovina (Annex IV of the General Framework Agreement for Peace in BiH).

81 Constitution of Republika Srpska (Official Gazette of Republika Srpska, number 21/92 - revised text, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 30/02, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05); Preamble: 'Respecting the will of its constituent peoples and citizens to educate and preserve Republika Srpska and to base the constitutional arrangement of the Republic on respect for human dignity, freedom and equality, national equality, democratic institutions, the rule of law, social justice, pluralistic society, guaranteeing and protecting human freedom and rights as well as the rights of minority groups in accordance with international standards, the prohibition of discrimination and respect for the rules of the market economy.' Constitution of the Federation of BiH (Official Gazette of FBiH, No. 1/94, 1/94 – Amendment I, 13/97 – Amendments II-XXIV, 13/97 – Amendments XXV-XXVI, 16/02 – Amendments XXVII-LIV, 22/ 02 - Amendments LVI-LXIII, 52/02 – Amendments LXIV-LXXXVII, 60/02 - correction of Amendment LXXXI, 18/03 – Amendment LXXXVIII, 63/03 – Amendments LXXXIX-XCIV, 9/04 – Amendments XCV-CII, 20/04 – Amendments CIII-CIV, 33/04 – Amendment CV, 71/05 – Amendments CVI-CVIII, 72/05 – Amendment CVI and 88//8 – Amendment CIX); Art. 2, item 1.d) 'The Federation shall ensure the application of the highest level of internationally recognised rights and freedoms established in the documents listed in the Annex to this Constitution, in particular the prohibition of any discrimination based on race, skin colour, sex, language, religion or belief, political or other beliefs, national and social origin, etc.'

82 Statute of the Brčko District of BiH ("Official Gazette of the Brčko District of BiH", No. 17/08 and 39/09); Art. 13, paragraph 1. 'Fundamental rights and obligations (1) Everyone has the right to enjoy all the rights and freedoms guaranteed by the Constitution and laws of Bosnia and Herzegovina, this statute and the laws of the District, without discrimination on any basis, including discrimination on the basis of gender, race , sexual orientation, skin colour, language, religion, national or social origin, political or other opinion, belonging to a national minority, property status, birth or other status.'

The Law on the Prohibition of Discrimination in Bosnia and Herzegovina[83] (Bosnian:ZoZD) established an appropriate legal framework for the exercise of equal rights and opportunities for all persons in Bosnia and Herzegovina and a system of protection against discrimination. Furthermore, the responsibilities and obligations of the legislative, judicial and executive authorities in Bosnia and Herzegovina, as well as legal entities and individuals exercising public authority, *i.e.* the competent institutions in Bosnia and Herzegovina, to enable the protection, promotion and creation of conditions for equal treatment through their actions, have been determined towards all citizens. The competence of the institution of the Ombudsman for Human Rights of BiH, as the central institution for protection against discrimination, and the authority of the Ministry of Human Rights and Refugees (MHRR) of BiH for monitoring the implementation of the ZoZD and annual reporting on the occurrences of discrimination have been established.

The adoption of the Law on Gender Equality in Bosnia and Herzegovina[84] (Bosnian: ZoRS) created a legal basis that made it possible to achieve significant progress in the integration of key international standards and principles that regulate gender equality. The law regulates issues of equality, gender equality and protection against discrimination based on gender, sexual orientation, married and family life, establishing the obligation to include the principle of gender equality in all laws, policies and practices. Application of the Law is mandatory in all areas of society, especially in the areas of work and employment, economy, education, social and health care, culture, sports, political participation, media, private and public life, etc. Harmonisation of laws and regulations with the Law on Gender Equality in Bosnia and Herzegovina represents a significant measure for the promotion of gender equality, but also for the abolition of discrimination against women.

Under the mentioned law, *gender equality* means that 'men and women are equally present in all areas of public and private life, that they have equal status, equal opportunities to exercise all rights, as well as equal benefit from the achieved results.'[85] Equal opportunities for all persons regardless of gender implies the absence of barriers to economic, political and social participation based on gender. The law also defines the concept of discrimination in language, which exists when only one grammatical gender is used as a generic term, which aims to ensure a gender-sensitive approach in writing or public speech.

The Law on Gender Equality in BiH obliges all state bodies at all governmental levels, and local self-govern bodies, including legislative, executive and judicial authorities, political parties, legal entities with public powers, legal entities that are owned or controlled by the state, entities, cantons, cities or municipalities, or over

83 The Law on Prohibition of Discrimination in Bosnia and Herzegovina, "Official Gazette of BiH" No. 59/09 and provisions of the Law on Amendments to the Law on Prohibition of Discrimination, "Official Gazette of BiH" No. 66/16.

84 The Law on Gender Equality in Bosnia and Herzegovina, "Official Gazette of Bosnia and Herzegovina", No. 16/03 and 102/09.

85 Ibid., Art.9.

whose work a public body exercises control, to ensure and promote equal representation of the sexes in management, decision-making and representation. The aforementioned law regulates, promotes, and protects gender equality, and guarantees equal opportunities to all citizens, both in the public and private spheres of life, thereby raising the standard of protection of the guarantee of human rights. Supervision over the implementation of ZoRS is carried out by MHRR, and in order to monitor the implementation of the mentioned Law, within the mentioned Ministry an Agency was established.[86]

The procedure for adopting new laws or amending existing laws in order to harmonise them with the provisions of the ZoRS is a procedure that is initiated only if it is concluded that: a) the law puts people of a certain gender at a disadvantage, that is; it contains discriminatory provisions, or b) that there are people in a certain areas of a certain gender in an unequal position compared to people of the other gender, so intervention is needed to ensure equal opportunities.

The process of development and improvement of the principle of gender equality implies the constant efforts of governmental institutions at all levels, within their competences, that they are obliged to take all appropriate and necessary measures to enact new or amend existing laws and other regulations in order to harmonise them with the provisions of the Law on Gender Equality and international standards for gender equality.[87]

From the above mentioned, two important obligations of state bodies arise in relation to the need to comply with the Law on Gender Equality, namely: a) Obligation to act in order to achieve gender equality, for example by prescribing necessary/temporary measures. b) To ensure that laws/regulations do not lead to discrimination or create new obstacles that will lead to discriminatory practices.

7.1. Women's Rights in Certain Social Areas in Bosnia and Herzegovina

Achieving real gender equality implies the prompt adoption of an active policy that guarantees the implementation of existing legal regulations and norms in certain areas of civil, political, economic, social and cultural life. The progressive realisation of goals related to the achievement of gender equality de iure and de facto must be regularly monitored and evaluated. This implies the process of creating and using tools and instruments, with quantitative and qualitative indicators, the purpose of which is to evaluate changes and measure progress in achieving the necessary standards in all spheres of public and private life.

7.1.1. Fields of Social Work

Recent European research, focused on four main dimensions of work quality: career and employment security, protection of health and well-being of workers, reconciliation of business and family life and the development of professional training, warn

86 Ibid., Art.25.
87 Ibid., Art.24.

of the continued significant career advancement and greater availability of leading and managerial jobs to men. Gender differences are dominantly expressed in other segments of available jobs: different treatment when entering into a fixed-term employment contract, non-standard working hours, atypical forms of employment, opportunities for professional development, attitudes towards pregnancy and maternity, and the possibility of transitioning from temporary to permanent employment.

Legislation on gender equality, anti-discrimination and the labour market in Bosnia and Herzegovina contains provisions on the prohibition of discrimination in employment, the relationship between employers and employees, working conditions, education, training, professional qualification and membership in professional associations.

The Law on Gender Equality in Bosnia and Herzegovina[88] prohibits discrimination based on gender in work and working relationships, which implies: a) non-application of equal pay and other benefits for the same work, *i.e.* work of equal value, b) preventing advancement in work under equal conditions, c) preventing equal conditions for education, training and professional development, d) uneven adaptation of the employer's working and auxiliary premises and equipment to the biological and physiological needs of employees of both sexes, e) different treatment due to pregnancy, childbirth or the use of the right to maternity leave, which also includes the inability to return to the same, or an equally paid job at the same level, after the expiration of maternity leave, as well as different treatment of men and women in connection with making a decision on the use of leave after the birth of a child, f) any unfavourable treatment of parents or guardians in harmonising obligations from family and professional life, g) organising work, dividing tasks or otherwise determining working conditions, terminating the employment relationship based on the employee's gender or marital status, a less favourable status is assigned compared to other employees, h) any other action or deed that represents some form of direct or indirect discrimination.[89]

The employer's obligation to take effective measures to prevent harassment, sexual harassment and gender-based discrimination in work and working relationships is also regulated, employer must not take any measures against the employee due to the fact that they complained about harassment, sexual harassment and discrimination based on gender.[90]

However, reports on human rights and the rule of law, both by domestic institutions and international bodies, point to the existence of gender-based discrimination among the workforce in BiH.[91] The aforementioned reports point out that: two thirds of all recorded cases of discrimination processed before the courts relate to labour

88 Ibid., Art. 12.
89 Ibid., Art. 13. (1).
90 Ibid., Art. 13. (2).
91 See at Spahić Šiljak, 2015.

rights (61% or 113 cases).[92] The difference in salary is evident – it is estimated that men in Bosnia and Herzegovina earn an average 12.7% more than women.[93] Furthermore, the existence of gender-based discrimination during employment[94] and unequal regulation of maternity leave was noted.[95]

So, women in Bosnia and Herzegovina face multiple obstacles on the labour market, such as longer waits for their first job, long-term interruptions in work experience due to maternity leave or care for elderly and sick family member, inability to re-enter the labour market due to older age and due to changes in the market, and the end of a need for a certain skill type.[96]

Research shows that in cases where men and women are individual prosecutors, men as prosecutors (30.5%) are more numerous than women (18.6%) in relation to the total number of judgments, including the labour relations.[97] Women are discriminated against on the labour market primarily because they are women, and the forms in which discrimination appears are: sexual harassment, promotion at work, dismissal, and most violations of rights occur due to pregnancy or motherhood.[98]

7.1.2. Professional Training and Advancement

The practical implementation of the principle of equality is necessary in all types and all levels of professional guidance, professional training, professional development and retraining, and means the absence of any type of discrimination based on gender when determining conditions, including criteria for selection and admission to all types of jobs or positions, regardless of the sector or branch of activity and at all professional hierarchical levels.

Although there is a legislative framework in BiH that prohibits discrimination based on gender and obliges employers to promote gender equality in the workplace, implementation is often insufficient, which leads to unequal treatment of women and men in the field of professional training and advancement.

One of the challenges is the lack of sufficient programs and initiatives aimed at improving the professional development and advancement of women in the workplace. Women often face prejudices and stereotypes that prevent them from advancing in their careers, and the lack of opportunities for professional development can further limit their chances. Although, there are individual active measures for the employment and economic empowerment of women throughout Bosnia and Herzegovina, which, among other things, include training and professional development,

92 Organization for Security and Co-operation in Europe. Mission to Bosnia and Herzegovina, no date.
93 Kanlić, 2022, p. 48.
94 UN Women, 2021, p. 42; Institucija ombudsmana za ljudska prava Bosne i Hercegovine, 2022, p. 205.
95 Ibid.
96 Filipović Hadžiabdić, 2018.
97 Organization for Security and Co-operation in Europe. Mission to Bosnia and Herzegovina, 2023, p. 17.
98 Gačanica, 2019.

the effect of these measures is not systematically recorded nor is their impact carefully monitored.[99] Even more, according to certain sources, the measures of economic empowerment of women actually strengthened the stereotypical interpretation of women's roles in BiH and traditional professional segregation.[100]

A special challenge is the lack of transparency in the recruitment and promotion process. Namely, there are cases in which women are offered fewer opportunities for career advancement or are given lower quality conditions for professional training compared to men. For example, access to advanced training and professional development is often offered to male participants with the accompanying explanation that women do not have time for additional education due to family obligations, as noted in *The Gender Equality Profile of Bosnia and Herzegovina*.[101]

7.1.3. Healthcare and Reproductive Health

International treaties define that the right to health is a basic human right, which, in addition to the right to preventive and curative health services, enables every person to enjoy the highest standards of physical and mental health. Bosnia and Herzegovina has ratified numerous international treaties and conventions that include the right to health. The right to health includes sexual and reproductive health, recognised as human rights in international and European human rights law.[102] International treaties on human rights, which include rights related to reproductive health, oblige the signatory states to take measures to combat discrimination against women in the field of health care, based on the equality of women and men, as well as adequate access to health services, including those related to family planning (pregnancy, childbirth, postnatal period, etc.).

The Law on Gender Equality in Bosnia and Herzegovina regulates that everyone has the same right to health care, access to health services, including those related to family planning, regardless of gender. Healthcare institutions undertake to take all measures to prevent discrimination based on gender in the enjoyment of all forms of healthcare. Especially when it comes to the protection and improvement of reproductive health, the competent authorities are obliged to take special measures.[103]

However, although all citizens of BiH are guaranteed the right to health care, health care is provided only by insured persons, while uninsured persons have the right to health care only in emergency cases or pay for health care services. The three systems and the diversity of legal and by-law regulations contribute to the different treatment of patients, and residents have fewer or greater rights in the field of health care, easier or more difficult access to health services, and better or worse quality of services.

99 UN Women, 2021, p. 12.
100 Ibid.
101 Kanlić, 2022, pp. 33–34.
102 Council of Europe. Commissioner for Human Rights, 2017.
103 The Law on Gender Equality in Bosnia and Herzegovina, Art.18.

Women with disabilities cannot always receive a proper medical examination due to the lack of necessary equipment (e.g. special gynaecological chairs). Women with disabilities living in rural areas have even greater difficulties in obtaining appropriate medical care, because health centres are located in cities, and there is no adequate transportation (in some areas, medical assistance is up to 60 kilometres away).[104]

7.1.4. Sports

Sport is explicitly defined by the European Sports Charter of the Council of Europe,[105] which is not a legally binding act, but above all certain guidelines, recommendations and a guide (soft law) in improving the sports system of the member states of the Council of Europe. According to the Art. 2 of the Charter '*sport* means all forms of physical activity which, through casual or organised participation, are aimed at maintaining or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.'[106]

The European Sports Charter aims to enable every person to participate in sports regardless of predispositions, characteristics, social status and such, and to protect athletes from political, financial and commercial exploitation, as well as from abuse and misuse in order to preserve human dignity and safety. In accordance with the above, governments are obliged to take appropriate measures to enable every individual to participate in sports, and to protect sportsmen and sportswomen from sexual abuse, especially children, young people and women.[107] The Council of European Sports Ministers adopted *the European Union Work Plan in the field of sports for 2021–2024,* which, among other things, seeks to increase the share of women in leading positions and among coaches, promote equal conditions for all athletes and increase media coverage of women's sports competitions.

According to data from the analysis of *the United Nations Agency for Gender Equality and Women's Empowerment – UN Women in BiH,* in the past three years, women's sports collectives received less than 10% of the budget for club financing from the state level.[108] In the structure of the governing bodies of the Olympic Committee of Bosnia and Herzegovina and other sports federations of Bosnia and Herzegovina, women make up only 12%, which is an obvious underrepresentation in decision-making places. Following the principle of gender-responsive budgeting as a strategy for achieving the goal of gender equality, but also more effective and fair distribution of public funds, in a transparent manner, it is evident that all relevant actors must work to change these ratios in favour of the development of women's sports in Bosnia and Herzegovina.

104 UN Women, 2021, pp. 50–51.
105 Council of Europe. Committee of Ministers, 2021.
106 Ibid., Art.2.
107 Ibid.
108 113.200,00 Bosnian marks in total out of 3.723.000,00 allocated funds.

7.1.5. Public Life

Equal participation in public life implies the right of all persons to have equal opportunities to participate in democratic processes, which includes the right to vote, the right to run for public office, access to information, participation in decision-making, etc. Despite this, women's participation in public political life, apart from being characterised by unequal participation, is characterised by an increasingly frequent series of gender stereotypes and hate speech and violence against women.

The participation of women in legislative and executive power in BiH is relatively low. According to the results of the 2022 General Election, the increase in the percentage of women on candidate lists is 42%, which is slightly more than the legal minimum of 40%. The success of women in elections is lower than their representation on candidate lists. Namely, after the last General Elections in 2022, a decrease was recorded in the percentage of women elected to the House of Representatives of the Parliament of BiH, amounting to 16.66%.

Although there is a legal obligation for gender equality in political life, there are still many obstacles and stereotypes that make it difficult for women to get involved in politics at all levels. Most political parties state gender equality as one of the principles in internal party documents,[109] but at the same time, internal party structures for women are not prescribed and parties do not allocate needed resources to activate ambitious women in politics.[110] Furthermore, women active in political parties are not equally represented in the main party bodies where decisions are made.[111] Women are rarely present or rarely involved in the leadership of political parties. Not a single political party in the country has a woman as party President. Since women are excluded from the internal party decision-making process, they have limited opportunities to improve their political skills and gain access to funds that would allow them to run their own campaigns. Intra-party women's associations have no influence, and deal with issues that are considered "women's."[112]

By contrast, women in BiH are represented in the judiciary more than in any other branch. However, there is a disparity between the number of women working in the judiciary and the number of women in high positions in judicial bodies or in courts of multiple jurisdictions. Of the total number of employees in Bosnia and Herzegovina, about 45% are women.[113]

The participation and representation of women in politics and public life is regulated by a large number of regulations. If we analyse the representation of women in political life, the relevant regulation that deals with the only affirmative measure is the *Election Law of Bosnia and Herzegovina*,[114] which in Art. 4.19. paragraph (2) treats

109 Gabeljić, 2021.
110 Kadribašić et al, 2020.
111 Ibid.
112 Ibid.
113 State Statistics Agency of Bosnia and Herzegovina, 2021.
114 Official Gazette of Bosnia and Herzegovina 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 32/10, 18/13, 7/14 and 31/16.

the equal representation of the sexes on the candidate lists. Namely, the obligation of political parties to include at least 40% of women in their election lists is prescribed. Mandatory quotas introduced a mandatory ranking order.

8. Conclusion

Although the principle of gender equality is widely accepted, and in most countries, measures have been taken to achieve equality, it is evident that there is still a gap between principle and practice, that is, between de iure and de facto equality. To overcome this gap, standards must not only be set, but their implementation must also be ensured, because only in this way can the effective realisation of sustainable gender equality and regular monitoring and evaluation of such processes be enabled.

Discrimination against women, which is still widely present, has a structural and horizontal character, it permeates all cultures and societies, all sectors, levels and areas of life, therefore such discrimination should be dealt systematically and in a comprehensive manner in order to achieve complete and real gender equality.

After all, the Committee of Ministers of the member states of the Council of Europe is on the same track, which emphasises with its Recommendations stating that; governments should encourage respect and fully implement the principle of gender equality by means of independent bodies (private individuals or companies, media organisations, autonomous academic institutions, etc.), and promote active measures for gender equality and the creation of a general climate that would lead to that goal. Therefore, the governments of the member states are recommended to take or re-introduce measures necessary for the practical implementation of gender equality, which is a condition for achieving social justice and a sine qua non of democracy.

Achieving real gender equality implies the prompt adoption of an active policy that guarantees the implementation of existing legal regulations and norms in certain areas of civil, political, economic, social, and cultural life. The progressive realisation of goals related to the achievement of gender equality de iure and de facto must be regularly monitored and evaluated. This implies the process of creating and using tools and instruments, with quantitative and qualitative indicators, the purpose of which is to evaluate changes and measure progress in achieving the necessary standards in all spheres of public and private life.

Both women and men have equal rights and deserve equal respect in all areas, including private and family life. If we want to ensure full and equal protection of the human rights of both women and men, the social importance of motherhood and fatherhood and the role of both parents in raising children must be considered. Democratic states should promote equality in allocation of duties related to family responsibilities and ensure that these responsibilities are not a basis for discrimination.

The choice of education and success affect the professional careers of women and men and the well-being of their personal, family, and social life. It is necessary to ensure equal access to education for girls and boys, women and men, at all levels of

education, lifelong education, science, research, and culture. Equal opportunities in education, science and culture are the basis for better human and economic development and are the driver of social change. On the other hand, women's equal access to higher education is not only their basic right, but also an instrument for an equal society and ensuring gender equality.

Furthermore, to achieve gender equality, it is necessary that women and men have equal opportunities in the labour market and in economic life, that they are economically independent and that they can participate in decision-making structures in the economy. In this area, there are still big differences between men and women. Women participate in paid work less than men, they work part-time more often, and their average salary is significantly lower than the average salary of men. The principle of equal pay for equal work and work of equal value is often not respected. Furthermore, women rarely participate in decision-making in the economy, whether it is about the formulation of public, economic or financial policies, whether it is about the private sector; they are rarely entrepreneurs and they are rarely in positions where decisions are made about economic life in general. Due to stereotypical gender roles, the unequal division of family responsibilities, an insufficiently developed care system, and the existence of a gender-segregated labour market, a gender gap is created in the time spent on paid and unpaid work.

Social protection is a fundamental human right and a tool that effectively promotes social cohesion. However, women are often at a disadvantage in this sense due to a number of factors related to their position on the labour market and to different degrees of social vulnerability based on traditional gender roles and social norms. Lower qualified jobs, lower wages, shorter professional careers or longer career breaks with negative consequences on the right to a pension are some of the factors that lead to such a situation. Additional aggravating circumstances can arise from traditional situations in which women do not have individual rights to social security but are dependent on the rights of their husbands/partners. Individualisation of rights is therefore a more favourable system in the context of gender equality. When planning and implementing the social protection policy, it is necessary to take into account the specific situation of women and men on the labour market and in society in general, as well as their current social obligations.

Gender equality requires that women and men have the same opportunity to realise their right to health, and this implies equal access to services and quality of care. Furthermore, it implies that women's and men's health must be seen as equal, and that women and men must have equal sexual and reproductive rights and an inviolable right to decide about their own bodies. Such confirmation must be reflected in the development, implementation, access, monitoring and evaluation of health and social services and in research priorities.

Violence against women in today's world takes different forms. These are, for example, rape and other forms of sexual violence, physical and psychological violence in the family and household or in external settings, sexual harassment, violence in conflicts and post-conflict situations, violence in institutional settings, disrespect

for freedom of choice in relation to reproduction, female genital mutilation, honour crimes, forced and early marriage and, in general, traditional practices that are harmful to women and girls. Violence against women is one of the most serious violations of human rights and basic freedoms of women and obstacles to the enjoyment of those rights and freedoms. Furthermore, violence against women represents a loss of capacity and resources for economic and social development. It is also one of the ways in which women are forced into a subordinate position in relation to men; therefore, it is a decisive obstacle to achieving gender equality. Suppression and abolition of violence against women are important components for the protection of women's human rights and a prerequisite for achieving gender equality.

Participation in political and public life is the basic right of every individual, which means that both women and men must enjoy that right equally. Therefore, the equal participation of women and men at all levels of political and public life and in decision-making is one of the requirements of human rights that can ensure the better functioning of a democratic society. The existence and proper functioning of a parity democracy is a guarantee that the needs and interests of women and men are taken into consideration when creating policies and leading society. To be able to talk about the equal participation of women and men in political and public life, a minimum rate of 40% representation of each gender must be achieved.

Gender stereotypes and a rigid division of gender roles influence social models, due to which women are seen as those who are responsible for the family and the sphere of private life (therefore, they are tied to unpaid work), and men as those who act in the public sphere and professional work (therefore, they are tied to paid work). Such a division leads to an established unequal division of household and family responsibilities, which is one of the main reasons for discrimination against women in the labour market, as well as one of the main reasons for their limited social and political involvement. Therefore, the balanced participation of women and men in professional/public life and private/family life is a key area in which gender equality is achieved in general, so it is necessary for the development of society. On the other hand, harmonising professional and public life with family and private life, which promotes the realisation of the individual in public, professional and social life, is a prerequisite for the quality life of all women and men, girls and boys, and for the full enjoyment of human rights in political, economic, cultural and social sphere.

Bibliography

Literature

Čok, V. (2010) *Spone međunarodnog i uporednog prava – Primeri iz oblasti ljudskih prava*. Beograd: Beogradski centar za ljudska prava.

Council of Europe (2003) *Balanced participation of women and men in political and public decision-making. Recommendation Rec (2003) 3 adopted by the Committee of Ministers of the Council of Europe on 12 March 2003 and explanatory memorandum* [Online]. Available at: https://rm.coe.int/1680519084 (Accessed: 15 June 2024).

Council of Europe. Commissioner for Human Rights (2017) *Sexual and Reproductive Health and Women's Rights in Europe*. Strasbourg: Council of Europe [Online]. Available at: https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead (Accessed: 13 August 2024).

Council of Europe. Committee of Ministers (2021) *Recommendation CM/Rec(2021)5 of the Committee of Ministers to member States on the Revised European Sports Charter,* 13 October 2021. [Online]. Available at: https://rm.coe.int/recommendation-cm-rec-2021-5-on-the-revision-of-the-european-sport-cha/1680a43914 (Accessed: 10 June 2024).

Filipović Hadžiabdić, S. (ed.) (2018) *Gender Action Plan of Bosnia and Herzegovina 2018-2022*. Sarajevo: Ministry of Human Rights and Refugees of Bosnia and Herzegovina. Agency for Gender Equality of Bosnia and Herzegovina [Online]. Available at: https://arsbih.gov.ba/wp-content/uploads/2019/02/GAP-BIH-2018-2022_ENG.pdf (Accessed: 5 September 2024).

Fredman, S. (1997) 'Reversing Discrimination', *Law Quarterly Review,* 113, pp. 575–600.

Gabeljić, S. (2021) *The role of gender equality in politics and the impact on the security sector in Bosnia and Herzegovina* [Online]. Available at: https://afw.ba/wp-content/uploads/2021/05/Samra-Gabeljic_ULOGA-RODNE-RAVNOPRAVNOSTI-U-POLITICS.pdf (Accessed: 10 August 2024).

Gačanica, L. (2019) *Gender-based discrimination and labour in Bosnia and Herzegovina.* Banja Luka: Helsinki Citizens' Assembly [Online]. Available at: http://hcabl.org/wp-content/uploads/2019/05/GENDER-BASED-DISCRIMINATION-AND-LABOUR-IN-BOSNIA-AND-HERZEGOVINA-FINAL.pdf (Accessed: 5 September 2024).

Institucija ombudsmana za ljudska prava Bosne i Hercegovine (2022) *Godišnji izvještaj o rezultatima aktivnosti institucije Ombudsmena za ljudska prava BiH za 2021.g.* Banja Luka [Online]. Available at: https://www.ombudsmen.gov.ba/documents/obmudsmen_doc2022041413104027bos.pdf (Accessed: 10 September 2024).

Kadribašić, A., Chiarenza, B., Čehajić-Čampara, M., Ramić-Mesihović, L. (2020) *Polazna studija o barijerama političkom učešću žena u Bosni i Hercegovini*. Sarajevo [Online]. https://www.gcfbih.gov.ba/wp-content/uploads/2020/05/UNDP-UNWOMEN-Polazna-studija-o-barijerama-politi%C4%8Dkom-u%C4%8De%C5%A1%C4%87u-%C5%BEena-u-BiH-1.pdf (Accessed: 10 August 2024).

Kanlić, E. (ed.) (2022) *2021 Alternative report on BiH's progress on the path to membership in the European Union for: Political criteria*. Sarajevo: Sarajevo Open Centre [Online]. Available at: https://eu-monitoring.ba/site/wp-content/uploads/2022/05/ENG_FINAL_WEB.pdf (Accessed: 10 September 2024).

Krstić, I. (2018) *Zabrana diskriminacije u međunarodnom i domaćem pravu*. Beograd: Pravni fakultet Univerziteta u Beogradu.

Organization for Security and Co-operation in Europe. Mission to Bosnia and Herzegovina (2023) *Analysis of judicial practice in cases of discrimination in Bosnia and Herzegovina for the period from 2018 to 2021* [Online]. Available at: https://bih.osce.org/sites/default/files/documents/publications/2026/01/542841.pdf (Accessed: 10 September 2024).

Organization for Security and Co-operation in Europe. Mission to Bosnia and Herzegovina (no date) *Procjena rada institucija BiH u borbi protiv diskriminacije* [Online]. Available at: https://www.osce.org/files/f/documents/4/f/414674.pdf (Accessed: 10 September 2024).

Rabe, J. (2001) *Equality, Affirmative Action and Justice*. Hamburg: Books on Demand.

Rošul Gajić, J. (2016) 'Women's Advocacy in Postwar Bosnia and Herzegovina. Implementation of UNSCR 1325 on Women, Peace and Security', *Journal of International Women's Studies*, 17(4), pp. 143–159.

Softić, S. (2012) *Međunarodno parvo*. Sarajevo: DES doo.

Spahić Šiljak, Z. (2015) *Women, Religion and Peace Leadership in Bosnia and Herzegovina* [Online]. Available at: https://eiz.hr/wp-content/uploads/2023/08/WOMEN-RELIGION-AND-PEACE-LEADERSHIP-IN-BOSNIA-_-HERZEGOCINA_Zilka-Spahic-Siljak.pdf (Accessed: 20 October 2025).

State Statistics Agency of Bosnia and Herzegovina (2021) *Women and men in Bosnia and Herzegovina* [Online]. Available at: https://bhas.gov.ba/data/Publikacije/Bilteni/2022/FAM_00_2021_TB_1_EN.pdf (Accessed: 5 September 2024).

UN Women (2021) *Country Gender Equality Profile of Bosnia and Herzegovina* [Online]. Available at: https://eca.unwomen.org/sites/default/files/Field%20Office%20ECA/Attachments/Publications/2021/7/UNW%20Country%20Gender%20Equality%20Profile%20BiH.pdf (Accessed: 5 September 2024).

Venice Commission (2019) *Compilation of Venice Commission Opinions and Reports concerning Electoral Systems and Gender Representation, CDL-PI(2019)005*. Strasbourg: Council of Europe [Online]. Available at: https://www.coe.int/en/web/venice-commission/-/CDL-PI(2019)005-e (Accessed: 5 September 2024)

Venice Commission (2021) *Compilation of Venice Commission Opinions and Reports concerning gender equality*. Strasbourg: Council of Europe [Online]. Available at: https://www.coe.int/en/web/venice-commission/-/CDL-PI(2021)002-e (Accessed: 2 September 2024).

Venice Commission (no date) *Code of Good Practice in Electoral Matters. Guidelines, explanatory report and interpretative declarations*. Strasbourg: Council of Europe [Online]. Available at: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Code_conduite_PREMS%20026115%20GBR.pdf (Accessed: 5 September 2024).

Legal Sources

Constitution of Bosnia and Herzegovina (Annex IV of the General Framework Agreement for Peace in BiH) [Online]. Available at: https://www.ustavnisud.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_bos.pdf (Accessed: 20 July 2024).

Constitution of Republika Srpska (Official Gazette of Republika Srpska, number 21/92 - revised text, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 30/02, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05).

Constitution of the Federation of BiH (Official Gazette of FBiH, no. 1/94, 1/94-Amendment I, 13/97 – Amendments II-XXIV, 13/97 – Amendments XXV-XXVI, 16/02 – Amendments XXVII-LIV, 22/ 02 - Amendments LVI-LXIII, 52/02 - Amendments LXIV-LXXXVII, 60/02 - correction of Amendment LXXXI, 18/03 - Amendment LXXXVIII, 63/03 - Amendments LXXXIX-XCIV, 9/04 - Amendments XCV-CII, 20/04 – Amendments CIII-CIV, 33/04 – Amendment CV, 71/05 – Amendments CVI-CVIII, 72/05 – Amendment CVI and 88//8 – Amendment CIX); Article 2, item 1.d).

Convention for the Protection of Human Rights and Fundamental Freedoms [Online]. Available at: https://70.coe.int/pdf/convention_eng.pdf (Accessed: 20 June 2024).

Convention on Action against Trafficking in Human Beings [Online]. Available at: https://rm.coe.int/168008371d (Accessed: 20 August 2024).

Convention on Preventing and Combating Violence against Women and Domestic Violence [Online]. Available at: https://rm.coe.int/168008482e (Accessed: 20 August 2024).

European Social Charter [Online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048b059 (Accessed: 15 August 2024).

Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000) Rome, 4.XI.2000. [Online]. Available at: https://rm.coe.int/09000016800cce48 (Accessed: 30. July 2024).

Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Available at: https://www.refworld.org/legal/agreements/coe/1952/en/35969 (Accessed: 11 June 2024).

Protocol No. 12 to The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4. XI. 2000. [Online]. Available at: https://www.echr.coe.int/documents/d/echr/library_collection_p12_ets177e_eng (Accessed: 20 July 2024).

Statute of the Brčko District of BiH ("Official Gazette of the Brčko District of BiH", no. 17/08 and 39/09)

Statute of the Council of Europe [Online]. Available at: https://rm.coe.int/1680306052 (Accessed: 20 June 2024).

The Law on Gender Equality in Bosnia and Herzegovina, "Official Gazette of Bosnia and Herzegovina", no. 16/03 and 102/09.

The Law on Prohibition of Discrimination in Bosnia and Herzegovina, "Official Gazette of BiH" No. 59/09 and provisions of the Law on Amendments to the Law on Prohibition of Discrimination, "Official Gazette of BiH" No. 66/16.

Case-Law

Case of A and B v. Georgia, Application No. 73975/16. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13569%22]} (Accessed: 10 July 2024).

Case of A.E. v. Bulgaria, Application No. 53891/20. [Online]. Available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7654573-10548603%22]} (Accessed: 10 July 2024).

Case of Abdulaziz, Cabales and Balkandali v. The United Kingdom, Application No. 9214/80; 9473/81; 9474/81), Judgment 28 May 1985. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57416%22]} (Accessed: 17 July 2024).

Case of Andrejeva v. Latvia, Application No. 55707/00, Judgment 18 February 2009. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-91388%22]} (Accessed: 17 July 2024).

Case of Aydin v. Turkey, Application No. 23178/97. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-6215%22]} (Accessed: 17 July 2024).

Case of B.S. v. Spain, Application No. 47159/08, Judgment 24 July 2012 [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-112459%22]} (Accessed: 22 July 2024).

Case of Bălșan v. Romania, Application No. 49645/09 Judgment 23 May 2017. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-173619%22]} (Accessed: 19 July 2024).

Case of Bevacqua and S. v. Bulgaria, Application No. 71127/01. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86875%22]} (Accessed: 10 July 2024).

Case of Civek v. Türkiye, Application No. 55354/11. [Online]. Available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-5307105-6607289%22]} (Accessed: 10 July 2024).

Case of Dilek Aslan v. Turkey, Application No. 34364/08, Judgment 20 October 2015. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-158027%22]} (Accessed: 18 July 2024).

Case of Durmaz v. Türkiye, Application No 3621/07. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-147871%22]} (Accessed: 10 July 2024).

Case of Halime Kılıç v. Türkiye, Application No. 63034/11, Judgment 28 June 2016. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-11265%22]} (Accessed: 7 September 2024).

Case of Hoffmann v. Austria, Application No. 12875/87, Judgment 23 June 1993. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57825%22]} (Accessed: 10 June 2024).

Case of Hoogendijk v. The Netherlands, Application No. 5846/00, Judgment 6 January 2005. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-68064%22]} (Accessed: 10 June 2024).

Case of Izci v. Turkey, Application No. 42605/05, Judgment 23 July 2013. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-122885%22]} (Accessed: 18 July 2024).

Case of Juhnke v. Türkiye, Application No. 52515/99. [Online]. available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-2201%22]} (Accessed: 17 July 2024).

Case of Maktouf and Damjanovic v. Bosnia and Herzegovina, Application No. 2312/08 and 34179/08, Judgment 18 July 2013. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-122716%22]} (Accessed: 20 August 2024).

Case of Marckx v. Belgium, Application No. 6833/74, Judgment 13 June 1979. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57534%22]} (Accessed: 05 July 2024).

Case of Maslova and Nalbandov v. Russia, Application No. 839/02, Judgment 24 January 2008. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-2283%22]} (Accessed: 18 July 2024).

Case of Nurcan Bayraktar v. Türkiye, Application No. 27094/20, Judgment 27 September 2023, [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-14131%22]} (Accessed: 20 August 2024).

Case of Okpisz v. Germany, Application No. 59140/00, Judgment 25 October 2005. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-70767%22]} (Accessed: 8 July 2024).

Case of Sejdić and Finci v. Bosnia and Herzegovina, Application No. 7996/06, 34836/06, Judgment 22 December 2009. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-96491%22]} (Accessed: 5 July 2024).

Case of Staatkundig Gereformeerde Partij v. the Netherlands, Application No. 58369/10, Judgment 10 July 2012. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-5581%22]} (Accessed: 17 June 2024).

Case of T.M and C.M. v. the Republic of Moldova, Application No. 26608/11, Judgment 28 January 2014. [Online]. Available at: https://rm.coe.int/16805a32bd (Accessed: 10 July 2024).

Case of Talpis v. Italy, Application No. 41237/14, Judgment 2 March 2017. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-171994%22]} (Accessed: 20 August 2024).

Case of Tërshana v. Albania, Application No. 48756/14, Judgment 04 August 2020. [Online]. Available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6760419-9026316%22]} (Accessed: 10 July 2024).

Case of Ünal Tekeli v. Türkiye, Application No. 29865/96, Judgment 16 November 2004. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-4152%22]} (Accessed: 18 July 2024).

Case of Valiulienė v. Lithuania, Application No. 33234/07. [Online]. Available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-4306515-5150989%22]} (Accessed: 7 July 2024).

Case of Van Raalte v. The Netherlands, Application No. 20060/92, Judgment 21 February 1997. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58031%22]} (Accessed: 17 July 2024).

Case of Y. Yilmaz v. Turkey, Application No. 4524/06, Judgment 14 October 2024. [Online]. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-10125%22]} (Accessed: 18 July 2024).

Case of Y.F. v. Turkey, Application No. 24209/94, Judgment 22 July 2003. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61247%22]} (accessed: 17 July 2024).

Case of Zarb Adami v. Malta, Application No. 17209/02, Judgment 20 June 2014. [Online]. Available at: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-75934%22]} (Accessed: 10 July 2024).

Case of Zornić v. Bosnia and Herzegovina, Application No. 3681/06, Judgment 15 July 2014. [Online]. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-9578%22]} (Accessed: 10 July 2024).

Case of Kontrová v. Slovakia, Application No. 7510/04. [Online]. Available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-2013708-2124711%22]} (Accessed: 10 July 2024).

| Chapter 6 |

Gender Equality and Women's Rights in European Union Law

Petra Weingerl – Lina Atelj

ABSTRACT

The European Union is committed to advancing gender equality through a comprehensive legal and policy framework. This chapter explores the growing prominence of this principle within EU governance, highlighting significant progress while addressing ongoing challenges. Hurdles, however, are not merely obstacles but opportunities to further promote fairness across society. The overview reflects the ongoing momentum toward securing gender equality as a normative objective. It emphasises the need to uphold fairness, ensure equitable opportunities, and provide full protection for individuals facing gender-based discrimination. By embedding gender equality as a fundamental value of European society, the EU not only strengthens its internal cohesion but also enhances its legitimacy in promoting justice and human rights of women in the Central and Eastern European region and beyond.

KEYWORDS

EU law, gender equality, pay gap, care gap, representation gap, health gap, gender-based violence, Central and Eastern Europe

1. EU Legal Framework for Women's Rights and Gender Equality

The principle of gender equality was initially introduced into EU law with the Treaty of Rome[1] in 1957. Guaranteeing equal pay for male and female workers in Article 119, it set a precedent for advancing women's rights in the European Community. The prohibition of wage discrimination based on gender not only advanced women's rights and freedoms but also strengthened the implementation and enforcement of EU equality law through ECJ rulings.

By generous interpretation, the ECJ expanded the substantive protection against discrimination and attributed broader social objectives of gender equality law, beyond purely economic goals.[2] Alongside case law principles, the legal framework

1 Treaty of Rome, 1957.
2 Bain and Masselot, 2012, pp. 105–106.

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has progressively enhanced gender equality across several domains, including equal pay, equal treatment in employment and self-employment, equal opportunities for work-life balance, and equal treatment in social security schemes. Simultaneously, gender equality has evolved as a constitutional EU norm.

This development can be traced through key treaties that shaped the EU constitutional framework. The Treaty of Amsterdam[3] provided a solid legal foundation for advancing anti-discrimination social objectives beyond the confines of the internal market. By doing so, it reinforced the fundamental character of gender equality.[4] The EU Constitutional Treaty,[5] although never adopted, recognised gender equality as a core value of the Union, a status later enshrined in the EU Charter of Fundamental Rights within the domain of human rights.[6] The Treaty of Lisbon,[7] which replaced the Constitutional Treaty, incorporated the Charter[8] into EU primary law. It further reinforced gender equality through various provisions in both the Treaty on European Union (TEU)[9] and the Treaty on the Functioning of the European Union (TFEU).[10]

2. Treaty Foundations of Gender Equality

Article 2 TEU sets out the fundamental values of the EU, including respect for human dignity, freedom, democracy, equality, the rule of law, and human rights. Moreover, equality between women and men is explicitly recognised as one of these core principles. Article 6 TEU refers to the Charter of Fundamental Rights, which prohibits discrimination on any ground, including sex (Article 21), and explicitly recognises the right to gender equality in all areas, not limited to employment (Article 23). Articles 10 and 19 TFEU mandate that the principles of non-discrimination be incorporated into all EU policies and actions. Therefore, equality is framed as a structural dimension of EU governance. Collectively, these provisions ensure a preliminary basis to promoting gender equality and combatting discrimination throughout the EU.

Efforts to achieve gender equality are a vital component of the broader non-discrimination framework. Both principles are interconnected and mutually supportive. Gender equality measures build on the overarching goal of non-discrimination by focusing on gender-specific dimensions of inequality. Beyond merely prohibiting discrimination, the EU is also obligated to actively promote equality between women and men across all its activities (Article 3 TEU).

3 Treaty of Amsterdam, 1997.
4 Masselot, 2007, p. 155.
5 Treaty establishing a Constitution for Europe, 2004.
6 Masselot, 2007, p. 156.
7 Treaty of Lisbon, 2007.
8 Charter of Fundamental Rights of the European Union, 2000.
9 Consolidated version of the Treaty on European Union, 2012.
10 Consolidated version of the Treaty on the Functioning of the European Union, 2012.

In addition to the general anti-discrimination mainstreaming provision outlined in Article 10 of the TFEU, Article 8 of the TFEU specifically introduces the principle of gender mainstreaming. This principle requires that a gender perspective be integrated into the development and implementation of new legislation or policies.[11] Gender mainstreaming serves as both a policy strategy and a soft law tool, addressing broader institutional sources of inequality. While such instruments are not subject to ECJ review, their advantage lies in flexibility, allowing them to effectively challenge uncontested institutionalised gender biases.[12]

The principle of equal pay, already mentioned as part of earlier Treaty provisions, is enshrined in Article 157 TFEU. This provision is distinctive, as it not only obliges Member States to ensure equal pay for equal work or work of equal value, but also supports positive action measures aimed at correcting gender imbalances in professional settings. Unlike gender mainstreaming, aimed at the general integration of gender dimension into all areas of policy and practice, positive action measures focus on addressing specific gender-based disadvantages. From the 1980s onwards, the Commission introduced gender equality policy programmes to extend its authority in this field and advance certain gender equality issues despite the lack of political will in the Council.[13] Initially based on Treaty Article 141(2) EC (now Article 157(4) TFEU), these programmes became institutionalised as independent soft law tools.[14] Although soft law may lack transparency without parliamentary and judicial oversight, it provides adaptability when proposing hard law is not feasible, thereby guiding future legislative development.[15]

Various legal instruments, whether in the form of hard law or soft law, collectively constitute the "gender equality acquis", which underpins the application of fundamental equality principles across the EU. Abstract constitutional principles generally need to be transposed into national legislation to achieve their full effect. However, the direct effect attributed to the treaty provision on equal pay (Article 119 EEC) in the Case 43/75 Defrenne established that individuals can invoke this provision directly in national courts, even without additional national legislation.[16] With this decision, the ECJ enabled individuals to challenge discriminatory practices directly and seek justice, thereby fostering bottom-up demands for societal change. The claim in this case related to the period before the adoption of Directive 75/117/EEC on equal pay[17] and highlighted the need for a clear and enforceable EU legislation on gender equality.

11 Bain and Masselot, 2012, p. 108.
12 Kronsell, 2012, p. 37.
13 Ahrens, 2019, p. 63.
14 Ahrens and van der Vleuten, 2019, p. 39.
15 Ahrens, 2019, pp. 61–62.
16 Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (No. 2) [1976] ECR 455.
17 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

3. Gender Equality Directives

Henceforth, a series of Directives were adopted to clarify and further develop gender equality principle both in the broader field of employment (Equal Treatment Directive 76/207/EEC;[18] Self-Employed Workers Directive 86/613/EEC[19]) and in social security matters (Equal Treatment in Social Security Directive 79/7/EEC[20]; Equal Treatment Directive in Occupational Social Security Schemes 86/378/EEC[21]). Even with a limited material scope, these directives have considerable prospects for improving gender equality in other domains. To dismantle patriarchal structures and norms, systemic change is essential, with a focus on economic relations serving as a promising starting point. Limited work opportunities not only constrain women's potential but also reinforce traditional gender roles. Achieving women's economic liberation is crucial for gender equality, as financial independence enhances women's autonomy and empowerment.

The Equal Treatment Directive 76/207/EEC prohibited both direct and indirect sex discrimination; particularly emphasising that discrimination based on marital or family status could fall under this category. In doing so, the directive recognised that women often face unequal treatment due to traditional gender roles and the disproportionate burden of family responsibilities. It sought to boost women's participation in the labour market by addressing not just pay, but also equality in education, training, job access, social security, and the balance between work and family.[22] Equal treatment ensures that women's contributions are valued equally with men's, leading to comparable income and financial stability. This helps reduce economic dependency and the associated vulnerability.

By guaranteeing equal treatment in benefits, contributions, and access to social security services, the Equal Treatment in Social Security Directive 79/7/EEC helped to reduce disparities in income and social security coverage between genders. It was complemented by the Equal Treatment Directive in Occupational Social Security Schemes 86/378/EEC that applied exclusively to employer-sponsored benefits and pensions. This directive directly addressed the differences in pension entitlements due to career breaks and part-time work, recognising that these factors can

18 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
19 Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood.
20 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
21 Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.
22 Jacquot, 2015, pp. 31–32.

disproportionately affect women. Seemingly gender-neutral social security schemes that neglect income disparities and the impact of caregiving and family responsibilities on women's labour participation may exacerbate women's socio-economic disadvantages, notably undermining their financial independence and safety.

Interpreting the Equal Treatment Directive 76/207/EEC in the Case C-184/83 Hofmann, the ECJ acknowledged that gender-specific biological attributes related to pregnancy and childbirth affect women's employment status. It ruled that special protections for women during pregnancy and maternity are lawful exceptions to the general principle of equal treatment and are justified to mitigate the disadvantages women experience compared to men in retaining employment.[23]

The Pregnant Workers Directive 92/85[24] is directly derived from the framework Directive 89/391, aimed at enhancing workplace safety and health. It specifically targets the protection of pregnant workers, as well as those who have recently given birth or are breastfeeding, a particularly vulnerable group.[25] It ensures not only health and safety at work but also job security and financial support during maternity. To that end, it prohibits the dismissal of these workers and guarantees maternity leave for a minimum of 14 continuous weeks, during which they are entitled to an allowance. While it provides special protections related to incapacity to work due to pregnancy, its focus remains primarily on addressing a single social risk. Adopting a multi-faceted social risk approach would better align with the principles of equal treatment and equal opportunities for both men and women, in employment and beyond.[26]

The Pregnant Workers Directive 92/85 was complemented by the Parental Leave Directive 96/34/EC[27] (repealed and replaced by Directive 2010/18/EU),[28] which supports the broader goal of work-life balance and promotes a more equal distribution of childcare responsibilities between men and women, thereby enhancing gender equality. The right to reconcile family or private life with work is a fundamental principle recognised by Article 33(2) of the Charter, which protects against dismissal due to maternity and ensures paid maternity and parental leave after childbirth or adoption. In line with this principle, the Parental Leave Directive 2010/18/EU provides both parents with an individual right to at least four months of parental leave, the right to request temporary changes to working hours upon return, and the right to time off for urgent family reasons under force majeure.

23 Case C-184/83, *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.
24 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
25 Rodríguez, 2018, p. 176.
26 Ibid., p. 194.
27 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP, and the ETUC.
28 Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

Building on the progress briefly outlined above, EU gender equality law has been influenced by the proactive role of the ECJ, which predominantly heard claims brought by individuals. Despite creating important precedents, this judicial enforcement approach is questionably efficient in addressing broader, systemic inequalities that perpetuate structural injustices. To address this shortfall and advance towards substantive equality, the CJEU has developed concepts such as indirect discrimination, the reversal of the burden of proof, and an obligation of positive action.[29]

Gender equality litigation brought before the court raised various questions about discrimination, one of which concerned a procedural aspect, specifically how the evidentiary burden should be allocated between the complainant and the respondent in discrimination cases. In Case C-109/88 Danfoss, the ECJ ruled that if an employer's pay system is shown to be discriminatory, it is the responsibility of the employer to prove that the system is based on objective factors unrelated to gender, thereby shifting the burden of proof in gender discrimination cases.[30] The case law of the ECJ has been incorporated into Burden of proof Directive 97/80/EC[31] and the following directives as a means of enforcing anti-discrimination laws. This principle of effective judicial protection extends beyond matters of evidence, as it is also crucial for ensuring access to court proceedings.[32] This directive also codified the definition of indirect discrimination, applying the burden of proof principle to cases of both direct and indirect discrimination.[33] The law ensures equal treatment in a procedural or formal sense, but does not necessarily guarantee actual parity. Substantive equality cannot be achieved solely by prohibiting discrimination. The concept of indirect discrimination represents progress in that regard, nonetheless overcoming barriers to achieve parity requires an active, value-driven approach.[34]

Definitions and concepts such as indirect discrimination, established in gender equality case law, were incorporated into broader EU non-discrimination law. This strengthened their impact with general provisions applicable across various non-discrimination grounds.[35] Gender Equality Directive 2002/73/EC[36] (amending Equal Treatment Directive 76/207/EEC) and Framework Directive 2000/78/EC[37] were part of a legislative package establishing a multifaceted EU anti-discrimination framework,

29 Anagnostou and Millns, 2013, p. 130.
30 Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, acting on behalf of Danfoss [1989] ECR 3199.
31 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.
32 Prechal and Burri, 2008, p. 19.
33 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, arts. 2 and 4.
34 Ellis and Watson, 2012, pp. 3–4.
35 O'Cinneide, 2012, p. 14.
36 Council Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
37 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (2000).

reflecting a broader perspective on equality and EU constitutionalisation efforts.[38] New directives aimed to establish a comprehensive framework for combating discrimination, with their primary objective being to ensure effective, rather than merely formal, equal treatment across Member States. A broader approach to legal systematisation of non-discrimination doctrines, coupled with references to human rights, demonstrates their constitutional ambition.[39]

The widening reach of earlier directives illustrates the ongoing expansion of prohibited grounds for discrimination, reflecting an additive approach to gender equality law. Directive 2004/113/EC on equal treatment in access to goods and services[40] extended gender equality protections beyond the workplace, as covered by previous directives, to ensure fair treatment in economic and commercial contexts. Given the multifaceted nature of gender inequality, which cannot be fully addressed through labour market measures alone, this directive represents a step towards an integrated approach to gender equality law.[41] Recognising the multidimensionality of gender discrimination, such an integrated approach may better address women's disadvantages rooted in various factors.[42]

Several directives concerning gender equality were consolidated and revised in accordance with CJEU case law into Recast Directive 2006/54/EC.[43] This directive governs equal treatment across all aspects of employment and occupational social security, systematically summarising scattered provisions from various gender equality directives, while also clarifying the definitions of discrimination, harassment, and sexual harassment. Discrimination includes direct discrimination, where someone is treated less favourably based on sex compared to others in a similar situation, and indirect discrimination, which involves a seemingly neutral rule or practice that disadvantages one sex unless it is justified by a legitimate aim with appropriate and necessary means.[44] Harassment and sexual harassment are forms of discrimination where unwanted conduct related to a person's sex or of a sexual nature occurs, with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating, or offensive environment.[45] Such conduct is inherently a means of subjugation and is especially problematic in environments with entrenched social power imbalances. Recognising harassment as a form of discrimination allows for the establishment of mechanisms to report, investigate, and address it, thereby challenging entrenched gender hierarchies.

38 Schiek, 2002, p. 293.
39 Ibid., p. 295.
40 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.
41 Schiek, 2005, p. 464.
42 Ibid., p. 465.
43 Recast Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
44 Ibid., art. 2(1)(a, b).
45 Ibid., art. 2(1)(c, d).

Legal definitions help ensure that non-discrimination concepts are clearly understood across all Member States. However, due to diverse cultural, political, and ideological influences, achieving harmonisation in the field of non-discrimination is challenging. While the ECJ supports the directive's objectives through consistent interpretation, its case law is sometimes criticised as being incoherent, contradictory or reactive to individual cases. This issue reflects the nature of EU law, which is built upon national legal systems. This dynamic interplay means that national and EU laws influence each other, with EU law often incorporating national legal concepts that are introduced into other Member States, where they may be unfamiliar.[46]

4. Gender Equality Soft Law Mechanisms

The legislative framework described above demonstrates that gender equality law initially advanced mainly through directives. These binding legal instruments were eventually followed by non-binding measures intended to complement hard law and address areas not fully covered by it. Following the initial period of EU gender equality law development in the 1970s, anchored by Article 119 EEC on 'equal pay for equal work', soft law instruments emerged in the 1980s, a period focusing on positive action, and gaining significant momentum in the 1990s, which marked a shift towards gender mainstreaming.

Action programmes emerged as a key soft law tool for advancing gender equality, offering some legal progress in light of Member States' reluctance to adopt new and costly legislation. These programmes covered a range of topics, including the labour market, and helped to expand the scope and content of gender equality policies.[47] The first programme (1982–1985)[48] focused on raising awareness of career options for women, increasing their participation in decision-making and reconciling family and work life. The second programme (1986–1990)[49] expanded these efforts to include women's employment in new technologies and the equal sharing of responsibilities. The third programme (1991–1995)[50] aimed to enhance women's societal status and representation, including in the media, while the fourth programme (1996–2000)[51] reinforced existing regulations and emphasised integrating gender perspectives into all community policies through gender mainstreaming.[52] These programmes encouraged Member States to enhance gender equality within their national contexts by aligning them with EU-guided priorities. Although the priorities set in non-binding legal instruments may not seem tangible, they play a vital role in harmonising

46 Mulder, 2017, p. 271.
47 Ahrens, 2018, p. 34.
48 Commission of the European Communities, 1981.
49 Commission of the European Communities, 1985.
50 Commission of the European Communities, 1990.
51 Commission of the European Communities, 1995.
52 Preti and di Bella, 2023, pp. 89–90.

national legal systems. Such guidelines help to enhance the coherence of fragmented norms within existing legislation.

A significant shift in EU gender policy occurred after the Fourth World Conference on Women in Beijing in 1995, prompting the EU to adopt a gender mainstreaming approach, which mandates the incorporation of gender perspectives into all its activities.[53] This approach promises a transformative change at every level of the policy process, ensuring that gender issues are relevant to all stakeholders across various areas, from the initial stages of policy conception and legislation to implementation and evaluation.[54] By requiring a comprehensive transformation in how institutions operate, rather than focusing solely on standalone gender equality initiatives, it is assumed to be more ambitious than previous action programmes.

Unlike previous programmes, the Framework Strategy for Gender Equality (2001–2005),[55] the Roadmap for Equality between Men and Women (2006–2010),[56] the European Pact for Gender Equality (2006),[57] and the Strategy for Equality between Men and Women (2010–2015)[58] presented a more integrated vision for promoting gender equality across the EU. These soft law instruments endorsed a dual approach of gender mainstreaming alongside targeted measures to achieve gender equality. This new perspective was supposed to highlight that the primary responsibility for gender equality lies with Member States, coupled with streamlined EU governance to ensure coordinated action at both national and supranational levels.[59]

However, the established format of EU gender equality policy – characterised by a triangle of directives, action programmes, and gender mainstreaming – was significantly altered with the introduction of the Roadmap for Equality between Men and Women (2006–2010). Unlike previous programmes, which typically set objectives that later formed the basis for legislative proposals, this strategy lacked references to legal obligations for promoting gender equality, as well as its own action programme and a clearly defined budget.[60] Furthermore, it did not include any new legislative proposals or actions requiring direct involvement from Member States or social partners, leading to the normalisation of gender equality as a supranational EU policy area.[61]

Such a shift created a dynamic that made it challenging to uphold earlier commitments. As the gender mainstreaming strategy weakened in the absence of firm obligations, holding Member States accountable for their prior commitments became increasingly difficult.[62] The far-reaching ambition of gender mainstreaming goals did not necessarily result in similarly ambitious outcomes. In contrast, the action

53 Crespi and Lomazzi, 2018, pp. 24–25.
54 Ibid., p. 26.
55 Commission of the European Communities, 2000.
56 Commission of the European Communities, 2006.
57 Council of the European Union, 2006.
58 European Commission, 2010.
59 O'Connor, 2014, p. 74.
60 Ahrens, 2018, p. 237.
61 Ibid., p. 239.
62 Debusscher and van der Vleuten, 2017, p. 20.

programmes, despite having more focused objectives, appeared to result in more explicit commitments and accountability from stakeholders, making their impact easier to measure.

The evolution of EU gender equality law has seen both significant advances and periods of slower progress. Hard law, with its focus on specific issues like equal pay and non-discrimination, led to a fragmented legal framework. Each directive tackled a particular aspect of gender equality, but the lack of an overarching approach kept the development segmented. Soft law, while aiming for a broader and more comprehensive impact, struggled with inconsistent implementation due to its non-binding nature. This led to uneven progress across Member States. As a result, hard law achieved clear but limited outcomes, while soft law addressed wider issues but with less consistent results. Together, both types of instruments contributed to a piecemeal development of the EU's gender equality framework, marked by both progress and gaps in coverage.

The remaining gaps in EU gender law guide its ongoing development, addressing both longstanding and emerging challenges. Gender inequality in employment remains a central focus in contemporary EU legal advancements.

5. Bridging the Gaps: Key Challenges in Gender Equality

5.1. Gender Pay Gap

Despite wage parity being one of the founding principles of the EU, the gender pay gap persists. Women's access to economic opportunities and decent work is hindered by sectoral segregation, discriminatory workplace practices and pay structures, the glass ceiling, uneven distribution of household responsibilities, and entrenched traditional gender and familial roles.[63] Pay is closely linked to social status, both reflecting and reinforcing social hierarchies and perceptions. When basic pay increases, it often leads to changes in other pay-related benefits, which can alter an individual's social standing.

Access to information is essential for demanding equal rights and opportunities in employment. The Pay Transparency Directive (2023/970/EU)[64] adopts wage transparency as a key tool for upholding the principle of equal pay. In addition to ensuring transparency in pre-employment information, pay setting, and progression policies, the Directive grants workers the right to request details on individual and average pay levels, mandates employer reporting on gender pay gaps, and promotes joint pay assessments with workers' representatives. It also contains provisions on social dialogue, though it has faced criticism from social partners for interfering with

63 European Commission, 2020, pp. 5–7.

64 Directive 2023/970 of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

their autonomy, collective bargaining, and established wage formation systems.[65] It is important to note that women do not always benefit equally from collective bargaining due to their underrepresentation in the unions. This can lead male-dominated unions to overlook gender-specific issues or limit collective bargaining in sectors where women's representation is essential.[66]

Additionally, the Pay Transparency Directive (2023/970/EU) introduces the first EU legal provision on intersectional discrimination. Article 3(2)(e) defines it as discrimination based on a combination of sex and other protected grounds, such as religion, disability, age, sexual orientation, or racial and ethnic origin.[67] This Article refers to the combination of sex with any grounds of discrimination protected under the Race Equality Directive 2000/43/EC[68] and the Framework Directive 2000/78/EC. Both of these directives address "multiple discrimination" as a facet of gender, recognising that women are often victims of numerous forms of discrimination. Unlike multiple discrimination, which takes an additive approach without recognising the synergistic effects of overlapping characteristics, intersectional discrimination acknowledges the unique, combined impact of intersecting identities.[69]

The ECJ has addressed complex cases involving multiple grounds of discrimination. Specifically, cases that examine the intersection of gender and age discrimination highlight the long-term implications for the gender pay gap. For example, in Case C-152/84 Marshall,[70] the ECJ ruled that compulsory retirement ages differing for men and women constituted direct sex discrimination. Requiring women to retire earlier than men was deemed discriminatory, as it treated individuals differently because of their gender, without any justification. Given that pensions are typically based on career earnings, factors such as career interruptions due to parenthood, part-time work, and wage inequality lead to reduced pension benefits for women. Policies like the one challenged in Marshall exacerbate these issues and contribute to the gender pay gap, thereby increasing the risk of poverty for older women.

With reference to the pension gap and the feminisation of poverty in its Preamble, the Pay Transparency Directive (2023/970/EU) applies the principle of equal pay to all forms of compensation, whether in cash or in kind, received directly or indirectly from an employer. Following ECJ case-law, it emphasises that pay includes not only the base salary but also complementary or variable components that should be determined through a gender-neutral evaluation of work of equal value.[71] By using transparency as its key method, this directive builds on the existing framework on

65 Rönnmar, 2024, p. 107.
66 Smith, 2012, p. 371.
67 Rönnmar, 2024, p. 107.
68 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
69 Solanke, 2021, pp. 94–95.
70 Case C-152/84, *Marshall v Southampton Area Health Authority* [1986] ECR 723.
71 Directive 2023/970 of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, the Preamble.

equal pay for equal work. Along with the Work-Life Balance Directive (2019/1158/EU)[72] and the Gender Balance on Company Boards Directive (2022/2381/EU),[73] it follows the Gender Equality Strategy 2020–2025[74] to address the root causes of the gender pay gap.

5.2. Gender Care Gap

The care gap and the gender pay gap are closely intertwined. Women often take on a disproportionate share of unpaid caregiving responsibilities, which affects their work-life balance and leads to reduced working hours, limited career advancement, and financial consequences. The care gap also undermines the principle of equal pay for equal work, because it stems from cultural and economic undervaluation of care work. Feminist economists challenged the neoclassical labour model's distinction between "productive" and "unproductive" work, which often deems time outside paid work – predominantly undertaken by women – as "unproductive". This view overlooks the economic value of activities like childcare, elder care, and domestic work. The concept of "care work" was developed to bridge the gap between care and work, emphasising that "social reproduction" is as crucial to the economy as industrial production.[75]

Shared childcare responsibilities have profound long-term implications for reducing gender disparities. Until 2019, the protection of carers was primarily covered by maternity leave under the Pregnant Workers Directive 92/85 for employees and the Self-Employment Directive 2010/41 for independent workers. Also, parental leave was governed by Council Directive 2010/18/EU. Child-related leave policies that include maternity leave without paternity leave, and result in unequal parental leave uptake, place a disproportionate childcare burden on women.[76] Extending maternity leave beyond biological needs can imply that post-childbirth care is solely the mother's responsibility, thus reinforcing gender-based role expectations.[77] Similarly, Directive 2010/18, which grants both parents four months of leave but makes only one month non-transferable and leaves payment terms to Member States, may exacerbate this issue, as women are more likely to take parental leave than men, including the transferable portion, leading to prolonged absences from work.[78]

The Work-Life Balance Directive (2019/1158/EU)[79] replacing Parental Leave Directive 2010/18/EU, seeks to improve female participation in paid employment by

72 Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.
73 Directive 2022/2381 of 23 November 2022 on improving the gender balance among directors of listed companies and related measures.
74 European Commission, 2020a.
75 European Institute for Gender Equality, 2021, p. 15.
76 Rodríguez, 2018, p. 189.
77 Ibid., p. 173.
78 Ibid., p. 189.
79 Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

promoting equal sharing of caregiving responsibilities between genders. By introducing non-transferable paternity leave, it challenges the stereotype that childcare is mainly a woman's duty. Key provisions include a minimum of ten days of paternity leave, paid parental leave that cannot be transferred, five days of unpaid carer's leave per year, and flexible working arrangements for parents and carers.[80] The Directive grants the right to paternity leave without requiring prior employment and provides an allowance for fathers and second parents, regardless of marital or family status, acknowledging diverse family structures.[81] In contrast to emphasising the traditional heterosexual family, which reinforces gender roles, embracing diverse family arrangements challenges the perception of women and men as homogeneous and siloed groups. Consequently, unequal caregiving responsibilities and broader societal expectations placed upon them are addressed.

The care gap applies to both childcare and the care of elderly relatives. The Work-Life Balance Directive (2019/1158/EU) recognises demographic trends that will increase the demand for caregiving and are likely to further widen existing gender disparities in caregiving responsibilities.[82] In the context of an ageing population and growing financial strains on pension systems, the underlying rationale of gender equality policies in work-family reconciliation is to enable women to participate in the labour market and to reproduce the future workforce. In this regard, feminist scholars caution that such interference in women's reproductive roles, driven by economic rationale, raises the contradictory issue of using gender equality policies as a tool of power to regulate reproductive choices.[83] The freedom to make reproductive choices without social, political, or economic constraints is central to women's autonomy and their equality in society.

In addition to parental leave arrangements, fostering family-friendly work practices like adaptable working hours is an effective way to enhance work-life balance, which relies on a supportive work environment. Consequently, an accommodating work culture shaped by managerial policies is essential in this effort. Research on gender bias indicates that women in leadership roles often possess less discriminatory attitudes and are less likely to reinforce gender imbalances in the workplace. Therefore, women in supervisory or managerial positions play a crucial role in promoting practices that support employees with family responsibilities, ultimately advancing gender equality.[84]

5.3. Gender Representation Gap

Balanced participation is an essential aspect of the principle of equality, undermined by systemic gender barriers and biases that impede women's influence in

80 Ganty and Vries, 2023, p. 115.
81 Ristovski and Kalamatiev, 2023, p. 119.
82 Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, the Preamble, para. 6.
83 Davaki, 2016, pp. 12–13.
84 Lucifora and Vigani, 2016, pp. 28–29.

decision-making bodies in public and political life. To achieve substantial participation, it is essential to address the underlying reasons for women's under-representation and develop solutions that go beyond simply raising the number of women in positions of influence. The reciprocal challenge is that while increasing women's participation is necessary to improve their status in society, their diminished status hinders that participation.[85]

In contrast to the advancement of women's economic participation and employment, which is regulated in the context of the internal market, EU law offers limited regulation concerning women's political participation. The EU's authority to combat sex-based discrimination under Article 19(1) TFEU does not extend to imposing gender parity rules on national electoral laws. Organising elections is part of Member States' constitutional identity under Article 4(2) TEU and falls within their competence. Consequently, neither primary nor secondary Union law mandates gender quotas or parity rules in electoral legislation.[86] At the EU level, only soft law provisions like recommendations and targets seek to promote gender balance in political assemblies.[87]

Since political and economic power structures are interconnected, active participation in either sphere can enhance the visibility and recognition of the represented group. This increased visibility can have a spillover effect in the other domain, contributing to a change in their societal status. The Women on Boards Directive (2022/2381/EU) acknowledges that women still lack equal access to power and decision-making in political and economic life and in the public and private sectors.[88] The glass ceiling refers to obstacles that limit women's advancement to top leadership positions. These obstacles include devaluation, stereotypes, sector-influenced preferences, psychological biases, limited access to professional networks, and patriarchal work environments that equate commitment with full-time hours, which hinder women with family responsibilities from being seen as dedicated.[89]

The Women on Boards Directive (2022/2381/EU) aims for gender balance in management positions by establishing procedural requirements for selecting candidates for director appointments or elections, emphasising transparency and merit.[90] Its key provisions mandate larger listed companies to achieve targets of 40% for the underrepresented gender among non-executive directors and 33% among all directors by 30 June 2026, along with annual reporting on gender composition of their management. Candidate selection must be non-discriminatory; if candidates are equally qualified, priority should be given to the underrepresented sex unless exceptional legal reasons,

85 Meier, 2008, p. 159.
86 Giegerich, 2023, p. 153.
87 Freidenvall, Johansson, and Dahlerup, 2013, p. 6.
88 Directive 2022/2381 of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, the Preamble, para. 8.
89 van't Foort-Diepeveen et al., 2021, p. 475.
90 Directive 2022/2381 of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, the Preamble, para. 7.

such as other diversity policies, take precedence. Additionally, penalties are to be imposed on companies that fail to comply with selection and reporting obligations.

The aforementioned measures constitute positive action aimed at unlocking the potential of highly qualified human resources, as women remain underrepresented in leadership positions despite their high levels of education.[91] The directive's rationale is conveyed through an emphasis on economic arguments, and although it references the fundamental right to gender equality, this aspect is largely overshadowed by financial considerations. This raises concerns about whether the legislative goals aimed at increasing women's representation on company boards should be grounded in economic arguments rather than fundamental principles.[92]

A higher number of women in boardrooms alone will not bring about meaningful changes, but it represents a promising catalyst for progress, addressing both participation and pay gap issues. More gender-inclusive decision-making, particularly in the economic sector, is crucial, as economic relations shape many other social dynamics. While breaking the glass ceiling is important, the focus should not be limited to elite positions. Broader efforts against inequality, especially those affecting the most vulnerable and disadvantaged women, must also be prioritised.

5.4. Gender-Based Violence

Gender-based violence reflects existing inequality gaps that exacerbate women's vulnerability to abuse. The EU's approach to addressing gender violence has expanded from an initial focus on the workplace, where it was identified as a barrier to equal opportunities. The evolution reflects the EU's alignment with relevant international instruments in this field.

Violence manifests in multiple forms, one of which is harassment, recognised as a type of discrimination in matters of employment and occupation under Framework Directive 2000/78/EC.[93] It is crucial to address harassment as discrimination rather than merely a health and safety issue, given the underlying inequalities that perpetuate it. Although health and safety regimes are shifting from a technical and medical approach to a biopsychosocial model that acknowledges social risks, they still predominantly focus on physical hazards.[94]

Gender-based violence and harassment encompass various unacceptable behaviours, frequently involving sexual elements, but not necessarily. Sexual harassment differs from other forms of harassment because, in a patriarchal environment, it can be dismissed as welcome attention. Legally distinguishing sexual harassment from other forms of harassment is necessary to acknowledge the unequal power relationships between the sexes and to uncover sexist attitudes in the workplace.[95]

91 Vasiljević and Sunko, 2017, p. 35.
92 Szydło, 2014, p. 179.
93 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, art. 2(3).
94 International Labour Organisation, 2024, p. 17.
95 Samuels, 2003, p. 468.

By defining sexual harassment as a distinct form of sex-based discrimination, the Gender Equality Directive 2002/73/EC, followed by the Recast Directive (2006/54/EC), established a connection between sexual harassment and gender inequality. This framework clarifies that sexual harassment is no longer considered merely a personal issue between individuals for which employers bear no responsibility.[96]

However, given the multifaceted nature of violence and harassment, and the limited scope of the aforementioned framework, further measures are necessary to address all aspects of this phenomenon. The International Labour Organisation Convention on combatting violence and harassment in the workplace serves as a benchmark for ensuring an integrated, and gender-responsive approach to preventing such behaviours in the workplace.[97] This Convention grants the right to a workplace free from abuse and mandates special protections for women and other vulnerable groups disproportionately impacted by such behaviour in professional settings. Since it addresses areas within EU competence, namely improving the working environment to protect workers' health and safety and promoting gender equality in employment, but can only be ratified by states, the Council has urged Member States to ratify it.[98]

The ILO Violence and Harassment Convention recognises domestic violence as a workplace issue that can affect employment, productivity, health and safety, mandating measures to mitigate its impact. This recognition fosters an integrated approach to ending gender-based violence, as a broader understanding of its consequences necessitates a more comprehensive response. While employment-related mechanisms can create supportive environments and resources for survivors, criminal justice is essential for ensuring accountability and deterrence for perpetrators.

The EU's ambition to harmonise Eurocrimes under Article 83(1) TFEU to address specific forms of gender-based offenses reflects an intention to align with the objectives of the Council of Europe's Istanbul Convention on preventing and combatting violence against women and domestic violence, to which the EU acceded in 2023.[99] The harmonisation of Member States' criminal laws serves as a limited tool for advancing gender equality, given the EU's restricted competence in this field. Under Article 83(1) TFEU, the EU is permitted to establish only minimum rules concerning the definition of and sanctions for serious cross-border crimes.[100] Due to resistance from certain Member States, particularly objections to the concept of gender, EU action is confined to addressing crimes such as rape, female genital mutilation, and the non-consensual sharing of intimate images. It also covers cyberstalking, cyber harassment, and cyber incitement to violence or hatred, rather than recognising gender-based violence as a serious cross-border crime.[101]

96 Zippel, 2006, p. 5.
97 International Labour Organisation, 2019.
98 Council of the European Union, 2023.
99 European Commission, 2020a.
100 Rigotti and McGlynn, 2022, p. 469.
101 Ibid., p. 471.

The above-mentioned crimes are criminalised at the EU level under the Violence Against Women Directive (2024/1385/EU).[102] This directive also establishes targeted measures for the protection, support, and access to justice for victims, as well as enhanced data collection, prevention, coordination, and cooperation efforts in this field.[103] While the Victims' Rights Directive (2012/29/EU) acknowledges the specific protection needs of survivors of sexual and gender-based violence and hate crimes, it falls short in fully addressing the heightened risks of intimidation, retaliation, and secondary and repeat victimisation.[104] The Violence Against Women Directive (2024/1385/EU) seeks to strengthen survivors' protection before, during, and for a reasonable time after criminal proceedings. It requires capacity building for front-line workers who may encounter survivors, individual assessments of their specific protection needs and provision of specialised support.[105]

The Violence Against Women Directive (2024/1385/EU) and the Istanbul Convention acknowledge physical, sexual, psychological, and economic forms of gender-based violence occurring in private and public settings. While both recognise that such violence is rooted in gender dynamics – including actual acts as well as threats, coercion, and arbitrary deprivation of liberty – the Istanbul Convention takes a more rights-centred approach. It defines violence against women as a breach of human rights and a form of discrimination. In contrast, the Directive focuses on defining gender-based violence as acts targeted at women or girls because of their gender (highlighting intent) or as actions that disproportionately affect women and girls (emphasising impact).[106] The advantage of the Directive over the Istanbul Convention is that it establishes minimum standards for Member States within EU jurisdiction, including the criminalisation of cyber violence, which is not specifically addressed by the Convention. Cyber violence against women encompasses various forms of violence perpetrated on digital platforms, specifically targeting individuals based on their gender.[107]

102 Directive 2024/1385 of 14 May 2024 on combatting violence against women and domestic violence.

103 Council Decision 2023/1075 of 2 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combatting violence against women and domestic violence with regard to institutions and public administration of the Union; Council Decision 2023/1076 of 2 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combatting violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement.

104 Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

105 Directive 2024/1385 of 14 May 2024 on combatting violence against women and domestic violence, the Preamble, paras. 5–8.

106 Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011), art. 3a; Directive 2024/1385 of 14 May 2024 on combatting violence against women and domestic violence, art. 2a.

107 Gasmi, 2024, p. 88.

By normalising gender-based violence and discrimination, cyber incitement to hatred strengthens harmful stereotypes and aggressive behaviour toward individuals, which can lead to hate speech and hate crimes. The European Commission's proposal to classify hate crimes and hate speech as Eurocrimes under Article 83(1) TFEU could enhance EU-level protection against cyber gender violence.[108]

Expanding legislation to combat gender violence addresses the wider implications and emerging challenges related to this issue. By prohibiting and criminalising such acts, the law delegitimises gender violence and holds perpetrators accountable, thereby discouraging this behaviour. However, without a broader perspective, even progressive legislation that addresses gender violence as a symptom rather than its root causes is inadequate. It is essential to confront the underlying factors contributing to gender-based violence and promote a cultural shift grounded in consent and respect. Additionally, providing support and resources for survivors is crucial, enabling them to escape violent situations and heal from their experiences.

5.5. Gender Health Gap

The gender health gap is shaped not only by differences in biological needs but also by disparities in access to healthcare, rooted in unequal economic resources, caregiving responsibilities, social exclusion, inadequate sexual and reproductive health services, and gender segregation within the predominantly female healthcare workforce.[109]

The principle of gender equality and gender mainstreaming applies to EU health policies; however, according to Article 168 TFEU, the EU's competence in public health is limited to a complementary role. The EU must ensure a high level of human health protection, as stated in the Charter of Fundamental Rights of the European Union, which guarantees access to healthcare, and the European Pillar of Social Rights, which establishes timely, affordable, and quality healthcare as a social right.[110]

Growing recognition of the fundamental character of health, pushing aside the market considerations that confine the EU's perspective to the free movement of health goods and services, underscores the need to view it as essential to human rights.[111] This is particularly relevant for sexual and reproductive health, which is paramount to gender equality and women's human rights. The ability to exercise self-determination is imperative for individual dignity. Control over bodily choices is a prerequisite for women's autonomy, enabling them to make informed decisions about their bodies, health, sexuality, and reproductive choices.

108 European Commission, 2021.

109 European Institute for Gender Equality, 2016, p. 4.

110 European Commission, 2021, p. 2.

111 In Case C-159/90 (*Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others*), the ECJ demonstrated a confined perspective on the free movement of health services by ruling that abortion services are included under the freedom to provide services. However, it also permitted Member States to impose restrictions, specifically on the distribution of information about these services.

Even market considerations can be flexible enough to potentially accommodate a rights-based approach. For instance, sexual and reproductive health-related goods and services could be recognised as falling within the scope of Directive 2004/113/EC, which guarantees equal treatment between men and women in access to goods and services. A restrictive interpretation suggests that these services are exclusively for women, implying that there is no discrimination between the sexes. However, a more nuanced view of discrimination, which recognises that barriers to accessing sexual and reproductive health services stem from historically unequal power relations between men and women, supports the argument that the Directive should also apply in this context.[112]

Women's sexual and reproductive health and rights are closely tied to EU competences in the field of gender equality and fundamental rights. An expansive interpretation of the existing legal framework could potentially justify binding legal interventions to ensure comprehensive sexuality education, access to modern contraception, safe and legal abortion, and ensuring high-quality maternal healthcare, all of which are essential components of women's sexual and reproductive health and rights.[113] In facilitating this legal advancement, EU institutions could significantly contribute, even through soft law mechanisms.

The European Parliament has historically been a strong advocate for gender equality, frequently setting the agenda by adopting resolutions on emerging issues, even without a clear treaty foundation.[114] Within the framework of women's health, the European Parliament's commitment to advancing gender equality is manifested in its resolution on Sexual and Reproductive Health. While acknowledging the limited EU competence to act in this field, it encourages Member States to promote these rights, recognising them as fundamental to women's well-being and as essential to comprehensive healthcare.[115]

Addressing barriers to healthcare necessitates a comprehensive understanding of gender specificities. These extend beyond biological differences to encompass social, economic, and political inequalities. The reciprocal effects of the health gap, pay gap, care gap, representation gap and gender-based violence illustrate the complexities of gender inequality. This suggests that transformative progress in one area can be obstructed by ongoing inequalities in another; conversely, positive developments can catalyse further advancements in related fields.

112 European Parliament, 2018, pp. 30–31.
113 Council of Europe Commissioner for Human Rights, 2017, p. 57.
114 van der Vleuten, 2019, p. 47.
115 European Parliament, 2021.

6. Navigating EU Gender Policies in Central and Eastern Europe

EU enlargement has extended the promotion of its fundamental values to Central and Eastern European (CEE) countries through the accession process. As part of their EU membership conditions, these states have undergone significant transformations to align their national systems with EU standards, including the principle of gender equality. Articles 49 and 2 of the TEU state that any European country upholding EU values can apply for membership. The Copenhagen criteria set four accession conditions, the first requiring candidate states to establish stable institutions guaranteeing democracy, rule of law, human rights, and minority protection.[116] Gender equality, as a core EU value rooted in human rights, is integral to this process, influencing laws, policies, and governance. EU enlargement policy, evolving alongside the Copenhagen criteria, has become a Member State-building strategy, fostering effective alignment with EU standards even before accession.[117]

The application of EU law is influenced by the national context in which it is implemented. In CEE countries, this context was shaped by a communist historical backdrop that fostered the idea of socialist emancipation of women, leading to high female labour market participation, often in full-time employment, supported by social benefits such as extended childcare, affordable household goods, and workplace welfare institutions.[118] Under Communist regimes, CEE states implemented egalitarian policies for women's economic and social rights, but lacked democratic legitimacy and an independent civil society.[119] Women's career opportunities remained restricted, often confined to lower positions within the employment hierarchy, due to persistent traditional views of the "mother"s role, which imposed a dual burden of work and caregiving, compounded by workplace discrimination.[120]

High female labour participation and visibility in political decision-making through quotas have fostered post-transition sentiments against EU gender equality regulations, as authorities believed no further provisions were necessary to enhance status of women. Conversely, rising nationalist sentiments reinforced traditional roles of "male breadwinners" and "female caretakers", linking the concept of a traditional family unit to patriotism.[121] This historical background helps explain the political backlash against gender equality that has emerged in some CEE countries. To address the contestation of gender "ideology" hindering policy advancement in this field, it is essential to understand the complex interplay between national and supranational dynamics. To achieve sustained change in state behaviour, EU normative pressures

116 Bego, 2015, p. 5.
117 Janse, 2019, pp. 46–47.
118 Kollonay Lehoczky, 2005, pp. 471–472.
119 Von Wahl, 2021, p. 12.
120 Kollonay Lehoczky, 2005, pp. 471–472.
121 Avdeyeva, 2015, p. 7.

alone are insufficient; social influence is also necessary to align values, beliefs, and policy positions on gender equality among Member States.[122]

7. EU's External Action: Promoting Gender Equality and Women's Rights Globally

Gender equality and women's empowerment are also the EU's objectives in its external action, thus both part of the EU's internal and external policies. Article 21 TEU emphasises that the EU's 'action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world'. The EU strives to be a global leader in promoting gender equality and women's empowerment, and to this end, it pursues a three-pronged approach combining gender mainstreaming, targeted actions and political dialogue.[123]

In promoting gender equality internally and across the world, the EU committed to implementing the Sustainable Development Goals (SDGs) adopted by the UN in 2015. Goal 5 aims to achieve gender equality by ending all forms of discrimination, violence and any harmful practices against women and girls in the public and private spheres. The EU partnered with the UN to achieve this goal, which established the Spotlight Initiative.[124] Its aim is to eliminate all forms of violence against women and girls.

The main EU policy framework to realise this is the Action Plan on Gender Equality and Women's Empowerment in External Action (GAP III).[125] It focuses on the following key areas of engagement: ending gender-based violence, sexual and reproductive health and rights, economic and social rights and empowerment, equal participation and leadership, women, peace and security and green and digital transformations.

8. Conclusion

EU gender equality law retains its heritage of an internal market consideration, as it initially aimed to remove obstacles to the free movement of workers and ensure equal economic participation. This foundation has evolved significantly, with gender equality principles extending far beyond economic goals, encompassing social, political, and human rights dimensions. Economic empowerment, especially through equal access to employment, was a crucial starting point for broader gender equality. However, as future advancements in gender equality are pursued, it is vital to avoid subordinating justice and rights principles to purely economic priorities.

122 Ibid., p. 3.
123 European External Action Service, no date.
124 United Nations, no date.
125 European Commission, 2020b.

Focusing solely on economic considerations risks overlooking the deeper social justice issues. Balancing economic and human rights perspectives ensures a more comprehensive approach to achieving long-term gender justice.

The incremental development of the EU gender acquis parallels the cultural transformation that materialises through law, gradually fostering shifts in dominant beliefs and behaviours. Although this process can provoke tension and resistance, it is essential to establish just legal principles to create an egalitarian society. Otherwise, persistent inequality may further deepen social conflict.

Supranational laws can drive cultural change by harmonising legal frameworks across diverse national settings and establishing consistent rights protections, even when they initially conflict with national norms. Through mandated changes, the EU fulfils its treaty commitment to promote equality values and influences societal attitudes toward a broader acceptance of progressive social norms.

Laws provide a solid foundation for advancing equality, but they must be complemented by collective societal efforts to challenge stereotypes, dismantle patriarchal norms, and promote inclusivity. In this regard, social solidarity is essential, as gender justice benefits everyone and requires the active involvement of all genders.

Bibliography

Literature

Ahrens, P. (2018) *Actors, Institutions and the Making of EU Gender Equality Programs*. London: Palgrave Macmillan; https://doi.org/10.1057/978-1-137-57060-4.

Ahrens, P. (2019) 'The birth, life, and death of policy instruments: 35 years of EU gender equality policy programmes', *West European Politics*, 42(1), pp. 45–66; https://doi.org/10.1080/01402382.2018.1490561.

Ahrens, P., van der Vleuten, A. (2019) 'EU gender equality policies in times of crisis: different instruments, different actors, different outcomes' in Jungwirth, I., Bauschke-Urban, C. (eds.) *Gender and Diversity Studies: European Perspectives*. 1st edn. Opladen–Berlin–Toronto: Verlag Barbara Budrich, pp. 31–54; https://doi.org/10.2307/j.ctvqsf36t.

Anagnostou, D., Millns, S. (2013) 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System', *Canadian Journal of Law and Society / Revue Canadienne Droit et Société,* 28(2), 115–131; https://doi.org/10.1017/cls.2013.17.

Avdeyeva, O.A. (2015) *Defending women's rights in Europe: Gender equality and EU enlargement*. New York: State University of New York Press; https://doi.org/10.1353/book.83874.

Bain, J., Masselot, A. (2012) 'Gender Equality Law and Identity Building for Europe', *Canterbury Law Review,* 18, pp. 97–121. [Online]. Available at: http://www.nzlii.org/nz/journals/CanterLawRw/2012/7.html (Accessed: 29 September 2024).

Bego, I. (2015) *Gender equality policy in the European Union: A fast track to parity for the new member states*. London: Palgrave Macmillan; https://doi.org/10.1057/9781137437174.

Commission of the European Communities (1981) *First Community Action Programme on the Promotion of Equal Opportunities for Women (1982–1985)*, COM (81) 758 final, 14 December 1981.

Commission of the European Communities (1985) *Equal opportunities for women: Medium-term Community programme 1986–1990*, Commission Communication to the Council, COM (85) 801 final and final/2, 19 December 1985. Bulletin of the European Communities, Supplement 3/86.

Commission of the European Communities (1990) *Third Community Action Programme on the Promotion of Equal Opportunities for Women (1991–1995)*, COM (90) 449 final, 7 November 1990.

Commission of the European Communities (1995) *Fourth Community Action Programme on Equal Opportunities for Women and Men (1996–2000)*, COM (95) 381 final, 19 July 1995.

Commission of the European Communities (2000) *Framework Strategy for Gender Equality (2001–2005)*, COM (2000) 335 final, 7 June 2000.

Commission of the European Communities (2006) *Roadmap for Equality between Men and Women (2006–2010)*, COM (2006) 92 final, 1 March 2006.

Council of Europe Commissioner for Human Rights (2017) *Women's sexual and reproductive health and rights in Europe: Issue paper* [Online]. Available at: https://www.coe.int/en/web/commissioner/women-s-sexual-and-reproductive-rights-in-europe (Accessed: 29 September 2024).

Crespi, I., Lomazzi, V. (2018) 'Gender mainstreaming and gender equality in Europe. Policies, legislation and Eurobarometer surveys', *Studi di Sociologia*, 56(1), pp. 23–40.

Davaki, K. (2016) *Demography and family policies from a gender perspective*. Brussels: European Parliament; https://doi.org/10.2861/14530.

Debusscher, P., van der Vleuten, A. (2017) 'Equality policies in the EU through a feminist historical institutionalist lens' in MacRae, H., Weiner, E. (eds.) *Towards Gendering Institutionalism: Equality in Europe*. Lanham: Rowman & Littlefield, pp. 3–24; https://doi.org/10.5040/9798881817183.ch-1.

Ellis, E., Watson, P. (2012) 'Key concepts in EU anti-discrimination law', in *EU Anti-Discrimination Law*. 2nd edn. Oxford: Oxford Academic. https://doi.org/10.1093/acprof:oso/9780199698462.003.0004.

European Commission (2010) *Strategy for Equality between Men and Women (2010–2015)*, COM (2010) 491 final, 21 September 2010.

European Commission (2020a) *A Union of Equality: Gender Equality Strategy 2020-2025, COM(2020) 152 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions.*

European Commission (2020b) *Gender Action Plan – putting women and girls' rights at the heart of the global recovery for a gender-equal world*, 25 November 2020. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2184 (Accessed: 29 September 2024).

European Commission (2020c) *Tackling the Gender Pay Gap in the European Union*. Luxembourg: Publications Office of the European Union; https://doi.org/10.2838/44611.

European Commission (2021) *Communication from the Commission to the European Parliament and the Council: A more inclusive and protective Europe: Extending the list of EU crimes to hate speech and hate crime (COM(2021) 777 final).*

European External Action Service (no date) *Gender Action Plan III & its key areas of EU engagement* [Online]. Available at: https://www.eeas.europa.eu/eeas/gender-action-plan-iii-its-key-areas-eu-engagement_en (Accessed: 29 September 2024).

European Institute for Gender Equality (2016) *Gender and health*. Luxembourg: Publications Office of the European Union [Online]. Available at: https://eige.europa.eu/publications-resources/publications/gender-health?language_content_entity=en (Accessed: 29 September 2024).

European Institute for Gender Equality (2021) *Gender inequalities in care and consequences for the labour market. Beijing Platform for Action*. Luxembourg: Publications Office of the European Union; https://doi.org/10.2839/074.

European Parliament (2018) *Sexual and reproductive health rights and the implication of conscientious objection*. Policy Department for Citizens' Rights and Constitutional Affairs. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604969/IPOL_STU(2018)604969_EN.pdf (Accessed: 29 September 2024).

European Parliament (2021) *Resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI))*.

Franklin, P., Bambra, C., Albani, V. (2021) *Gender equality and health in the EU*. Luxembourg: Publications Office of the European Union; https://doi.org/10.2838/991480.

Freidenvall, L., Johansson, E., Dahlerup, D. (2013) *Electoral gender quota systems and their implementation in Europe: update 2013*. Brussels: Publications Office; https://doi.org/10.2861/2350.

Ganty, S., Vries, K. (2023) 'Non-discrimination in European social security law: exploring safeguards against gender and racial discrimination' in Vonk, G., Pennings, F. (eds.) *European Social Security Law*. Edward Elgar Publishing, pp. 103–129; https://doi.org/10.4337/9781800886353.00012.

Gasmi, G. (2024) 'EU approach towards violence against women and domestic violence – new EU Directive', *Revija za evropsko pravo*, 26(1), pp. 79–95; https://doi.org/10.56461/rep260124.03.G.

Giegerich, T. (2023) 'Gendering Political Participation in Germany and Beyond: Should Quotas Ensure Gender Parity in Parliaments?' in Gstrein, O.J., Fröhlich, M., van den Berg, C., Giegerich, T. (eds.) *Modernising European Legal Education (MELE)*. Cham: Springer, pp. 141–166; https://doi.org/10.1007/978-3-031-40801-4_9.

International Labour Organisation (2024) *Preventing and addressing violence and harassment in the world of work through occupational safety and health measures*. Geneva: International Labour Office [Online]. Available at: https://www.ilo.org/publications/major-publications/preventing-and-addressing-violence-and-harassment-world-work-through (Accessed: 29 September 2024).

Jacquot, S. (2015) *Transformations in EU Gender Equality: From Emergence to Dismantling*. London: Palgrave MacMillan; https://doi.org/10.1057/9781137436573.

Janse, R. (2019) 'Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement', *International Journal of Constitutional Law*, 17(1), pp. 43–65; https://doi.org/10.1093/icon/moz009.

Kollonay Lehoczky, C. (2005) 'The significance of existing EU sex equality law for women in the new member states: The case of Hungary', *Maastricht Journal of European and Comparative Law*, 12(4), pp. 467–493; https://doi.org/10.1177/1023263X0501200406

Kronsell, A. (2012) 'Gendering theories of European integration' in Abels, G., Mushaben, J.M. (eds.) *Gendering the European Union. Gender and Politics Series*. London: Palgrave Macmillan, pp. 23–40; https://doi.org/10.1057/9780230353299_2.

Lucifora, C., Vigani, D. (2016) *What if your boss is a woman? Work organization, work-life balance and gender discrimination at the workplace*. *Discussion Paper No 9737*. Bonn: IZA.

Masselot, A. (2007) 'The State of Gender Equality Law in the European Union', *European Law Journal*, 13(2), pp. 152–168; https://doi.org/10.1111/j.1468-0386.2007.00361.x.

Meier, P. (2008) 'Critical Frame Analysis of EU Gender Equality Policies: New Perspectives on the Substantive Representation of Women', *Representation*, 44(2), pp. 155–167; https://doi.org/10.1080/00344890802079656.

Mulder, J. (2017) *EU non-discrimination law in the courts: approaches to sex and sexualities discrimination in EU law*. Oxford–London–Portland: Hart Publishing Ltd.

O'Cinneide, C. (2012) *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*. European Network of Legal Experts in the Non-Discrimination Field. European Commission Directorate-General for Justice [Online]. Available at: https://tandis.odihr.pl/bitstream/20.500.12389/21675/1/07759.pdf (Accessed: 29 September 2024).

O'Connor, J.S. (2014) 'Gender mainstreaming in the European Union: broadening the possibilities for gender equality and/or an inherently constrained exercise?', *Journal of International and Comparative Social Policy*, 30(1), pp. 69–78. https://doi.org/10.1080/21699763.2014.888012.

Prechal, S., Burri, S. (2008) *EU gender equality law*. Luxembourg: Office for Official Publications of the European Communities; https://doi.org/10.2767/62805.

Preti, S., di Bella, E. (2023) 'Gender Equality as EU Strategy', in di Bella, E., Fachelli, S., López-Roldán, P., Suter, C. (eds.) *Measuring Gender Equality*. Cham: Springer, pp. 89–117; https://doi.org/10.1007/978-3-031-41486-2_4.

Rigotti, C., McGlynn, C. (2022) 'Towards an EU criminal law on violence against women: The ambitions and limitations of the Commission's proposal to criminalise image-based sexual abuse', *New Journal of European Criminal Law*, 13(4), pp. 452–477; https://doi.org/10.1177/20322844221140713.

Ristovski, A., Kalamatiev, T. (2023) 'The approach of EU labour law in redressing the problems of working parents and carers', *Stanovništvo*, 61(2), pp. 109–127; https://doi.org/10.59954/stnv.555.

Rodríguez, M. (2018) 'EU Directives on maternity leave: A misleading social risk approach and its unsatisfactory effects on both mothers and fathers', *European Labour Law Journal*, 9(2), pp. 171–194; https://doi.org/10.1177/2031952518780057.

Rönnmar, M. (2024) 'The role of equality law in addressing gender inequalities in work and employment relations: experiences from the European Union', in Rönnmar, M., Hayter, S. (eds.) *Making and Breaking Gender Inequalities in Work*. Cheltenham: Edward Elgar Publishing, pp. 97–115; https://doi.org/10.4337/9781035337477.00016.

Samuels, H. (2003) 'Sexual harassment in the workplace: a feminist analysis of recent developments in the UK', *Women's Studies International Forum*, 26(5), pp. 467–482; https://doi.org/10.1016/j.wsif.2003.08.004.

Schiek, D. (2002) 'A New Framework on Equal Treatment of Persons in EC Law?', *European Law Journal*, 8(2), pp. 290–314; https://doi.org/10.1111/1468-0386.00154.

Schiek, D. (2005) 'Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law', *Maastricht Journal of European and Comparative Law*, 12(4), pp. 427–466; https://doi.org/10.1177/1023263X0501200405.

Smith, M. (2012) 'Social regulation of the gender pay gap in the EU', *European Journal of Industrial Relations*, 18(4), pp. 365–380; https://doi.org/10.1177/095968011246593.

Solanke, I. (2021) 'The EU Approach to Intersectional Discrimination in Law' in Abels, G., Krizsán, A., MacRae, H., van der Vleuten, A. (eds.) *The Routledge Handbook of Gender and EU Politics*. London: Routledge, pp. 93–103; https://doi.org/10.4324/9781351049955-9.

Szydło, M. (2014) 'Constitutional values underlying gender equality on the boards of companies: how should the EU put these values into practice?', *The International and Comparative Law Quarterly*, 63(1), pp. 167–196. [Online]. Available at: http://www.jstor.org/stable/43301970 (Accessed: 29 September 2024).

United Nations (no date) *Spotlight Initiative* [Online]. Available at: https://www.spotlightinitiative.org/ (Accessed: 29 September 2024).

van 't Foort-Diepeveen, R.A., Argyrou, A., Lambooy, T. (2021) 'Holistic and Integrative Review into the Barriers to Women's Advancement to the Corporate Top in Europe', *Gender in Management*, 36(4), pp. 464–481; https://doi-org.ezproxy.lib.ukm.si/10.1108/GM-02-2020-0058.

van der Vleuten, A. (2019) 'The European Parliament as a constant promoter of gender equality: Another European myth?' in Ahrens, P., Rolandsen Agustín, L. (eds.) *Gendering the European Parliament: Introducing structures, policies and practices*. Roman & Littlefield, pp. 35–50.

Vasiljević, S., Sunko, A.M. (2017) 'EU Law and Gender-Balanced Boards: Making Equality Effective', *Croatian Yearbook of European Law & Policy*, 13(13), pp. 27–51; https://doi.org/10.3935/cyelp.13.2017.297.

Von Wahl, A. (2021) 'The EU as a gender equality regime' in Abels, G., Krizsán, A., MacRae, H., van der Vleuten, A. (eds.) *The Routledge handbook of gender and EU politics*. London: Routledge, pp. 17–29; https://doi.org/10.4324/9781351049955-3.

Zippel, K.S. (2006) *Gender equality politics in the changing European Union: The European Union anti-discrimination directive and sexual harassment* [Online]. Available at: https://aei.pitt.edu/9027/ (Accessed: 29 September 2024).

Legal Sources

Charter of Fundamental Rights of the European Union (2000) *Official Journal of the European Union*, C 364, pp. 1–22.

Consolidated version of the Treaty on European Union (2012) *Official Journal of the European Union*, C 326, 26 October 2012, pp. 13–390.

Consolidated version of the Treaty on the Functioning of the European Union (2012) *Official Journal of the European Union*, C 326, 26 October 2012, pp. 47–390

Council Decision (EU) 2023/1075 of 2 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union, *Official Journal of the European Union*, L 143I, 2 June 2023, p. 1.

Council Decision (EU) 2023/1076 of 2 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement, *Official Journal of the European Union*, L 143I, 2 June 2023, p. 4.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Union*, L180, pp. 22–26.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal of the European Union*, L 303, 2 December 2000, p. 16.

Council Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *Official Journal of the European Union*, L 269, 5 October 2002, p. 15.

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *Official Journal of the European Union*, L 373, 21 December 2004, pp. 37–43.

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, *Official Journal of the European Union*, L 45, 19 February 1975, pp. 19–20.

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *Official Journal of the European Union*, L 39, 14 February 1976, pp. 40–42.

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, *Official Journal of the European Union*, L 6/24, 10 January 1979.

Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *Official Journal of the European Union*, L 225, 12 August 1986.

Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, *Official Journal of the European Union*, L 359, 19 December 1986, pp. 56–58.

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, *Official Journal of the European Union*, L 348, 28 November 1992, p. 1.

Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP, and the ETUC, *Official Journal of the European Union*, L 145, 19 June 1996, pp. 4–9.

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, *Official Journal of the European Union*, L 14, 20 January 1998, p. 6.

Council of Europe (2011) *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, Istanbul, 11 May 2011, CETS No. 210.

Council of the European Union (2006) 'European Pact for Gender Equality 2006–2010', *Official Journal of the European Union*, C 79, 1 April 2006.

Council of the European Union (2023) *Council decision inviting Member States to ratify the Violence and Harassment Convention*, 2019 (No. 190) of the International Labour Organization, Document 13106/23.

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, *Official Journal of the European Union*, L 188, 12 July 2019, pp. 79–93.

Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures (Text with EEA relevance), *Official Journal of the European Union*, L 315, 7 December 2022, pp. 44–59.

Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, *Official Journal of the European Union*, L 132, pp. 21–36.

Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, *Official Journal of the European Union*, L 1385, 14 May 2024.

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, *Official Journal of the European Union*, L 315, 25 October 2012, pp. 57–73.

International Labour Organisation (2019) *Convention on combating violence and harassment in the workplace* (No. 190), Geneva, 108th ILC session, 21 June 2019.

Recast Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, *Official Journal of the European Union*, L 204, 26 July 2006, pp. 23–36.

Treaty establishing a Constitution for Europe (2004) *Official Journal of the European Union*, C 310, pp. 1–474.

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997) *Official Journal of the European Union*, C 340, pp. 1–144.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) *Official Journal of the European Union*, C 306, pp. 1–301.

Treaty of Rome establishing the European Economic Community (1957) *Official Journal of the European Union*, P 317, pp. 1–36.

Case-Law

Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (No. 2) [1976] ECR 455.

Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199.

Case C-152/84, *Marshall v Southampton Area Health Authority* [1986] ECR 723.

Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd v Grogan and Others* [1991] ECR I 4685.

Case C-184/83, *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.

Part III
Migrants and Migrant Workers

| Chapter 7 |

The International Protection of Migrants' and Migrant Workers' Rights: The United Nations Framework

Bartłomiej Oręziak

ABSTRACT

This chapter offers a thorough analysis of the evolution of migration law from UN, EU and CoE perspective focusing on an overview of its historical context and the principal issues surrounding migration. It also contains current level analysis of migrant workers' rights protection in the UN. It underscores the importance of legal developments in shaping migration policy. The chapter then delves into the history of United Nations legislation related to the rights of migrants and migrant workers, including pivotal documents such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, alongside other pertinent legal instruments. Subsequent sections explore the history of migration law within the European Union, presenting not only union directives and regulations aimed at safeguarding migrant rights but also relevant EU primary law provisions. In the next step, the chapter highlights the historical evolution of Council of Europe legislation, which also has been important in establishing standards for migrant rights protection. A review of Council of Europe regulations and initiatives demonstrates the organisation's role in shaping and standardising human rights norms in the migration context. The final section is devoted to the practice of protecting migrant rights by the UN treaty body on the example of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as this is one of the key UN legal instruments in this area. The chapter ends with concise conclusions presenting the findings and key insights.

KEYWORDS

migrants' and migrant workers' rights, United Nations, European Union, Council of Europe, human rights

1. Introduction

Migrations, especially those of a mass nature, have affected various regions of the world, shaping their development on various sectors of the economy, society or politics. This caused transformations at the level of society and politics, having a profound impact on the formation of national and cultural identity of many communities.

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The movement of large groups of people, often referred to as migrations of peoples, has frequently altered the face of continents, transforming them in ways that are still felt today.[1]

In the case of mass migrations, however, it is rare to encounter the complete migration of an entire nation or tribe. Typically, only a portion of the community decided to leave their previous settlements, leaving the remaining group in their original places of residence.[2] In practice, every mass migration involved the division of a given community, with the migrating branch typically coming into contact with more developed civilizations, which resulted in their greater visibility on the historical stage. On the other hand, the communities that remained in place often fell into obscurity, losing their role in the broader historical context. The migrating groups, which often moved towards areas with more favourable climatic and cultural conditions, gained an advantage in access to resources, trade opportunities, and contacts with advanced civilizations. These groups, having found themselves in a new environment, had greater chances for adaptation and development, which often led to their integration or dominance over the local population. Meanwhile, the branches of tribes or nations that stayed in their original settlements often maintained a traditional way of life, but their role in history was gradually marginalised.[3]

It is worth noting the persistence of the bonds between part of the migrant population and the rest of society. These bonds have often been significantly loosened or even completely lost in the main by distance. However, there are cases in which a sense of unity and tribal identity have overcome various adversities. Nevertheless, one of the shocks of migration, especially large-scale migration, was the separation of some of the people who remained in their homeland from the historical core.[4] Based on this, it is important to view mass migration from the perspective of a process that has significantly influenced the pace of development of societies. This impact extends to the histories of populations, including their traditions or sense of tribal identity.[5]

The next stage of migration on a global scale for Europe marked the beginning of the Era of Exploration, which occurred around the 15th century. The discovery of two continents in the Western Hemisphere and their colonisation by the Spanish and other European nations paved the way for a centuries-long period of colonial activity.[6] While migrations on the European continent had different characteristics, European expansion was characterised by an intensified process of settling newly discovered lands, extracting diverse natural resources, and integrating them according to European standards. Tribal peoples, on the other hand, were displaced and sometimes exterminated. Modern states, building their demographic and political identity,

1 Oris, 2003, pp. 187–215; Greenwood and Hunt, 2003, pp. 3–37; Bailey, 1993, pp. 315–326.
2 Flahaux and De Haas, 2016, p. 1; Neharica, 2022, pp. 26–38; Andersson, Karadja and Prawitz, 2022, pp. 1859–1896.
3 Strzelczyk, 2006, p. 22.
4 Lyon, 2017, pp. 649–651.
5 Okólski, 2011, p. 7.
6 Sánchez-Albornoz, 1994, pp. 55–88.

increasingly used migrations as a political tool. Although early modern migrations had a limited scope and demographic impact due to restricted communication and technological capabilities, they initiated processes that would later have a profound impact on European history. In the following centuries, migrations took various forms, including mass labour emigration in the 19th century,[7] through penal deportations, and up to the complex migratory movements of the 20th century.[8] Nowadays, migrations, particularly those that are uncontrolled and considered undesirable, have become one of the most significant global challenges. Europe, which for centuries has been both a place of origin and a destination for migrants, now faces new realities. Deepening globalisation, armed conflict and global warming are among the main motivations accompanying migrants. Migration has become not only a challenge, but also a key element in global dialogue and European integration, the protection of human rights and social stability on the continent.

Migrant workers represent a specific category of migrants, distinguished primarily by the type of employment they undertake outside their home country. To better understand this group and its unique challenges, it is essential to adopt the type of employment as the primary criterion for their classification. From the perspective of the nature or type of work undertaken, migrations can be divided into two main categories: migration for self-employment and migration for wage labour. Migration for self-employment involves individuals who choose to run a business on their own in another country. These people have ownership or co-ownership of the inputs, and the income from their labour belongs exclusively to them. Self-employment migration, also known as entrepreneurship, is becoming increasingly popular, particularly in the context of the development of small and medium-sized enterprises and the removal of barriers from providing services in foreign markets. The International Labour Organization (ILO) and the United Nations (UN) define labour migration as taking up employment with a company owned by someone else. It represents the second most common type of migration, taking place in the country of origin as well as abroad. People migrating to increase their income, identified with wage labour, are confronted with working under different conditions, problems with social protection or difficulties in finding their way in the midst of a new environment.[9]

The type of employment is only one of the distinguished categories of migration. In legal and academic doctrine, we can encounter a distinction between primary migration, forced migration, voluntary migration or mass migration. Although at first glance one may not see the connection between the cited classification and the group of migrant workers, it shows a broader perspective of the phenomenon as migration in itself and, above all, the significantly different motivation of those who decide to migrate. Understanding the characteristics and classification of migrant workers is

7 Greer, 2012, pp. 365–386.
8 Wilson, 2021, pp. 387–407.
9 Pomianek, 2009, p. 28.

important for developing effective migration strategies and protecting the privilege of this group internationally.

It is the progressing globalisation on an ever-increasing scale and the consequent emerging migration crises that have proved to be the impulses of taking action to secure the rights of migrants and migrant workers. The path of evolution brings us to the current legal solutions chosen and, consequently, the new challenges of migration and the protection of human rights. Commitment to the title issue, on the part of the United Nations (UN), the European Union (EU), and the Council of Europe (CoE), has significantly influenced changing approaches and regulations directed at protecting the rights of migrants. Examples of the results of international cooperation include the Convention relating to the Status of Refugees[10] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[11] They are now of fundamental importance for the countries involved and, above all, for the migrant population.

2. History of UN Legislation on the Rights of Migrants and Migrant Workers

The UN, was established to ensure stability and peace in the world, support cooperation between countries and promote development in various spheres of social and economic life. Its origins date back to the San Francisco Conference, held on April 25, 1945. It was then that representatives of a number of countries signed the Charter of the United Nations – a document that officially came into force a few months later, on October 24, starting the organisation's activities.[12] Within the UN, there are several main bodies responsible for various areas of activity. Among the most important are the General Assembly, which brings together all Member States, the Security Council, which makes decisions on peacekeeping, the Secretariat headed by the Secretary-General, the International Court of Justice, which resolves legal disputes, and the Economic and Social Council, which promotes economic and social development. The UN plays an important role not only in mediation and conflict resolution, but also in defending human rights, fighting poverty and working for sustainable development. Moreover, the organisation cooperates with a number of specialised institutions that are responsible for specific areas – such as the World Health Organization (WHO), the United Nations Children's Fund (UNICEF) and the International Labour Organization (ILO). By combining diplomatic and operational functions, the UN has become an important part of the global governance system, striving to improve the quality of life for people around the globe.[13]

10 UN General Assembly, 1951, p. 137.
11 UN General Assembly, 1990.
12 United Nations, 1945.
13 Daws and Weiss, 2008, pp. 3–38; Hanhimäki, 2008, pp. 111–130.

The process of developing international regulations for the protection of people migrating and employed outside their own country is complex and reflects a worldwide approach to human rights and working conditions. The United Nations, through the preparation of a series of legal documents, has over the years set rules to provide protection and support for those moving in search of employment. The first initiatives to protect workers internationally emerged in 1919, when the International Labour Organization (ILO) was established. This agency of the UN system operates on the basis of cooperation between three groups of stakeholders: representatives of states, the employer community and labour organisations, covering 187 member countries. Its activities focus on creating employment standards and promoting the development of working conditions consistent with social justice and international peace.[14]

In 1948, shortly after the end of World War II, the United Nations promulgated the Universal Declaration of Human Rights. The document set forth basic rights for every human being, such as the right to employment (Article 23), the right to social security (Article 22) and the prohibition of discrimination (Articles 2 and 7). The adoption of the Declaration played an important role in the further development of the protection of the rights of movers and those taking up employment outside their country, becoming a reference point for the creation of subsequent international regulations.[15]

In 1949, the International Labour Organization's Convention No. 97 on Labour Migration was adopted. The document lays down rules for dealing with people who take up employment outside their country, covering such issues as fair recruitment, equal treatment and protection from abuse. The introduction of the Convention has prompted many countries to amend their national laws to improve the situation of employed newcomers.[16]

In the 1950s, the United Nations turned its attention to refugee and non-citizen issues. In 1951, the Convention Relating to the Status of Refugees was adopted, which, together with the 1967 Protocol, became the basis of the international refugee protection system.[17] Among other things, the document provides for the right to work, access to education and protection from refoulement, introducing the principle of non-refoulement, which has influenced the shaping of asylum laws in many countries.[18] Subsequent years also saw the development of the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Both documents established a legal framework for the protection of stateless persons, guaranteeing them the enjoyment of basic rights such as the right to employment or access to education.[19]

14 International Labour Organization (ILO), 1919; Kott and Droux, 2013, pp. 1–14; Van Daele, 2008, pp. 485–511.
15 UN General Assembly, 1948; Morsink, 1999, pp. 191–238; Mertus, 2009, pp. 37–64.
16 International Labour Organization (ILO), 1949.
17 UN General Assembly, 1951, p. 137.
18 Goodwin-Gill and McAdam, 2007, pp. 201–284.
19 UN General Assembly, 1961, p. 175.

In the second half of the 1960s, the United Nations addressed the issue of eliminating racial inequality. In 1965, Member States signed a document committing them to ensure equal treatment before the law for all persons and to combat racial discrimination. The adoption of these regulations helped strengthen the rights of foreign workers, especially in accessing the labour market and public services.[20]

Subsequently, further documents were introduced to strengthen the protection of the fundamental rights of the movers. In 1966, the International Covenant on Economic, Social and Cultural Rights[21] and the International Covenant on Civil and Political Rights[22] were enacted. Both agreements required states to respect the economic, social and political rights of every person, regardless of their origin. These provisions were intended to ensure, among other things, the right to safe working conditions, access to social welfare, the opportunity to obtain an education and equal treatment before the courts and administration.

In the 1970s and 1980s, the United Nations continued its efforts to improve the situation of migrants in search of work. Among other things, the safety of those working at sea was addressed at the time, with the SOLAS Convention developed in 1974[23] to increase standards for the protection of life on the water. Shortly thereafter, in 1975,[24] the International Labour Organization adopted Convention No. 143, requiring countries to ensure fair working conditions for foreign workers and reduce illegal migration. At the same time, a document on women's rights (1979) was also adopted to ensure equal access to employment, education and healthcare – regardless of origin or place of residence. Regulations introduced at the time helped better protect women, including those moving between countries.[25] Maritime safety issues were further developed – in 1982, the Law of the Sea rules[26] was agreed upon, and a few years later, regulations for rescue operations in international waters were adopted. This ensured that those trying to get to a destination by sea could count on faster assistance in case of danger.[27] In 1984, the UN adopted a document dedicated to combatting torture and ill-treatment. The new regulations were intended to protect all people, including migrants, from violence and abuse, regardless of their status.[28]

In the late 1980s and early 1990s, the United Nations paid particular attention to issues related to the protection of the youngest and those migrating for labour. In 1989, the Convention on the Rights of the Child[29] was enacted, which emphasised the need to provide care and protection for all children, regardless of their origin. A year later, a document dedicated to migrant workers and their families was adopted

20 UN General Assembly, 1965, p. 195.
21 UN General Assembly, 1966b, p. 3.
22 UN General Assembly, 1966a, p. 171.
23 International Convention for the Safety of Life at Sea, 1974.
24 International Labour Organization (ILO), 1975.
25 UN General Assembly, 1979, p. 13.
26 United Nations, 1982.
27 International Maritime Organization, 1997.
28 UN General Assembly, 1984, p. 85.
29 UN General Assembly, 1989, p. 3.

– the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[30] It introduced a comprehensive set of rights aimed at protecting refugees and their families, by which it meant mainly access to education, healthcare and protection from exploitation.[31] This document serves as a reference point for further discussions on the evolvement of international legal frameworks related to migration, and its provisions form the basis for analysing subsequent UN initiatives and treaties concerning migrants' rights.

New challenges related to migration emerged with globalisation and the increase in labour migration.[32] Two important documents were adopted in 2000. The first dealt with countering the smuggling of people by land, sea and air,[33] and the second focused on preventing human trafficking, with a particular emphasis on women and children.[34] These documents aimed to combat migration-related crime and provide protection and support to victims, particularly women and children. In 2006, the United Nations launched further initiatives to protect human rights. At that time, the Convention on the Rights of Persons with Disabilities[35] was adopted, which guarantees them equal treatment, including the right to work, study and enjoy social welfare – regardless of whether they are nationals of a country or work abroad. The same year also saw the enactment of the Convention for the Protection of All Persons from Enforced Disappearance, aimed at preventing such practices and holding perpetrators accountable.[36]

In 2011, the Domestic Workers Convention was adopted as a further step in efforts to protect workers' rights. Its provisions were intended to improve the situation of this occupational group, a large part of which are migrant workers, by guaranteeing adequate conditions of employment, fair wages and protection from abuse by employers.[37]

A key document, albeit currently in a revised version, is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families from 1990. It serves as a foundational framework for the protection of migrant rights worldwide. The legal instruments discussed, even in their updated forms, still create a comprehensive system for safeguarding migrant rights, addressing the various challenges associated with migration. Each of these instruments make a unique contribution to securing migrants' rights, and together they form a cohesive and extensive protective network. Nevertheless, the 1990 International Convention remains the most crucial reference point, setting protection standards that other legal instruments continue to follow.

30 Grant, 2007, pp. 29–49.
31 International Commission of Jurists (ICJ), 2014.
32 Zimmermann, 2008, pp. 2–9.
33 UN General Assembly, 2000a.
34 UN General Assembly, 2000b.
35 Convention on the Rights of Persons with Disabilities, 2006.
36 UN General Assembly, 2006.
37 International Labour Organization (ILO), 2011.

3. History of EU Legislation on the Rights of Migrants and Migrant Workers

The European Union (EU) is an example of an international organisation that combines features of economic, political, and social union. It was established as a result of long-standing efforts toward European integration, initiated after World War II to ensure lasting peace and stability on the continent.[38] The EU was formally established by the Maastricht Treaty, which came into effect on November 1, 1993, although its roots go back to earlier European communities, such as the European Coal and Steel Community (ECSC) and the European Economic Community (EEC). The EU aims to promote cooperation among its Member States in various fields, including the economy, law, foreign policy, and security.[39] The main objective of the Union is to create an integrated internal market that allows for the free movement of goods, services, capital, and people.[40] This enables Member States to collaborate economically, benefiting both businesses and citizens. The European Union has a complex institutional structure. The key institutions include the European Commission, the Council of the European Union, the European Parliament, the European Council, and the Court of Justice of the European Union.

Since the adoption of the Universal Declaration of Human Rights in 1948, migration has become a significant element in international discussions on human rights. The Declaration recognises the right to leave any country, including one's own, and the right to return to one's homeland (Article 13). In the European context, internal migration has been considered just as important as migration beyond the continent's borders.[41]

The next step was the signing of the Treaty establishing the European Economic Community in 1957, which laid down the fundamental principles of the free movement of workers. The Treaty envisioned the creation of a common market by the end of 1969, which was crucial for worker mobility in Europe.[42]

In 1964, the Council adopted Directive 64/221/EEC, aimed at coordinating special measures concerning the movement and residence of foreigners, justified on grounds of public policy, public security, or public health.[43] Subsequent regulations, such as Regulation No. 1612/68, focused on the free movement of workers, allowing

38 Craig and de Búrca, 2020, pp. 1–1344.
39 Dinan, 2014, pp. 305–353; Weatherill, 2016, pp. 1–20.
40 Barnard, 2022, pp. 515–555; Chalmers, Davies and Monti, 2019, pp. 695–733.
41 UN General Assembly, 1948.
42 Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 1957.
43 Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

them to seek employment in other Member States without discrimination based on nationality.[44]

The Council Directive 68/360/EEC removed restrictions on the movement and residence of workers from Member States and their families. It proved to be a catalyst in eliminating administrative and legal barriers that had previously limited worker mobility within the European Community.[45]

In the following years, additional directives, such as Directive 72/194/EEC[46] and Directive 73/148/EEC, gradually expanded the rights of migrants, including the right to remain in the territory of a Member State after the end of employment and the removal of restrictions on the movement and residence of citizens of Member States.[47]

The signing of the Schengen Agreement in 1985,[48] followed by the Single European Act in 1986, were further milestones in shaping the Community's migration policy. These agreements led to the creation of a single internal market and the removal of border controls between Member States.[49]

The Maastricht Treaty of 1993 expanded the scope of the European Union's common policies, including in the areas of asylum policy, external border control, and immigration policy.[50] With the signing of the Treaty of Amsterdam in 1999, migration issues were incorporated into the common policies of the European Union. This allowed for the development of more unified and coordinated actions regarding both migration and the protection of the rights of people arriving from abroad.[51]

Directive 2001/55/EC initiated significant changes in the EU's approach to managing migration flows and protecting migrants, particularly those fleeing persecution.[52] The Nice Treaty of 2003 expanded the legislative procedure to areas related to migration, thereby increasing the role of the European Parliament in these matters.[53]

The introduction of the Charter of Fundamental Rights of the European Union in 2009, reinforced by the Treaty of Lisbon, emphasised rights to decent working conditions, non-discrimination, and social security.[54] Subsequent directives, such as

44 Council Regulation (EEC) No 1612/68 (1968) on freedom of movement for workers within the Community.
45 Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, 1968.
46 Council Directive 72/194/EEC on freedom of movement for workers within the Community, 1972.
47 Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, 1973.
48 Schengen Agreement, 1985.
49 Single European Act, 1986.
50 Treaty on European Union (Consolidated Version), 2002.
51 Amsterdam Treaty, 1999.
52 UN High Commissioner for Refugees (UNHCR), 2003.
53 Treaty of Nice, 2003.
54 Charter of Fundamental Rights of the European Union, 2012.

Directive 2011/95/EU,[55] Directive 2011/98/EU, Directive 2013/32/EU[56] and Directive 2013/33/EU[57] established common standards for international protection and streamlined administrative procedures for migrants.[58]

The COVID-19 pandemic highlighted the need to protect migrant workers from a new perspective, as evidenced by the resolutions from 2020, which emphasise the importance of ensuring safety and decent working conditions, especially for cross-border and seasonal workers. Responding to the challenges posed by the COVID-19 pandemic, in spring 2020 the European Union addressed issues related to working conditions and health protection of the employed, including those in seasonal work and those crossing borders for work purposes. The April resolution pointed to the need to ensure that all workers have adequate access to healthcare, a safe working environment and support in the difficult situation of a pandemic The June document from the same year further emphasised the importance of securing adequate living and working conditions for this group, as well as the need to provide personal protective equipment.[59] Both resolutions draw attention to the obligation to respect workers' rights and protect those employed from abuse, although it should be remembered that they are non-binding recommendations.[60]

Changes in the situation of migrant workers were also linked to Britain's decision to leave the European Union structures. One of the main documents shaping the relationship between the European Union and the United Kingdom became the Trade and Cooperation Agreement of 2021. This agreement established the framework for future relations, including important provisions concerning the rights of migrant workers. It includes commitments to ensure equal treatment and non-discrimination of workers, protecting the rights of EU citizens working in the UK and British citizens working in the EU. The agreement also provides mechanisms for coordinating social security systems to protect the benefits and entitlements of cross-border workers. Furthermore, it promotes cooperation on labour standards and their enforcement, preventing the exploitation of migrant workers and ensuring their rights on both sides of the English Channel.[61]

In May 2021, the European Parliament, in its Resolution of May 20, 2021, again highlighted the particularly difficult situation of cross-border, posted, seasonal, and other mobile workers in the context of the COVID-19 pandemic. The Parliament called

55 European Union: Council of the European Union, 2011.
56 Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection.
57 Directive 2013/33/EU of the European Parliament and of the Council, laying down standards for the reception of applicants for international protection.
58 Directive 2011/98/EU of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in a Member State and on a common set of rights for third-country workers legally residing in a Member State.
59 European Parliament, Resolution of 19 June 2020 on European protection of cross-border and seasonal workers in the context of the COVID-19 crisis.
60 Senden, 2004, pp. 291–319.
61 EU-UK Trade and Cooperation Agreement, 2021.

for better implementation, enforcement, and monitoring of the revised directive on the posting of workers. The resolution also urged the creation of a single contact point that would provide digital services for worker mobility and posting, serving both workers and employers.[62]

Continuing its efforts to attract skilled workers from outside the EU, the European Union introduced Directive 2021/1883, known as the EU Blue Card Directive. This directive establishes the conditions for entry and residence of third-country nationals for employment in the EU in positions requiring high qualifications. The aim of the directive is to attract and retain highly qualified workers by offering simplified application procedures, more flexible requirements, and extended rights and benefits. Under this directive, highly skilled workers from outside the EU gain access to the same rights as citizens of Member States – in terms of working conditions, education, social security and family reunification. The adoption of this legislation is also aimed at making the EU labour market more attractive and facilitating the filling of labour shortages in specific sectors.[63]

At the end of 2021, the European Parliament highlighted the need for a new tool that would facilitate access to social benefits for people working in different countries of the European Union. It proposed the introduction of the European Social Security Card, a digital system that would allow quick checking and transfer of entitlements, which would particularly ease the situation of mobile and migrant workers. Such a solution would reduce red tape and better protect workers' rights across the EU.[64]

In early 2024, the European Parliament proposed changes to the functioning of the European Labour Authority (ELA). The resolution, adopted on January 18, pointed to the need to expand the institution's powers so that it can more effectively monitor compliance with workers' rights, particularly those of cross-border workers and migrants. Among the demands was an increase in its ability to conduct inspections, provide support in resolving disputes and provide workers with reliable information. The proposals are intended to improve working conditions across the European Union, counter abuses and strengthen the protection of workers' rights.[65]

Legal reforms undertaken by the European Union on the protection of migrants and migrant workers have led to the development of consistent regulations that have taken shape as the process of European integration has developed. Since the inception of the EU, particular emphasis has been placed on the free movement of people and the elimination of barriers that restrict worker mobility within the single market. The EU has introduced various instruments supporting the protection of migrants, such

62 European Parliament, Resolution of 20 May 2021 on impacts of EU rules on the free movements of workers and services: intra-EU labour mobility as a tool to match labour market needs and skills.

63 Directive (EU) 2021/1883.

64 European Parliament, Resolution of 25 November 2021 on the introduction of a European social security pass.

65 European Parliament, Resolution of 18 January 2024 on the revision of the European Labour Authority mandate.

as the Schengen Agreement, directives on the free movement of workers, and the Maastricht and Amsterdam Treaties, which expanded the scope of common policies, including migration policy. In recent years, the European Union has responded to new challenges, such as the migration crisis and the COVID-19 pandemic, by implementing additional regulations and initiatives aimed at protecting the rights of migrants and cross-border workers.

4. History of Council of Europe Legislation on Migrant and Migrant Worker Rights

The Council of Europe is an international organisation, founded on May 5, 1949, with the aim of promoting democracy, protecting human rights, and supporting the rule of law in Europe. The functioning of the Council of Europe is based on its Statute,[66] which sets out its main tasks, internal organisation and rules of operation. This document is the legal basis for all undertakings carried out by the organisation at the international level. The Council brings together 46 countries, covering almost the entire European continent, and is one of the oldest institutions of international cooperation in Europe. It was established in response to the need to ensure peace and security in post-war Europe, with the goal of developing democracy and protecting human rights.[67] The organisation's activities focus on creating legal standards, overseeing their implementation by Member States, and promoting cooperation in such areas as culture, education and heritage protection.[68] The structure of the Council includes: Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities, Secretary General and Commissioner for Human Rights. The Council of Europe's contribution to the development of human rights is particularly evident through the establishment of the European Convention on Human Rights, which today is one of the most important pillars of individual protection in Europe.[69] The organisation is also involved in efforts to strengthen democratic principles, fight corruption and promote cultural and educational exchanges. Although the Council of Europe is not part of the European Union, its initiatives are complementary, strengthening the process of building a united Europe based on democratic values and respect for human rights. The Council's importance in shaping European law and policy makes it one of the main pillars of international cooperation in Europe.[70]

The Council of Europe, as a guardian of democratic values and human rights on the European continent, has strived from its inception to address the challenges associated with migration. The history of legislation concerning the rights of migrants

66 Council of Europe, 1949.
67 Schmahl and Breuer, 2017, pp. 93–107; Heath-Brown, 2016, pp. 40–41; Kolb, 2013, pp. 3–16.
68 Council of Europe, 2012, pp. 72–87; Yurttagül, 2021, pp. 75–108.
69 Council of Europe, 1950; Lovat and Shany, 2014, pp. 253–276; Keller and Stone Sweet, 2008, pp. 3–28.
70 Royer, 2010, pp. 8–9.

and migrant workers in Europe illustrates the evolution and growing sensitivity to the needs of those who leave their homeland for various reasons, seeking better lives in new countries. The first step toward ensuring dignity and rights for all people on the European continent was the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. This Convention served as the foundation for subsequent legal instruments, including those concerning migrants. The provisions protecting the right to family life and prohibiting discrimination were groundbreaking, opening new horizons for the protection of the rights of migrants and migrant workers. Through this Convention, migrants received protection that had previously been reserved exclusively for the citizens of host countries.[71]

As the number of migrants settling in various parts of Europe increased, the need arose to provide them with adequate social and medical care. In response to these challenges, the European Convention on Social and Medical Assistance was adopted in 1953. This Convention marked a new approach to migrants, treating them not only as a labour force but primarily as individuals in need of support. The adoption of this legislation ensured that migrant workers and their families were entitled to social assistance and medical services, regardless of their nationality. This event marked an important milestone in the process of shaping more inclusive and caring social structures.[72]

The lives of migrants, like those of citizens of host countries, carry the inevitable experiences of old age, illness and bereavement. An understanding of this human condition common to all provided the impetus for the adoption in 1953 of the European Provisional Agreement on Social Security for old-age, disability and survivors' benefits. This agreement allowed migrants to retain their rights to social security benefits regardless of their change of residence, becoming an important step in building coherent social security systems in Europe. It was an expression of respect for human labour and an act of solidarity that transcended national boundaries.[73]

In 1961, European countries adopted the European Social Charter, a document that in time came to be known as the continent's "social constitution". The Charter required signatories to protect a wide range of social and economic rights. Its provisions aimed to ensure that migrants had the same rights as citizens of host countries, including the right to housing, access to healthcare and social security. The adoption of the Charter became an expression of the idea of building a just social order, in which an individual's origin is not a barrier to the enjoyment of decent living and working conditions.[74]

Dynamic social and economic changes led to the decision to adopt the Additional Protocol to the European Social Charter in 1988. This document expanded the catalogue of rights protected by the Charter, while strengthening the guarantees already

71 Council of Europe, 1950.
72 Council of Europe, 1953a.
73 Council of Europe, 1953b.
74 Council of Europe, 1961.

in place, with particular emphasis on promoting equality and ensuring equal opportunities in employment. As a result, migrants gained protection that corresponded to the new realities of social life, allowing them to actively participate in the professional and social life of the countries in which they resided.[75]

With the increase in labour migration within Europe, the need arose to create solutions for transferring social security entitlements between countries. The European Social Security Convention, adopted in 1972, became the answer. This agreement enabled migrants to retain their social security rights even when they changed their country of residence, thereby contributing to their social stability and sense of security.[76]

In 1977, the Council of Europe took another significant step by adopting the European Convention on the Legal Status of Migrant Workers. This Convention emphasises equal treatment for migrant workers in areas such as employment, social security, and settlement. It established standards for the protection of this group's rights, promoting integration and fair treatment of migrants in the countries where they chose to settle. Notably, this was the first convention of its kind, predating the later United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in 1990.[77]

At the end of the 20th century, in response to changing social and economic needs led European countries to adopt a new version of the European Social Charter. The revised document expanded the protection of social and economic rights, including for migrant workers. Special emphasis was placed on guaranteeing the right to protection from poverty and against social marginalisation.[78]

The Council of Europe, like the other organisations discussed earlier, has had a tremendous impact on shaping the protection of human rights and the development of democratic values in Europe. Since 1949, it has systematically developed standards aimed at ensuring decent living and working conditions for all residents of the continent – including migrants. Through numerous treaties and international agreements, it has created a coherent system for the protection of social, economic and cultural rights, strengthening integration processes and promoting equality in European societies.

5. The Practice of Protecting Migrant Rights by the UN Treaty Body

Contemporary international initiatives in the field of human rights largely focus on ensuring the protection of migrants and migrant workers. Within the structures of the United Nations, the International Convention on the Protection of the Rights of

75 Council of Europe, 1988.
76 Council of Europe, 1972.
77 Council of Europe, 1977.
78 Council of Europe, 1996.

All Migrant Workers and Members of Their Families, which has been in effect since 2003, is significant.[79] In response to the global challenges of migration, a convention was adopted to guarantee the fundamental rights of every migrant, regardless of their legal status. The Committee for the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)[80] is responsible for monitoring compliance with its provisions. This body, composed of independent specialists, evaluates the actions of States Parties and makes recommendations to lead to improvements in the situation of migrants around the world.

ICMW, enacted by the UN General Assembly in 1990, sets rules for the protection of migrants, regardless of their legal situation. It is one of the key documents in the international system of human rights protection, which aims to ensure that migrants and their families also enjoy rights under other international agreements.[81] Among other things, the Convention guarantees the right to life, liberty, personal security, protection from all forms of discrimination and access to decent employment conditions.[82]

The Committee on the Protection of the Rights of Migrant Workers (CMW) is engaged in both evaluating the actions of states on the basis of the reports they submit and investigating complaints of violations of migrants' rights. Although it has the authority under the Convention to receive individual and inter-state complaints, in practice this ability is not used due to the small number of states that have recognised its jurisdiction. Despite its limited authority in this area, the Committee's activities remain important for the promotion and protection of migrants' rights, influencing the formation of international standards. The CMW also actively conducts education and outreach activities – organising meetings, consultations, and General Discussion Days, enabling the exchange of experiences between different actors. These initiatives raise awareness of the situation of migrants and promote effective models for their protection around the world.[83]

The Committee on Migrant Workers (CMW), established under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), consists of independent specialists tasked with assessing the extent to which States Parties are implementing their obligations under the Convention. The Committee's functioning is based on two main lines of action: analysis of national reports and consideration of violations of migrants' rights. The CMW meets twice a year in Geneva, and during its bi-weekly sessions examines the reports submitted, prepares lists of issues requiring clarification, and formulates recommendations and concluding observations addressed to individual states.

79 UN General Assembly, 1990.
80 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, no date.
81 Cholewinski, 1997, pp. 79–136; Panizzon, Zürcher and Fornalé, 2015, pp. 1–14; Sookrajowa and Pécoud, 2019, pp. 1–15.
82 Ibid.
83 Government of Poland, no date.

These reports contain information about the measures taken by states to implement the convention's provisions, as well as identifying challenges and gaps in the protection of migrant rights. The Committee also has the authority to consider individual and inter-state complaints. According to Article 76, Paragraph 1 of the ICMW – Any States Party to the present Convention may at any time declare that it accepts the authority of the Committee to receive and consider complaints in which one States Party accuses another of failing to fulfil its obligations under the Convention. Such complaints are valid only if submitted by a States Party that has itself accepted the Committee's authority. The Committee will not consider any complaints against a state that has not issued such a declaration. The process for handling such complaints includes the following steps:

a) If a States Party believes that another state is not fulfilling its obligations under the Convention, it may formally notify the other state in writing and may also inform the Committee. The state receiving the complaint must, within three months, provide a written response explaining the situation, which should include, where appropriate, information on domestic legal measures taken or available to resolve the matter.
b) If the issue remains unresolved six months after the initial notification, either party has the right to bring the matter before the Committee, informing both the Committee and the other state involved.
c) The Committee will take up the matter only after confirming that all domestic legal remedies have been tried and exhausted, in accordance with internationally recognised legal principles – except in cases where such remedies are clearly delayed or ineffective.
d) If the above condition is met, the Committee may offer its assistance to help the two states reconsider the case.
e) The Committee shall conduct its deliberations in camera when considering such communications.
f) In considering a complaint submitted, the Committee may request any relevant information from the states involved.
g) Both states involved have the right to be present during the Committee's deliberations and may present their positions orally or in writing.
h) Within one year of receiving a complaint, the Committee must issue a report:
i) If the matter is resolved amicably, the report will contain a brief description of the facts and the agreement reached.
j) If no agreement is reached, the report will describe the relevant facts in detail and include written and oral statements from both countries. The Committee may also privately share its views on the case with the parties involved.

In all cases, the report is made available to the countries involved.

On the other side, in accordance with Article 77 Paragraph from 1 to 7 ICMW:

1. Any States Party to the present Convention may at any time make a declaration recognising the competence of the Committee to receive and consider

complaints filed by persons under its jurisdiction – if they believe that their rights guaranteed by the Convention have been violated by that state. The Committee shall not consider complaints against a state that has not so agreed.
2. The Committee will reject submissions that are anonymous, carry the appearance of an abuse of the right to complain, or are contrary to the principles of the Convention.
3. Individual complaints may be considered only if the Committee finds that:
   (a) The case is not currently pending or has not previously been considered under other international review or conciliation procedures;
   (b) The complainant has exhausted all available domestic remedies. However, this obligation may be waived if the Committee finds that the domestic proceedings are unduly protracted or have no realistic prospect of successful resolution.
4. If the conditions set forth in paragraph 2 are met, the Committee will inform the States Party in question (which has previously recognised its competence under paragraph 1) of the complaint. The state should submit a written response within six months, taking into account the measures taken and its position on the allegations.
5. The Committee shall analyse the submissions received, taking into account all available information – both that provided by the complainant and by the state concerned.
6. Committee meetings on such complaints are held in camera.
7. The Committee communicates its position to both the affected state and the complainant.

Both provisions pertain to the key competencies of the CMW and could play a significant role in the protection of migrant rights. However, their application is subject to an important limitation. With regard to individual complaints (Article 76(2) ICMW) and inter-state complaints (Article 77(8) ICMW), the CMW acquires jurisdiction only once at least ten States Parties have made the necessary declarations accepting its competence.

In practice, however, a small number of states have opted to ratify the protocols granting the Committee such jurisdiction, which limits the effectiveness of this mechanism. So far, only six states – Ecuador, El Salvador, Mexico, Turkey, Uruguay, and Guinea-Bissau – have recognised the jurisdiction of the CMW, which means that this institution is not operational.[84]

In addition to its primary supervisory function, the CMW engages in promotional activities aimed at raising awareness about migrant rights. Regular meetings are organised with representatives of states, non-governmental organisations, and other international institutions to promote best practices and standardise migrant protection globally. The General Discussion Days organised by the Committee serve as a

84 United Nations, no date.

forum for exchanging views and knowledge, which often leads to the development of new comments that assist in the better understanding and implementation of the provisions of the Convention.

Turning to the tools available to migrants for pursuing their rights at the international level, it is important to mention the individual complaint mechanism. Unfortunately, this mechanism is not available even for the states that have made the relevant declarations under Articles 76 and 77 of the ICMW, rendering this instrument currently illusory. In practice, this means that no migrant can use this tool to protect their rights.

Inter-state complaints are possible within the Committee's jurisdiction; however, they also require at least 10 States Parties to accept this form of jurisdiction by the CMW. This mechanism would allow states to file complaints against other states in cases of violations of their citizens' rights. Nevertheless, in practice, similar to the individual complaint mechanism, this instrument is not operational.

In cases where a violation of the Convention is identified, the Committee has the authority to issue recommendations and conduct further consultations with the States Party. As part of the monitoring process, the Committee evaluates the actions taken by states and examines their compliance with the provisions of the Convention. The reports produced by the CMW are available to the public and aim to increase transparency and enforce the responsibility of states to protect the rights of migrants. In addition, the Committee seeks to promote legal and policy reforms that can improve the situation of migrants in individual countries.

6. Conclusions

Over the decades, the United Nations, the European Union and the Council of Europe have gradually developed systems to protect the rights of migrants and migrant workers, reflecting a growing concern for these groups. From early legislative initiatives to contemporary legal solutions, these organisations have consistently worked to establish and strengthen norms that ensure decent living and working conditions for migrants, equality before the law and access to social security. Throughout different historical periods and political contexts, efforts have been made to build a unified and comprehensive legal framework that is adapted to the changing needs of migrants.

Among the most significant achievements of these organisations is the development of fundamental legal documents, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the European Social Charter and the comprehensive system of migration law of the European Union. These acts have become pillars for the protection of migrants' rights in the international arena. The establishment of these standards not only imposed specific obligations on states towards migrants, but also significantly increased awareness of their rights. This kind of foundation is key to creating societies that are fair and based on the principle of equal treatment.

Although much has been achieved in recent decades in the area of protecting the rights of migrants, in practice there are still serious difficulties in fully implementing and respecting accepted standards. One of the key problems is the insufficient number of ratifications of major international conventions, which leads to discrepancies in the application of protective standards in different countries. In addition, the different political, social and economic conditions of individual countries make it difficult to develop a uniform system of protection for migrants. The crises of recent years, such as increased migration, the COVID-19 pandemic and the effects of climate change, further expose the shortcomings of existing mechanisms and point to the urgent need to adapt them to new conditions. In response to these challenges, international organisations are initiating new measures and adopting legislation designed not only to respond to current emergencies, but also to seek to strengthen migrant protection systems on a sustainable basis. In the current realities, effective oversight of the realisation of migrants' rights is also becoming increasingly important, a role played by the European Labour Office and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, among others, which can make a real contribution to improving the situation of migrants.

In the context under discussion, it is important to analyse the links between the lawmaking process, the number and quality of regulations adopted and the effectiveness of their enforcement systems. This is a crucial issue for determining the effectiveness or illusory nature of international law. Ideally, the relationship should be such that the international organisation issuing a legal instrument, which sets forth certain legal norms, is also able to ensure the implementation of each norm. The European Union serves as a positive example in this regard, with its European Commission and the Court of Justice of the European Union (CJEU) effectively overseeing the enforcement of its legal norms. Similarly, the Council of Europe, with its European Court of Human Rights, plays a significant role in ensuring compliance with human rights standards. In contrast, the United Nations, despite having established the Committee on Migrant Workers (CMW), currently lacks the jurisdiction to address complaints under the ICMW, highlighting a gap in the enforcement of its legal norms.

Looking ahead, the protection of migrant rights requires significant efforts from national governments, including full ratification of existing treaties and legal instruments (e.g., Articles 76 and 77 of the ICMW) and continuous adaptation of migration policies to evolving global realities, while respecting their inviolable sovereignty and the goodwill of international legal entities. This is a challenging task, but it appears essential for effectively safeguarding the rights of migrants and migrant workers worldwide, utilising the capabilities of currently functioning international organisations.

Bibliography

Literature

Andersson, D., Karadja, M., Prawitz, E. (2022) 'Mass Migration and Technological Change', *Journal of the European Economic Association*, 20(5), pp. 1859–1896; https://doi.org/10.1093/jeea/jvac017.

Angeleri, S., Nivard, C. (eds.) (2022) The European Social Charter: A Commentary. Leiden: Brill–Nijhoff, pp. 351–425.

Bailey, A.J. (1993) 'Migration history, migration behavior and selectivity', *Annals of Regional Science*, 27, pp. 315–326.

Barnard, C. (2022) *The Substantive Law of the EU: The Four Freedoms*. 7th edn. Oxford University Press.

Chalmers, D., Davies, G., Monti, G. (2019) *European Union Law: Text and Materials*. 4th edn. Cambridge: Cambridge University Press; https://doi.org/10.1017/9781009230322.

Cholewinski, R. (1997) 'The Protection of the Rights of Migrant Workers and their Families by the ILO With Particular Reference to the Migrant Workers Instruments of 1949 and 1975' in Cholewinski, R. (ed.) *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*. Oxford: Oxford University Press, pp. 79–136; https://doi.org/10.1093/oso/9780198259923.003.0004.

Council of Europe (2012) *Yearbook of the European Convention on Human Rights*. Dordrecht: Springer.

Craig, P., de Búrca, G. (2020) *EU Law: Text, Cases, and Materials*. 7th edn. Oxford: Oxford University Press.

Daws, S., Weiss, T.G. (eds.) (2008) *The Oxford Handbook on the United Nations*. Oxford Academic; https://doi.org/10.1093/oxfordhb/9780199560103.001.0001.

Dinan, D. (2014) *Europe Recast: A History of European Union*. 2nd edn. Boulder: Lynne Rienner Publishers Inc.

Flahaux, M.L., De Haas, H. (2016) 'African migration: trends, patterns, drivers', *Comparative Migration Studies*, 4(1), p. 1; https://doi.org/10.1186/s40878-015-0015-6

Goodwin-Gill, G.S., McAdam, J. (2007) *The Refugee in International Law*. 3rd edn. Oxford: Oxford University Press, pp. 201–284.

Grant, S. (2007) 'The Legal Protection of Stranded Migrants' in Cholewinski, R.I., Perruchoud, R., MacDonald, E. (eds.) *International Migration Law: Developing Paradigms and Key Challenges*. The Hague: T.M.C. Asser Press, pp. 29–49.

Greenwood, M.J., Hunt, G.L. (2003) 'The Early History Of Migration Research', *International Regional Science Review*, 26(1), pp. 3–37; https://doi.org/10.1177/0160017602238983.

Greer, A. (2012) 'Commons and Enclosure in the Colonization of North America', *The American Historical Review*, 117(2), pp. 365–386; https://doi.org/10.1086/ahr.117.2.365.

Hanhimäki, J.M. (2008) *The United Nations: A Very Short Introduction*. Oxford: Oxford University Press.

International Commission of Jurists (ICJ) (2014) *Migration and International Human Rights Law, Practitioners Guide No. 6*. Updated edn. [Online]. Available at: https://www.refworld.org/reference/research/icjurists/2014/en/101819 (Accessed: 12 August 2024).

Keller, H., Stone Sweet, A. (2008) *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford: Oxford Academic.

Kolb, M. (2013) *The European Union and the Council of Europe*. London: Palgrave Macmillan.

Kott, S., Droux, J. (2013) 'Introduction: A Global History Written from the ILO' in Kott, S., Droux, J. (eds.) *Globalizing Social Rights. International Labour Organization (ILO) Century Series*. London: Palgrave Macmillan, pp. 1–14.

Lovat, H., Shany, Y. (2014) 'The European Court of Human Rights' in *Assessing the Effectiveness of International Courts. International Courts and Tribunals Series*. Oxford: Oxford Academic, pp. 253–276.

Lyon, J.R. (2017) 'Review of The Emperor's Old Clothes: Constitutional History and the Symbolic Language of the Holy Roman Empire, by B. Stollberg-Rilinger & T. Dunlap', *The Historian*, 79(3), pp. 649–651.

McAdam, J. (2007) 'International Migration Law: Developing Paradigms and Key Challenges', *International Journal of Refugee Law*, 19(4), pp. 776–779; https://doi.org/10.1093/ijrl/eem058.

Mertus, J.A. (2009) *The United Nations and Human Rights: A Guide for a New Era*. London: Routledge; https://doi.org/10.4324/9780203878019.

Morsink, J. (1999) *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. University of Pennsylvania Press.

Neharica, S. (2022) 'Seasonal Migration: Trends and Challenges Faced by Tribal Community', *International Journal of Economic and Management Studies*, 11(03), pp. 26–38; https://doi.org/10.55968/ijems.v11i03.219.

Okólski, M. (2011) *Modernizacyjna rola migracji*. Warszawa: Wydawnictwo Naukowe Scholar.

Oris, M. (2003) 'The history of migration as a chapter in the history of the European rural family: An overview', *The History of the Family*, 8(2), pp. 187–215.

Heath-Brown, N. (2016) 'Council of Europe' in *The Statesman's Yearbook*. London: Palgrave Macmillan, pp. 39–40; https://doi.org/10.1007/978-1-349-57823-8_11.

Panizzon, M., Zürcher, G., Fornalé, E. (2015) 'Introduction: Conceptualizing a Pluralist Framework for Labour Migration' in Panizzon, M., Zürcher, G., Fornalé, E. (eds.) *The Palgrave Handbook of International Labour Migration*. London: Palgrave Macmillan, pp. 1–14; https://doi.org/10.1057/9781137352217_1.

Petersen, W. (1958) 'A General Typology of Migration', *American Sociological Review*, 23, pp. 256–266.

Pomianek, T. (2009) *Rynek pracy w Polsce i innych krajach Unii Europejskiej*. Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego.

Royer, A. (2010) *The Council of Europe*. Strasbourg: Council of Europe.

Sánchez-Albornoz, N. (1994) 'The First Transatlantic Transfer: Spanish Migration to the New World, 1493–1810', in Canny, N. (ed.) *Europeans on the Move: Studies on European Migration 1500–1800*. Oxford: Oxford University Press, pp. 55–88; https://doi.org/10.1093/acprof:oso/9780198204190.003.0003.

Schmahl, S., Breuer, M. (eds.) (2017) T*he Council of Europe: Its Law and Policies*. Oxford: Oxford University Press.

Senden, L. (2004) *Soft Law in European Community Law*. Oxford–Portland: Hart Publishing, pp. 291–319.

Sookrajowa, S.S., Pécoud, A. (2019) 'United Nations Migrant Workers Convention' in Ratuva, S. (ed.) *The Palgrave Handbook of Ethnicity*. Singapore: Palgrave Macmillan, pp. 1–15; https://doi.org/10.1007/978-981-13-0242-8_142-1.

Strzelczyk, J. (2006) 'Migracje w naszym kręgu cywilizacyjnym doby preindustrialnej' in Furdala, A., Wysoczański, W. (eds.) *Migracje: dzieje, typologia, definicje*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, p. 22.

Van Daele, J. (2008) 'The International Labour Organization (ILO) in Past and Present Research', *International Review of Social History,* 53(3), pp. 485–511; https://doi.org/10.1017/S0020859008003568.

Weatherill, S. (2016) 'Law and Values in the European Union'. Oxford: Oxford University Press.

Wilson, D. (2021) 'European colonisation, law, and Indigenous marine dispossession: historical perspectives on the construction and entrenchment of unequal marine governance', *Maritime Studies*, 20, pp. 387–407; https://doi.org/10.1007/s40152-021-00233-2.

Yurttagül, H.C.L. (2021) Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union. Cham: Springer; https://doi.org/10.1007/978-3-030-78059-3.

Zimmermann, K.F. (2008) *Migration and Globalization: Challenges and Perspectives for the Research Infrastructure. IZA Discussion Paper No. 3890*. [Online]. Available at: https://www.econstor.eu/bitstream/10419/35657/1/589738674.pdf (Accessed: 12 August 2024).

Legal Acts

International Governmental Organizations

Convention on the Rights of Persons with Disabilities (2006) [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities (Accessed: 13 August 2024).

Council of Europe (1949) Statute of the Council of Europe, 5 May 1949. [Online]. Available at: https://rm.coe.int/1680306052 (Accessed 13 Aug. 2024).

Council of Europe (1950) European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950. [Online]. Available at: https://www.refworld.org/legal/agreements/coe/1950/en/18688 (Accessed: 13 August 2024).

Council of Europe (1953a) The European Convention on Social and Medical Assistance [Online]. Available at: https://rm.coe.int/16800637c2 (Accessed: 12 August 2024).

Council of Europe (1953b) The European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors [Online]. Available at: https://rm.coe.int/16800637b7 (Accessed: 12 August 2024).

Council of Europe (1961) European Social Charter, ETS 35, 18 October 1961. [Online]. Available at: https://www.refworld.org/legal/agreements/coe/1961/en/19363 (Accessed: 13 August 2024).

Council of Europe (1972) European Convention on Social Security, ETS 78, 14 December 1972. https://www.refworld.org/legal/agreements/coe/1972/en/20076 (Accessed: 13 August 2024).

Council of Europe (1977) The European Convention on the Legal Status of Migrant Workers [Online]. Available at: https://rm.coe.int/1680077323 (Accessed: 13 August 2024).

Council of Europe (1988) Additional Protocol to the European Social Charter, ETS 128, 5 May 1988. [Online]. Available at: https://www.refworld.org/legal/agreements/coe/1988/en/13871 (Accessed: 13 August 2024).

Council of Europe (1996) European Social Charter (Revised), ETS 163, 3 May 1996. [Online]. Available at: https://www.refworld.org/legal/agreements/coe/1996/en/40138 (Accessed: 13 August 2024).

International Convention for the Safety of Life at Sea (1974) [Online]. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf (Accessed: 13 August 2024).

International Labour Organization (ILO) (1919) Constitution of the International Labour Organisation (ILO) [Online]. Available at: https://www.refworld.org/legal/agreements/ilo/1919/en/47521 (Accessed:12 August 2024).

International Labour Organization (ILO) (1949) C097 - Migration for Employment Convention (Revised), 1949, No.97. [Online]. Available at: https://www.refworld.org/legal/agreements/ilo/1949/en/17672 (Accessed: 12 August 2024).

International Labour Organization (ILO) (1975) C143 - Migrant Workers (Supplementary Provisions) Convention, 1975, No.143, 24 June. [Online]. Available at: https://www.refworld.org/legal/agreements/ilo/1975/en/20902 (Accessed: 13 August 2024).

International Labour Organization (ILO) (2011) C189 - Domestic Workers Convention, 2011, No. 189, 16 June. [Online]. Available at: https://www.refworld.org/legal/agreements/ilo/2011/en/83143 (Accessed: 13 August 2024).

International Maritime Organization (1997) International Convention on Maritime Search and Rescue (SAR)[Online]. Available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d43b3 (Accessed: 13 August 2024).

UN General Assembly (1948) Universal Declaration of Human Rights, 217 A (III), 10 December [Online]. Available at: https://www.refworld.org/legal/resolution/unga/1948/en/11563 (Accessed: 12 August 2024).

UN General Assembly (1951) Convention Relating to the Status of Refugees. United Nations, Treaty Series, vol. 189 [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1951/en/39821 (Accessed: 12 August 2024).

UN General Assembly (1954) Convention Relating to the Status of Stateless Persons. United Nations, Treaty Series, vol. 360. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1954/en/32744 (Accessed: 12 August 2024).

UN General Assembly (1961) Convention on the Reduction of Statelessness. United Nations, Treaty Series, vol. 989, p. 175, 30 August. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1961/en/20424 (Accessed: 12 August 2024).

UN General Assembly (1965) International Convention on the Elimination of All Forms of Racial Discrimination. United Nations, Treaty Series, vol. 660, p. 195, 21 December1965. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1965/en/13974 (Accessed: 12 August 2024).

UN General Assembly (1966a) International Covenant on Civil and Political Rights. United Nations, Treaty Series, vol. 999, p. 171, 16 December. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1966/en/17703 (Accessed: 12 August 2024).

UN General Assembly (1966b) International Covenant on Economic, Social and Cultural Rights. United Nations, Treaty Series, vol. 993, p. 3, 16 December. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1966/en/33423 (Accessed: 12 August 2024).

UN General Assembly (1979) Convention on the Elimination of All Forms of Discrimination Against Women. United Nations, Treaty Series, vol. 1249, p. 13, 18 December. [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women (Accessed: 12 August 2024)

UN General Assembly (1984) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. United Nations, Treaty Series, vol. 1465, p. 85, 10 December. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1984/en/13941 (Accessed: 13 August 2024).

UN General Assembly (1989) Convention on the Rights of the Child. United Nations, Treaty Series, vol. 1577, p. 3, 20 November. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1989/en/18815 (Accessed: 13 August 2024).

UN General Assembly (1990) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. A/RES/45/158. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1990/en/27627 (Accessed: 12 August 2024).

UN General Assembly (2000a) Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/2000/en/53096 (Accessed: 13 August 2024).

UN General Assembly (2000b) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/2000/en/23886 (Accessed: 13 August 2024).

UN General Assembly (2006) International Convention for the Protection of All Persons from Enforced Disappearance, 20 December. [Online]. Available at: https://www.refworld.org/legal/agreements/unga/2006/en/57490 (Accessed: 13 August 2024).

UN High Commissioner for Refugees (UNHCR) (2003) UNHCR Annotated Comments on Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof. [Online]. Available at: https://www.refworld.org/legal/intlegcomments/unhcr/2003/en/31318 (Accessed: 13 August 2024).

United Nations (1945) Charter of the United Nations. 1 UNTS XVI [Online]. Available at: https://www.refworld.org/legal/constinstr/un/1945/en/27654 (Accessed: 12 August 2024).

United Nations (1982) United Nations Convention on the Law of the Sea. [Online]. Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Accessed: 13 August 2024).

International Agreements and Treaties

Amsterdam Treaty (1999) [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997M/TXT&from=PL (Accessed: 12 August 2024).

Charter of Fundamental Rights of the European Union (2012) 2012/C 326/02, 26 October 2012. [Online]. Available at: https://www.refworld.org/legal/agreements/eu/2012/en/13901 (Accessed: 13 August 2024).

EU-UK Trade and Cooperation Agreement (2021) [Online]. Available at: https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en (Accessed: 12 August 2024).

Single European Act (1986) [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar.0004.02/DOC_1&format=PDF (Accessed: 12 August 2024).

Treaty Establishing the European Community (Consolidated Version), Rome Treaty (1957) 25 March. [Online]. Available at: https://www.refworld.org/legal/agreements/eu/1957/en/40087 (Accessed: 12 August 2024).

Treaty of Nice (2003) [Online]. Available at: https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-nice (Accessed: 13 August 2024).

Treaty on European Union (Consolidated Version) (2002) Treaty of Maastricht, Official Journal of the European Communities C 325/5, 24 December 2002; 7 February 1992. [Online]. Available at: https://www.refworld.org/legal/agreements/eu/1992/en/16882 (Accessed: 13 August 2024).

Directives and Regulations

Council Directive 68/360/EEC (1968) on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

Council Directive 72/194/EEC (1972) on freedom of movement for workers within the Community, 18 May.

Council Directive 73/148/EEC (1973) on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, 21 May.

Council Regulation (EEC) No 1612/68 (1968) on freedom of movement for workers within the Community, 15 October.

Directive (EU) 2021/1883 (2021). [Online]. Available at: https://eur-lex.europa.eu/legal-content/pl/TXT/?uri=CELEX:32021L1883 (Accessed: 12 August 2024).

Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. [Online]. Available at: https://www.refworld.org/legal/reglegislation/eu/2004/en/68542 (Accessed: 12 August 2024).

Directive 2011/98/EU of the European Parliament and of the Council, 13 December 2011, on a single application procedure for a single permit for third-country nationals to reside and work in a Member State and on a common set of rights for third-country workers legally residing in a Member State. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32011L0098 (Accessed: 12 August 2024).

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.

Directive 2013/33/EU of the European Parliament and of the Council, 26 June 2013, laying down standards for the reception of applicants for international protection.

European Union: Council of the European Union (2011) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L. 337/9-337/26, 20 December. [Online]. Available at: https://www.refworld.org/legal/reglegislation/council/2011/en/84781 (Accessed: 13 August 2024).

Schengen Agreement (1985) of 14 June.

Resolutions of the European Parliament

European Parliament, Resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020IP0054 (Accessed: 12 August 2024).

European Parliament, Resolution of 19 June 2020 on European protection of cross-border and seasonal workers in the context of the COVID-19 crisis. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0176 (Accessed: 12 August 2024).

European Parliament, Resolution of 20 May 2021 on impacts of EU rules on the free movements of workers and services: intra-EU labour mobility as a tool to match labour market needs and skills. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021IP0249 (Accessed: 12 August 2024).

European Parliament, Resolution of 25 November 2021 on the introduction of a European social security pass. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021IP0473 (Accessed: 12 August 2024).

European Parliament, Resolution of 18 January 2024 on the revision of the European Labour Authority mandate. [Online]. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0052_EN.html (Accessed: 12 August 2024).

Websites

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (no date) [Online]. Available at: https://www.ohchr.org/en/treaty-bodies/cmw (Accessed: 13 August 2024).

Government of Poland (no date) 'Konwencja o ochronie praw wszystkich pracowników migrujących oraz członków ich rodzin'. [Online]. Available at: https://www.gov.pl/web/rodzina/konwencja-o-ochronie-praw-wszystkich-pracownikow-migrujacych-oraz-czlonkow-ich-rodzin (Accessed: 13 August 2024).

International Labour Organization (ILO) (no date) Employment statistics. [Online]. Available at: https://ilostat.ilo.org/topics/employment/ (Accessed: 18 August 2024).

United Nations (no date) [Online]. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en (Accessed: 13 August 2024).

| Chapter 8 |

Migrants' and Migrant Workers' Rights in the Jurisprudence of the European Court of Human Rights

Tena Konjević

ABSTRACT

Migration remains a key socio-legal phenomenon, profoundly influencing labour markets and human rights protections across Europe. This chapter explores the legal framework governing the protection of migrants and migrant workers under the Council of Europe (hereinafter: CoE), with a specific focus on the European Convention on Human Rights (hereinafter: ECHR) and the case law of the European Court of Human Rights (hereinafter: ECtHR). It begins by defining key categories of migrants and analysing their respective levels of legal protection. The chapter then examines the primary CoE legal instruments addressing migration, including the ECHR, the European Social Charter, and the European Convention on the Legal Status of Migrant Workers, as well as related anti-trafficking and social security conventions. However, the central focus of the chapter is that of the role of the ECtHR in shaping legal standards applicable to migrants, particularly migrant workers. In that regard, the analysis specifically highlights key jurisprudence concerning forced labour, servitude, human trafficking, discrimination, and access to social security. Specifically, it assesses how the ECtHR interprets related provisions in cases involving migrant workers, particularly Article 4, Article 8, and Article 14. Finally, the chapter underscores the necessity of a synergetic institutional approach to ensure that migrant workers and other vulnerable groups receive comprehensive and effective protection under European human rights law.

KEYWORDS

migrants, migrant workers, European Court of Human Rights, European Convention on Human Rights, Council of Europe human rights instruments

1. Introduction

Migration is a growing global phenomenon[1] influenced by economic, political and environmental factors. However, it is not uniform, since while voluntary migration

1 Global migration flows, both inward and outward, became institutionalised during history through multilateral treaties. Key international organisations, such as the International Labour Organisation, United Nations, and the Council of Europe, played a crucial role in coordinating and unifying these agreements. See Blanco Sío-López and Tedeschi, 2015, p. 138.

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increases, including labour migration, forced migration also escalates due to conflicts, rights violations, and crises.[2] Therefore, as the legal status and international protection of migrants depend on the reasons for their displacement, it is essential to distinguish between different categories. Those fleeing persecution under Article 1A of the 1951 Geneva Convention[3] are classified as asylum seekers or refugees and benefit from enhanced protection, whereas other migrants fall under the general human rights protection.[4] Recognising these distinctions is essential for legal and policy analysis. However, before exploring specific protections, especially for other migrants, including migrant workers, in the context of the Council of Europe, it is crucial to understand who qualifies as a migrant and examine the legal frameworks and jurisdictional mechanisms that safeguard their rights. Namely, migrants[5] are individuals who move from their country of usual residence or nationality to another country for various reasons, including economic opportunities, education, natural disasters, war, persecution, or human rights violations.[6] Aliens,[7] migrant workers and refugees are now recognised by international law as distinct legal categories, granting them human rights-based protections.[8] All international human rights standards for migrants are established through various legal instruments, including general treaties safeguarding fundamental human rights, as well as specialised agreements addressing specific migration-related issues, such as non-discrimination[9] or the rights of particular groups such as migrant workers.[10] However, despite the legal protection, they often face serious obstacles to having their human rights respected,[11] particu-

2 Hryshyna et al., 2023, p. 491.
3 United Nations, 1951, pp. 189, 137.
4 Ktistakis, 2013, pp. 9–10.
5 Migrants are generally categorised into three main groups: regular migrants (legally authorised entrants), undocumented migrants (those without valid residency), and vulnerable groups such as stateless persons, trafficking victims, and unaccompanied children. See Ibid., pp. 10–11.
6 Ibid., p. 9.
7 The terms "migrants" and "aliens" are often used interchangeably, but there is a subtle distinction: an alien is defined as 'a person who is not a national of the country in which they are present'. See Ibid.
8 Nuhoglu Soysal, 1995, pp. 149–150.
9 Equality and non-discrimination are fundamental principles ensuring that all individuals, including migrants, enjoy human rights on an equal basis. Legal protections against discrimination apply universally and at the European level, covering grounds such as race, sex, language, religion, political opinion, national or social origin, and other statuses. Key legal instruments enshrining this principle include art. 2(1) and art. 26 of the International Covenant on Civil and Political Rights, art. 14 and Protocol No. 12 of the ECHR, art. E of the ESC, art. 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Also, under EU law, art. 21 of the Charter of Fundamental Rights of the European Union expands the list of protected grounds to include ethnic origin, genetic features, disability, and age. The ECtHR has further interpreted "other status" in art. 14 of the ECHR, extending protection to additional grounds such as age, disability, economic and social status, health, marital status, nationality, sexual orientation, and gender identity. See Ktistakis, 2013, p. 15.
10 Ibid., p. 13.
11 Council of Europe, 1985.

larly those who are irregular[12] or undocumented.[13] Migrants are frequently harassed, economically marginalised, denied access to essential services, detained, and deported. At first glance, such difficulties should not exist, as human rights are meant to protect all individuals equally, simply by virtue of being human. In theory, human rights frameworks uphold the dignity[14] and equal worth of every person, without exception.[15] In that regard, the role of the CoE's contribution to the human rights framework is essential in the European context. It formulated policies to promote human rights compliance in migration management for different groups of migrants, including irregular migrants, and migrant workers.[16] In the following, the chapter examines the instruments developed by the CoE for the protection of the previously mentioned groups of migrants, with a particular emphasis on migrant workers. The analysis will primarily focus on the safeguards provided by the European Convention on Human Rights,[17] highlighting the pivotal role played by its principal guardian and interpreter, the European Court of Human Rights.

12 Migrants with irregular status are recognised as a vulnerable group under the ECHR, obligating states to guarantee access to certain social and economic rights despite their unlawful presence. See Ippolito and Pérez González, 2021, p. 139.

13 Undocumented migrants are deemed especially vulnerable and therefore warrant targeted legal safeguards to protect them from exploitation – a principle upheld by international human rights standards and the ECtHR. See Ibid., p. 139. Art. 5 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines documented and regular migrant workers as those legally authorised to enter, stay, and work in a host state under its laws and international agreements. See Ibid., pp. 152–153.

14 European case law has increasingly centred human dignity as a fundamental legal principle. The European Court has applied this concept across a spectrum of issues – ranging from safeguarding the right to life and preventing inhuman or degrading treatment to prohibiting forced labour and even suggest limits on press freedom. In parallel, courts at national and international levels have invoked human dignity to strengthen socio-economic rights, enforce anti-discrimination measures and broaden the scope of various legal protections. See Selejan-Gutan, 2021, pp. 176–177.

15 Dembour and Kelly, 2011, pp. 1–2.

16 Blanco Sío-López and Tedeschi, 2015, p. 138.

17 Council of Europe, 1950.

2. Council of Europe's Legal Framework for Migrants: Human Rights, Social Protection and ECtHR Influence

During its history, Europe has faced increasing migration pressures,[18] including internal[19] and external migrations, prompting the CoE to adopt legal instruments and mechanisms to protect migrants' rights.[20] That is the reason why in CoE, the codification of human rights, particularly through the European Convention on Human Rights, reinforced their enforceability. The ECHR, like other human rights frameworks, applies universally to all individuals within the jurisdiction of its Member States, regardless of citizenship or legal status. Its protections are not contingent on nationality or immigration status but extend to everyone under a state's autonomy.[21] However, it is important to emphasise that the CoE provides both general and specific legal instruments for the protection of migrants. Non-nationals within the jurisdiction of a Member State are entitled to the rights guaranteed by the cited Convention, while

18 European migration evolved through several key phases. From 1945 to the early 1960s, migration was shaped by post-war reconstruction and the end of colonialism, with countries focusing on rebuilding their economies. The second phase, from the late 1950s to 1973, saw significant labour migration, as people from Southern Europe, Turkey, Morocco, and Yugoslavia moved to northern Europe for work, contributing to economic growth and challenging legal structures. The third phase experienced expected declines in migration due to economic recession and social tensions, yet new migration streams from other regions emerged, balancing the demographic shifts. Additionally, in the 1980s, Southern European countries became destinations for migrants from neighbouring Mediterranean nations and Asia. The final post-Berlin Wall period (late 1980s – 1990s) was marked by a rise in political refugees and Eastern European emigrants, initially directed to Northern Europe, but later extending to Southern Europe as well, highlighting the relationship between political changes and migration flows. Therefore, the opening of the Iron Curtain triggered a surge in migration, reinforcing widespread fears of massive population movements. See Venturini, 2004, p. 13; Bade, 2003, p. 275.

19 Central and Eastern European migration has been a transformative force throughout history. Migration, as intrinsic to human existence as birth and death, played a significant role in this region during the long nineteenth century, when massive labour emigration, exemplified, by over 10 million Poles leaving between 1860 and 1914, and seasonal cross-border movements evolved into broader international flows. The two World Wars brought about drastic changes, as forced displacements and state interventions led to widespread resettlements following the expulsion of Germans from East-Central and South-Eastern Europe. Finally, the collapse of the Eastern block between 1989 and 1992 spurred over 4 million departures from former Eastern bloc countries, marking a shift in nations like Hungary from being primarily exporters to becoming importers of migration and growing debates over migration pressures. The migration debate from Central and Eastern European countries reached a peak during the EU pre-accession period. The 2004 eastward expansion of the EU, while intended to grant full citizenship rights to new Member States, led to significant discussions on border control among existing EU members. As a result, despite the expansion, labour market rights for citizens of these countries were restricted by transitional arrangements that obstructed the chance for a conclusion of the 'East-West division of the continent'. See Bade, 2003, pp. 58, 182, 216, 218, 299, 282; Favell, 2008, p. 264; Konjević, 2023, p. 121.

20 Ktistakis, 2013, pp. 10–11.

21 Dembour and Kelly, 2011, pp. 1–2.

nationals of other contracting parties, and in some cases all migrants, may benefit from provisions under the Revised European Social Charter,[22] that will be touched upon below. Beyond these core instruments, the European Convention on the Legal Status of Migrant Workers[23] specifically addresses migrant workers' rights. Other relevant conventions include the Convention on Action against Trafficking in Human Beings,[24] the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,[25] the European Convention on Extradition,[26] the European Convention on the Suppression of Terrorism,[27] and the European Code of Social Security.[28] Additionally, the CoE established a European Social Security code[29] and included provisions in the European Social Charter to protect and assist migrant workers and their families. This code covered areas such as departure, travel, and reception of migrants, as well as regulations ensuring equal treatment and maintaining established rights.[30] Furthermore, the Committee of Ministers and the Parliamentary Assembly of the CoE (PACE) have issued numerous recommendations and resolutions concerning migrant rights, further shaping the legal framework for their protection.[31] Moreover, the CoE promoted the social and political rights of legally resident foreigners through the influence on the Member States. As early as in 1967, proposals emerged to enhance migrant participation, leading to Local Consultative Councils in some municipalities. While early national bodies in the Benelux and Nordic countries appeared in the 1970s and 1980s, later on many disappeared. However, countries like Greece, Ireland, Italy, Spain, and Portugal have revived interest in such bodies as part of broader integration strategies.[32] Nevertheless, a key role in interpreting and enforcing international legal standards, thereby both limiting and shaping national jurisdiction, was played by European supranational institutions such as the European Court of Human Rights.[33] In that sense, international and regional courts are crucial in shaping legal standards that protect migrants, often more effectively than treaty law. Similar to domestic courts, they help expand migrant rights by being less susceptible to political and majority pressures.[34] In order to understand the role of the ECtHR, the following chapter will include a detailed analysis of the ECtHR's contribution to the protection of migrants, specifically migrant workers, by shaping the scope for the interpretation of the ECHR.

22 Council of Europe, 1996.
23 Council of Europe, 1977a.
24 Council of Europe, 2005.
25 Council of Europe, 1987.
26 Council of Europe, 1957.
27 Council of Europe, 1977b.
28 Council of Europe,1964.
29 Ibid.
30 Blanco Sío-López and Tedeschi, 2015, p. 138.
31 Ktistakis, 2013, pp. 14–15.
32 Tilly, 2015, p. 222.
33 Nuhoglu Soysal, 1995, pp. 149–150.
34 Berg, 2007, pp. 20–21.

2.1. The Role of the ECtHR in Migrant Protection

Although the ECHR does not explicitly address migration, the ECtHR has become a court of last resort for migrants seeking protection. Many applicants turn to it to challenge deportation, secure dignified residency, and claim equal rights with citizens, making migration a central issue in its case law.[35] Namely, Article 34 of the ECHR guarantees individuals, non-governmental organisations, and groups the right to submit applications to the ECtHR if they claim to be victims of a violation by a High Contracting Party. States must not obstruct the effective exercise of this right.[36] This provision is considered a fundamental safeguard for ensuring the effectiveness of the ECHR. However, the right of individual application is subject to specific conditions. Under Articles 32,[37] 34[38] and 35[39] of the ECHR, applicants must: be victims of a violation of the ECHR, exhaust all domestic remedies and submit their application within the prescribed time limit.[40] Despite its broad jurisdiction, the European human rights regime does not provide universal protection regardless of nationality. Similar to the International Covenant on Civil and Political Rights,[41] the ECHR reserves political rights for citizens. Historically, the recognition of foreigners' civil rights under the ECHR was limited, with fewer than a dozen relevant decisions between 1959 and 1993.[42] However, as will be discussed below, the ECtHR broadened the ECHR to incorporate certain social rights, connecting them to civil rights.

Also, while the ECHR does not explicitly protect unauthorised migrants, including migrant workers, its jurisprudence has strengthened migrant rights, particularly through Article 8,[43] which ensures respect for private and family life. However, this provision does not grant migrants an automatic right to reside with their families in a chosen country. As noted by the International Labour Organisation, states have no legal obligation to guarantee family reunification[44] under international law.[45] However, the ECtHR consistently acknowledges that states have the right to regulate immigration. It outlines legitimate grounds for imposing restrictions, such as economic stability and public order, provided these measures are deemed necessary

35 Cali et al., 2021, p.12.
36 Art. 34 of the ECHR.
37 Art. 32 of the ECHR.
38 Art. 34 of the ECHR.
39 Art. 35 of the ECHR.
40 The ECtHR has developed extensive case law on the admissibility criteria for individual applications, further clarifying these procedural requirements. Ktistakis, 2013, pp. 14–15; Berg, 2007, pp. 21–22.
41 United Nations, 1966.
42 Berg, 2007, pp. 21–22.
43 Art. 8 of the ECHR.
44 Under art. 8 ECHR, which protects the right to family life, the ECtHR has ruled that, in certain cases, migrants' family members should be granted entry and residence permits, regardless of their refugee status. However, this obligation applies only in limited circumstances. The Court has clarified that art. 8 does not grant an absolute right to choose a matrimonial residence or to demand family reunification in a specific country. See Ktistakis, 2013, p. 74.
45 International Labour Office,1999, p. 473; Berg, 2007, pp. 21–22.

in a democratic society.[46] Regarding Article 8, the ECtHR balances an individual's right to private and family life with the state's interest in maintaining public order and security, while considering multiple aspects.[47] An early successful challenge to deportation under Article 8 was brought by Mr. Berrehab, who opposed his expulsion following the revocation of his residence permit after his marriage ended.[48] Soon after, the European Commission of Human Rights made a significant statement on the application of Article 8 to non-citizens, offering a notable perspective on their relationship with their country of residence.[49] Also, the ECtHR has been more reluctant to apply this approach when the applicant's presence is unauthorised. For a long time, *Dalia v France* remained one of the few cases addressing the applicability of Article 8 to the exclusion of an irregular migrant.[50] The ECtHR recently additionally addressed state control over irregular migration in a case involving Ms Solange Rodrigues da Silva, an undocumented Brazilian national in the Netherlands, and her Dutch daughter. On 31 January 2006, the ECtHR ruled that denying her a residence permit violated Article 8 ECHR, which protects private and family life.[51] In that case, the ECtHR reaffirmed that family life established during irregular migration status does not automatically prevent deportation, only in exceptional circumstances. However, the Court recognised that irregular residence is just one factor among others, highlighting that Ms Da Silva's inability to regularise her stay was due to bureaucratic obstacles. This case marked a shift in acknowledging broader considerations beyond strict immigration status in Article 8 assessments.[52] Similarly, in the *Mendizabal v France* case[53], the ECtHR ruled that the government's failure to issue a residence permit was unlawful as it violated EU law. While reaffirming that Article 8 does not guarantee a specific type of residence permit, the Court emphasised that any solution must effectively protect private and family life. Notably, the judgement recognised the hardship caused by prolonged precarious migration status, highlighting its serious material and psychological consequences, including employment instability, financial difficulties, and barriers to professional development.[54] Finally, one of the

46 Ibid., p. 23.
47 See more in Ibid.; *Beldjoudi v France*, European Court of Human Rights, Application No. 12083/86 (Judgement of 26 March 1992), Series A No 234; *Mehemi v France*, European Court of Human Rights, Application No. 25017/94 (Judgement of 26 September 1997), Reports of Judgements and Decisions 1997-VI, p. 1962.
48 See more in *Berrehab v Netherlands*, European Court of Human Rights, Application No. 10730/84, Judgement of 21 June 1988, Series A. No. 138; Berg, 2007, p. 24.
49 See more in *Djeroud v France*, European Court of Human Rights, Application No. 13560/88, Judgement of 27 August 1991, Series A No. 194; Berg, 2007, p. 24.
50 *Dalia v France*, European Court of Human Rights, Application No. 26102/95 (Judgement of 19 February 1998), Reports of Judgements and Decisions 1998-I; Berg, 2007, p. 24.
51 *Rodrigues da Silva and Hoogkamer v the Netherlands*, European Court of Human Rights, Application No. 50435/99 (Judgement of 31 January 2006), Reports of Judgements and Decisions 2006-I.
52 Costello, 2015, p. 81.
53 *Mendizabal v France*, European Court of Human Rights, Application No. 51431/99, Judgement of 17 January 2006.
54 Costello, 2015, p. 81.

latest interesting cases within the scope of Article 8, *B.F. and Others v Switzerland*,[55] included the ECtHR's first examination of the requirement of financial independence for family reunification.[56] The case involved a Chinese national of Tibetan ethnicity, J.K., and four Eritrean nationals, B. F., D.E., S.Y., and S.M., who lived in Switzerland. Following a thorough analysis of several pertinent factors, the ECtHR concentrated on the non-reliance on social assistance. The ECtHR initially decided that J.K. had been a part of the workforce for years and had done everything that could be anticipated to earn enough money to support himself and his family. The Court then evaluated S.Y.'s case and found that she is raising her three young children by herself, making it challenging for her to work full-time. The applicant had done everything that might be expected of her to support herself and her children by working part-time, according to the ECtHR. Family reunification would be permanently prohibited if the rule of not relying on social aid were applied rigidly. Regarding B.F. and D.E., the Court pointed out that B.F. was never hired in Switzerland since it was acknowledged that she was not able to work. The ECtHR was not convinced that the Federal Administrative Court had adequately considered whether B.F.'s health would allow her to work, at least partially, despite the Court's conclusion that she would eventually continue to rely on social assistance. Given the foregoing, the ECtHR determined that Switzerland had breached Article 8 ECHR by failing to fairly balance the applicants' desire to be reunited with their family with the nation's desire to safeguard their financial security.[57]

Finally, the ECtHR has faced criticism for either overstepping in migration cases or deferring too much to state sovereignty, creating gaps in human rights protection. Despite the growing number of migration cases, little analysis exists on the underlying causes. Ruling[58] from more than ten years ago already highlighted migrant vulnerability, yet discussions often remain abstract and legalistic, lacking empirical insight.[59] However, it is important to emphasise that embracing this concept of migratory vulnerability offers multiple benefits, primarily from the perspective that it highlights both social dynamics and individual circumstances, making its application complex and not easily defined by fixed criteria. Additionally, it often intersects with other forms of vulnerability, which must also be considered in assessments.[60] In order to conceptualise it with the focus of further analysis the vulnerability will be examined more in detail below. Finally, it is visible that the scope of the ECtHR case law regarding migration is extensive and covers a broad spectrum of interpretation of the particular ECHR provisions. However, the following analysis will focus on the CoE

55 *B.F. and Others v Switzerland*, Europan Court of Human Rights, Application No. 14381/20, Judgement of 10 October 2023.
56 See Branko, 2023.
57 European Legal Network on Asylum, 2023.
58 See *M.S.S. v Belgium and Greece*, European Court of Human Rights, Application No. 30696/09 (Grand Chamber, Judgement of 21 January 2011), Reports of Judgements and Decisions 2011-I.
59 Baumgärte, 2020, pp. 13–14.
60 Ibid., pp. 20–23.

legal framework, particularly ECHR, and the ECtHR case law covering specifically one substantially present group of migrants, migrant workers.

3. The Council of Europe's Labour and Social Protections for Migrant Workers: Legal Framework and ECtHR's Role

Since its inaugural consultative assembly in 1949, the CoE has encouraged all countries to extend the same rights and social standards to foreign workers as those granted to national workers.[61] Former Portuguese Minister of Justice, Rui Manuel Chancerelle de Machete, in his speech, warned that during times of crisis, migrant workers often face discrimination, protectionism, and even expulsion. He emphasised that only strong political commitment, guided by human rights conventions and supported by public awareness, can prevent immigrants from becoming the main victims of economic downturns.[62] Therefore, the labour market legal framework needs to establish labour standards and safeguard workers' rights, functioning as an enforcement mechanism to ensure compliance. Key regulations should govern working conditions[63] and they protect workers' rights to organise, bargain collectively, access legal due process, and be free from forced labour.[64]

In this regard, the abovementioned European Convention on the Legal Status of Migrant Workers[65] is one of the CoE treaties governing the treatment of foreigners in Member States. It complements the European Social Charter[66] by specifying the social and economic rights of migrant workers. In terms of residence rights, its counterpart is the Convention on Establishment,[67] while social security rights are addressed in the European Convention on Social Security.[68] More broadly, the ECHR applies to all individuals within the jurisdiction of CoE Member States, with several

61 Fauri, 2015, 105.
62 Council of Europe, 1985, p. 9.
63 For example, the principle of equal pay has gradually gained recognition and is explicitly affirmed in most international conventions protecting migrant workers and their families. See Vourc'h et al., 1999, p. 82.
64 Freeman and Ögelman, 2000, p. 115.
65 The Convention defines a migrant worker as a national of one contracting party who has been authorised to reside in another contracting state specifically for the purpose of paid employment. This requirement is essential, as individuals who reside for other reasons, even if they engage in work, such as students working part-time or full-time during their studies, are not covered by the Convention. Additionally, several categories of workers are explicitly excluded from this definition, including frontier workers, artists, entertainers, athletes employed for short-term engagements, members of liberal professions, seamen, trainees, seasonal workers, and employees sent by a foreign company to perform specific work in another contracting state. See Council of Europe, 1977a, p. 11.
66 Council of Europe, 1996.
67 Council of Europe, 1955.
68 Council of Europe, 1972.

provisions relevant to migrant workers.[69] Therefore, the ECHR itself does not specifically regulate labour migration, but several articles apply to the rights of migrant workers, irregular migrants, and economic migrants in terms of employment rights, family life, discrimination,[70] and expulsion. In that sense, Article 3 and Article 4 regulating the prohibition of torture, inhuman or degrading treatment[71] and prohibition of slavery and forced labour is particularly relevant in cases of exploitation of migrants. Article 5 regulating the right to liberty and security[72] has been used in cases concerning the detention of irregular migrants. Article 8 regulating the right to respect for private and family life,[73] protects family unification,[74] residence rights and deportation cases. Article 13 regulating the right to an effective remedy[75] ensures that migrants can challenge unlawful detention or deportation. Article 14 on the prohibition of discrimination[76] prevents discriminatory treatment of migrants' employment, healthcare, and social security. Article 4 of Protocol No. 4 regulating the prohibition of collective expulsion of aliens (hereinafter Protocol No. 4)[77] protects migrants from mass deportations without an individual case review. Finally, Article 1 of Protocol No. 1 on the protection of property (hereinafter: Protocol No. 1)[78] can be relevant for migrant workers' rights to wages and property and Article 2 of Protocol No. 1 guarantees individuals the right to freedom of movement within a given territory, as well as the right to exit that territory.[79] Therefore, since ECHR does not directly and in

69 Guild, 1999, p. 5.
70 Discrimination disguised as equal treatment is often used against migrant workers, arguing that their limited job opportunities are due not to their migrant status but to a lack of required qualifications. See Räthzel, 1999, p. 50.
71 Art. 3 of the ECHR.
72 Art. 5 of the ECHR.
73 Art. 8 of the ECHR.
74 The Council of Europe has put forward several recommendations to Member States on the matter of family unification. Additionally, the issue has been discussed at the international level within the International Labour Organisation, leading to significant developments, including Convention No. 143. This Convention allows Member States to take all necessary measures within their authority and cooperate with other states to facilitate family reunification for legally residing migrant workers. See Tilly, 2015, p. 221.
75 Art. 13 of the ECHR.
76 Art. 14 of the ECHR.
77 Council of Europe, 1963, art. 4.
78 Council of Europe, 1952, art. 1.
79 The ECtHR has clarified that freedom of movement under art. 2 of Protocol No. 4 prohibits any restrictions that are not lawful, necessary, and proportionate in a democratic society. This provision is related to art. 5(1) ECHR, which protects against deprivation of liberty, but the latter does not cover mere restrictions on movement. This distinction between the two is one of degree and intensity, rather than nature or substance, making classification difficult in borderline cases. To determine whether a measure falls under art. 5(1) or art. 2 of Protocol No. 4, factors such as type, duration, effects, and implementation must be assessed. See Schabas, 2015, pp. 1056–1057.

detail regulate employment, the European Social Charter (ESC)[80] provides specific rights for migrant workers, including Article 1 on the right to work,[81] Article 19 on the right of migrant workers and their families to protection and assistance,[82] Article 4 on the right to fair remuneration[83] and Article 6 on the right to bargain collectively[84] etc. Nevertheless, this instrument does not grant migrant workers an automatic right to be admitted to other Member States, despite Article 18 which affirms their right to work[85] in another Contracting Party's territory, and Article 19 which provides protection and assistance.[86] However, it is worth emphasising that Europe still lacks specialised protective standards for unauthorised migrant workers. The ESC and the European Convention on the Legal Status of Migrant Workers[87] apply only to nationals of contracting states who are legally employed. According to some scholars, the Migrant Workers Convention sets only a minimum standard of treatment for irregular migrants, who remain largely unprotected under regional European norms.[88]

According to the above, even though the CoE provides various protections related to employment and workers' rights, only the revised European Social Charter (ESC) explicitly guarantees the right to work under Article 1.[89] This provision commits states to pursue full employment policies, ensuring free access to employment services, and promoting vocational training and rehabilitation. However, these obligations relate to policy measures rather than results, meaning failure to achieve full employment does not automatically constitute a violation. The European Committee of Social

80 Council of Europe, 1996. While the ECHR primarily protects civil and political rights, the ESC ensures social and economic rights, including most labour rights. The ECHR allows individuals to file petitions directly with the ECtHR. In contrast, the ESC is overseen by the European Committee of Social Rights, which assesses state compliance through periodic reports and collective complaints. See Mantouvalou, 2013, p. 531.

81 Art. 1 of the ESC.

82 Art. 19 of the ESC.

83 Art. 4 of the ESC.

84 Art. 6 of the ESC.

85 Despite the recognition of social rights under the ESC, the ECtHR has consistently ruled that migrants do not have a general right to work under the ECHR. Moreover, Strasbourg institutions have often dismissed claims challenging state measures that leave individuals, including migrants, in destitution. A notable early example was a 1990 Commission decision, where a non-migrant family living in state-providing housing lost access to electricity due to unpaid bills leaving them without heating or lighting. Their application was deemed inadmissible, reinforcing the Court's restrictive approach to socio-economic hardships under the ECHR. See more in: Dembour, 2021, p. 28.

86 Plender, 1985, p. 45.

87 Council of Europe, 1977a.

88 Berg, 2007, pp. 21–22.

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

Rights assesses compliance by examining a state's economic situation, employment policies, and support for vulnerable groups, such as ethnic minorities. For example, a lack of commitment to full employment or inadequate measures to combat high and long-term unemployment can be considered violations. Also, Article 1.2 ESC(r) has been interpreted to further protect the right to work by prohibiting employment discrimination, though this right applies only to lawfully resident migrants and nationals of contracting states. However, restrictions apply to jobs related to public interest, national security, or public authority functions.[90] Furthermore, Article E of the ESC emphasises that the rights established in the Charter shall be guaranteed without discrimination on any basis, including race, colour, sex, language, religion, political or other options, national origin, social background, health status, affiliation with a national minority, birth, or any other status.[91] Therefore, discrimination can occur when uniform measures are implemented without accounting for relevant differences, leading to a disproportional impact on specific groups, such as ethnic minorities. It can also result from inaction, where the failure to ensure effective access to rights and benefits for all workers creates inequality.[92] However, Article G of the ESC further regulates that the provided protection against discrimination can be restricted only if prescribed by law or deemed necessary in a democratic society to protect the rights and freedoms of others, as well as public interest, national security, public health, or morals. Any restrictions permitted under this Charter must be applied solely for the purposes for which they were established and not for any other reason.[93] Therefore, for example, while the prohibition of discrimination in employment ensures equal treatment, it does not prevent states from limiting access to employment for foreigners who do not possess a valid work permit. However, a general restriction barring nationals of other contracting states from employment, unless justified under Article G of the ESC, would constitute a violation of the right to non-discrimination guaranteed by the ESC.[94]

Finally, under Article 12.4(a) of the ESC,[95] migrant workers and their families must receive equal social security rights as nationals. States can ensure this through bilateral and multilateral agreements. Unlike other provisions, Article 12.4 has a broader scope, extending rights to former residents, refugees, stateless persons, and self-employed workers, as recognised by the ESC. Additionally, the ESC requires states to eliminate discrimination in social security laws, ensuring equal access to foreigners from contracting states. While nationality-based restrictions are prohibited, reasonable residency requirements for non-contributory benefits and child benefits linked to residency are considered compatible with Article 12.4 ESC.[96] In order to understand

90 Ktistakis, 2013, pp. 61–63.
91 Art. E of the ESC.
92 Ktistakis, 2013, pp. 63–65.
93 Art. G of the ESC.
94 Ktistakis, 2013, p. 65.
95 Art. 12 of the ESC.
96 Ktistakis, 2013, pp. 68–69.

the ECtHR standpoint towards the social security rights of migrants, the chapter will provide an analysis of the pillar case laws in that regard. Additionally, the following section includes an analysis of other relevant decisions of the ECtHR crucial for the protection of migrant workers in the scope of the ECHR.

3.1. The ECtHR's Role in the Protection of Migrant Workers

In a world where labour law is losing its central role amid globalisation and social exclusion, the ECtHR remains a pillar of Western democracies. It serves as a guiding force, offering direction and protection in uncertain times.[97] In order to reach that role, the ECtHR has expanded the ECHR to include certain social rights, recognising their connection to civil rights. In *Airey v Ireland*,[98] for example, the Court affirmed that socio-economic rights fall within the Convention's scope. It has also interpreted Article 3 of the ECHR[99] to protect undocumented migrants' health and to argue that denying basic income support can lead to inhuman and degrading conditions.[100] This approach contributes to the opinion that the ECtHR is increasingly viewed as a European Court of Social Rights, prioritising justice and social principles over purely economic considerations. Unlike the European Court of Justice, which focuses on EU economic goals, the ECtHR integrates social rights into its jurisprudence. It has also reinforced International Labour Organisation standards, contributing to the multi-level protection of social rights.[101]

Therefore, labour rights are primarily protected under social rights treaties, with the ECHR directly addressing trade union rights (Article 11) and the prohibition of slavery, servitude and forced labour (Article 4). While trafficking is not explicitly mentioned, the ECtHR has progressively interpreted Article 4 to encompass it,[102] establishing state obligations to prevent exploitation, protect victims, and ensure effective investigations, as will be visible in the examples of case-law analysed below. The Court has emphasised equal protection for all individuals, regardless of

97 Perulli and Sychenko, 2018, p. 288; Dorssemont and Lörcher, 2013, p. 417.
98 *Airey v Ireland*, Application No. 6289/73, European Court of Human Rights, Judgement of 9 October 1979, Series A No. 32.
99 Art. 3. of the ECHR.
100 Perulli and Sychenko, 2018, p. 288.
101 Ibid., p. 289.
102 The ECtHR has developed a wide range of case laws on the concrete obligations regarding trafficking, such as: *Siliadin v France*, European Court of Human Rights, Application No. 73316/01, Judgement of 26 July 2005; *Rantsev v Cyprus and Russia*, European Court of Human Rights, Application No. 25965/04, Judgement of 7 January 2010; *C.N. v France*, European Court of Human Rights, Application No. 67724/09, Judgement of 11 October 2012; *C.N. v United Kingdom*, European Court of Human Rights, Application No. 4239/08, Judgement of 13 November 2012; *Chitos v Greece*, European Court of Human Rights, Application No. 51637/12, Judgement of 4 June 2015; *L.E. v Greece*, European Court of Human Rights, Application No. 71545/12, Judgement of 21 January 2016; *J. and Others v Austria*, European Court of Human Rights, Application No. 58216/12, Judgement of 17 January 2017; *Chowdury and Others v Greece*, European Court of Human Rights, Application No. 21884/15, Judgement of 30 March 2017. See more in Ippolito and Pérez González, 2021, pp. 152–155. Some of the aforementioned cases will be analysed in more detail below.

nationality, and has recognised vulnerability as a key factor in determining situations of slavery and forced labour.[103] Consequently, the ECtHR has recognised migrant workers as a vulnerable group in certain contexts,[104] particularly concerning exploitation, discrimination, and lack of legal protection. However, the ECtHR does not automatically classify all migrant workers as vulnerable but recognises their potential for heightened vulnerability, especially in cases of precarious legal status, exploitative labour conditions, and lack of access to justice. While vulnerability[105] is frequently acknowledged by the Member States of the CoE and the international community, the concept of intersectionality or intersectional vulnerability remains less widely recognised or incorporated into legislation, case law, and international reports.[106] Vulnerability theory challenges the ECtHR's interpretation of vulnerability, though the concept itself predates the Court's usage.[107] For example, in *Chowdury and Others v. Greece*,[108] the ECtHR addressed the exploitation of Bangladeshi migrant workers on a Greek strawberry farm in Manolada. These undocumented workers endured gruelling conditions, working long hours under armed supervision without pay for months. When they demanded their wages, they were met with gunfire, resulting in serious injuries to several workers. The ECtHR determined that this treatment constituted forced labour and human trafficking, highlighting that initial consent to employment does not preclude a situation from being classified as forced labour. The ECtHR emphasised the migrant workers' vulnerability due to their undocumented status and the state's failure to protect them, thereby violating Article 4 of the ECHR, which prohibits forced labour and human trafficking.[109] The Court highlighted that the applicants' status as undocumented workers heightened their vulnerability, particularly due to their precarious legal situation, financial instability, and fear of detention or deportation, all of which increased their risk of exploitation. In that case, the ECtHR reinforced this link between vulnerability and forced labour, noting that modern-day slavery disproportionately affects women, often as migrant domestic workers.[110] Finally, the ECtHR outlined state obligations under Article 4 of the ECHR, requiring both preventative and protective measures against human trafficking. States

103 Ibid., pp. 152–153.
104 In recent years, the European Court of Human Rights has issued numerous rulings on individual rights, including immigration and family reunification. As the Court's influence has expanded, national courts have increasingly referenced the ECHR in their decisions in these matters. See more in Nuhoglu Soysal, 1995, p. 150.
105 The concept of vulnerability has gained prominence across various disciplines, offering new perspectives on persistent issues such as social marginalisation, economic insecurity, and global conflicts. While widely embraced, it has also faced criticism for its broad and evolving application. See Cole, 2016, pp. 260, 262; Baumgärte, 2020, p. 14.
106 Mendola and Pera, 2021, pp. 110, 119.
107 See more about the vulnerability interpretation by the ECtHR in: Baumgärte, 2020, pp. 16–18.
108 *Chowdury and Others v. Greece*, Application No. 21884/15, European Court of Human Rights, Judgement of 30 March 2017.
109 Perulli and Sychenko, 2018, p. 292.
110 Ippolito and Pérez González, 2021, pp. 152–155.

must establish effective legal and administrative frameworks to safeguard victims' rights and to ensure that immigration laws do not enable or tolerate trafficking. In some cases, states are also required to take active measures to protect individuals at risk.[111] However, that case is just one of many others considering the rights of migrant workers through the eyes of the ECHR. Therefore, the following analysis will provide a broader range of the case-law analysis in order to clarify the ECtHR's standpoints towards the situations that challenge and violate the position and rights of migrant workers.

3.2. ECtHR Case-Law on Migrant Workers: Slavery, Servitude and Forced Labour

While the previously discussed, the decision in *Chowdury and Others v. Greece* represents a significant milestone in ECtHR case law, with the Court addressing the rights and vulnerabilities of migrant workers in numerous other rulings. Therefore, the ECtHR has played a crucial role in shaping the legal framework governing the treatment of migrant workers, particularly in relation to their fundamental rights. This analysis will focus on landmark decisions that have had a profound impact on the development of legal standards in this area, influencing both national and international approaches to the protection of migrant workers' rights. The case-law analysis will cover the main challenges and rights violations of migrant workers analysed by the Court, including slavery, servitude, and forced labour in connection to human trafficking, just as discrimination based on nationality and social security rights protection.

3.2.1. Rantsev v Cyprus and Russia

Slavery and servitude are universally recognised as criminal offences and are prohibited under various international legal instruments, with the prohibition of slavery established as *jus cogens* in international law. However, the ECtHR has set specific criteria for classifying a situation as slavery or servitude, as seen in the case of *Rantsev v Cyprus and Russia*.[112] Namely, this case concerned the suspicious death of Ms. Oxana Ranstseva, a Russian national who travelled to Cyprus on an "artiste" visa, a system widely associated with human trafficking. After leaving her employer, she was forcibly taken to a police station, which then released her into the custody of the same employer. Hours later, she was found dead after falling from a balcony. Her father alleged that both Cyprus and Russia failed to protect her from trafficking and conduct a proper investigation. The ECtHR ruled that Cyprus violated Article 2 (right to life) by failing to ensure her safety and properly investigate her death. It also found both Cyprus and Russia in breach of Article 4 (prohibition of slavery) for failing to prevent

111 Pinto de Albuquerque, 2020, p. 30.
112 Ktistakis, 2013, pp. 63–65.

trafficking and investigate its circumstances. Additionally, Cyprus violated Article 5 (right to liberty) by unlawfully detaining and handing her to her employer.[113]

Therefore, despite some critics,[114] the ECtHR expanded the ECHR's interpretation by incorporating international legal norms and soft law principles, aligning its application with broader international law. This approach allowed it to recognise the case as one involving a trafficking victim who died due to the state's procedural failure to protect her. As a result, the ECtHR unanimously held that human trafficking, though not explicitly mentioned in the ECHR, fell within the scope of Article 4. This was a significant development, as the Court had previously only addressed human trafficking once, in *Siliadin v France*,[115] which will be analysed below. This interpretative approach significantly broadened the Court's engagement with labour rights, bridging the gap between civil and social rights more than ever before.[116] However, some scholars argued that the broad positive obligations[117] established by the ECtHR, in this case, have been gradually weakened, raising concerns about the diminishing human rights-based approach to trafficking under international human rights law. While the ECHR does not explicitly prohibit less severe forms of exploitation, such cases could, in certain circumstances, fall under the protection of Article 3.[118] It is also important to emphasise that in this case, the ECtHR clarified the concept of forced and compulsory labour, establishing that it requires physical and psychological coercion that overrides an individual's free will.[119] Finally, this case led to legal reforms and remains a key precedent in human trafficking and migrant worker rights.

3.2.2. Siliadin v France

In the context of human rights, defining key concepts is essential to clearly outline the scope of Article 4 ECHR, and the specific conduct states must refrain from. From the perspective of positive obligations, definitions of slavery, servitude, and forced labour serve to establish the circumstances in which states are required to take action. However, human rights norms, including Article 4, are generally broad and open-ended, requiring interpretation. The ECtHR applies progressive and expansive interpretation techniques, ensuring that legal protections evolve to address emerging human rights concerns.[120] Namely, the prohibition of slavery, servitude and forced labour requires states to take preventive and investigative measures. The ECtHR has affirmed that states must protect individuals from forced labour when they are aware or should be aware of the risks of trafficking and exploitation. *Siliadin v France* is a

113 *Rantsev v Cyprus and Russia*, European Court of Human Rights, Application No. 25965/04, Judgement of 7 January 2010.
114 See Allain, 2010, p. 555.
115 Pinto de Albuquerque, 2020, p. 30.
116 Mantouvalou, 2013, p. 537.
117 See more about positive obligations that the ECtHR referred to in this case in: Pati, 2011.
118 Ippolito and Pérez González, 2021, pp. 152–155.
119 *Rantsev v Cyprus and Russia*, European Court of Human Rights, Application No. 25965/04, Judgement of 7 January 2010, par. 276; Ktistakis, 2013, pp. 63–65.
120 Stoyanova, 2014, pp. 419–420.

key case in this context, reinforcing states' obligations to prevent and combat such abuses.[121] A similar approach of incorporating soft law principles to protect migrant workers' rights was later applied in the aforementioned case *Chowdhury and Others v Greece*.

In the case *Siliadin v France*, the ECtHR referenced the Parliamentary Assembly's findings that modern slavery primarily affects women, particularly migrant domestic workers. Given that the Convention does not explicitly define servitude or forced labour, the Court emphasised the importance of interpreting these terms in light of relevant international legal instruments.[122] Namely, the case concerned a Togolese minor, Ms Siwa-Akofa Siliadin, who was brought to France under the false promise of education and legal residency. Instead, she was forced to work as an unpaid domestic servant for several years in conditions of servitude. Her passport was taken away, and she was made to work long hours without pay and was entirely dependent on her employers. The ECtHR found that France violated Article 4 of the ECHR, as its legal framework at the time did not provide sufficient protection against servitude and forced labour. The Court ruled that Siliadin had been held in servitude due to her complete dependence on her employers, her isolation, and her lack of alternative means of survival. However, it did not classify her situation as slavery, as there was no formal ownership or legal control over her.[123] This case marked the first time the ECtHR held a state accountable for failing to protect an individual from servitude. It established that states have positive obligations under Article 4 to criminalise and effectively prevent forced labour and servitude. The judgement led to legal reforms in France and reinforced the requirement for states to adopt stronger protections against modern forms of exploitation.

Therefore, the ECtHR found that the applicant was in servitude because, beyond being subjected to forced labour, she was a vulnerable and isolated minor without resources or any means to live independently from the household where she was employed.[124] In this regard, forced labour is classified as a form of exploitation within the framework of human trafficking. It is explicitly outlawed under Article 4 of the CoE Convention on Actions against Trafficking in Human Beings[125] and Article 3 of the Palermo Protocol,[126] which complements the UN Convention against Transnational

121 Ktistakis, 2013, p. 65.
122 Pinto de Albuquerque, 2020, p. 30.
123 *Siliadin v France*, European Court of Human Rights, Application No. 73316/01, Judgement of 26 July 2005.
124 Ippolito and Pérez González, 2021, pp. 152–155.
125 Council of Europe, 2005.
126 United Nations, 2000b.

Organised Crime.[127] One of the best examples of previous judgements of the ECtHR in which the Court has defined forced and compulsory labour based on the ILO definition, even though not on the migrant worker's scenario, is the case *Van der Mussele v Belgium*. Namely, this case concerned Eric Van der Mussele, a Belgian lawyer, who challenged the requirement for pupil *avocats* (trainee lawyers) to provide unpaid pro bono legal assistance to indigent clients. He argued that his obligation amounted to forced or compulsory labour under Article 4(2) ECHR, violated his property rights under Article 1 of Protocol No. 1, and constituted discrimination under Article 14. His complaint was not about the appointment itself, but about the lack of compensation and reimbursement and the sanctions he would face for refusal, such as potential exclusion from the bar register. The ECtHR ruled that Belgium had not violated the ECHR. It found that while the requirements constituted "labour", it was not forced or compulsory because trainee lawyers voluntarily enter the profession knowing they must provide free legal aid as part of their training. The obligation was proportionate, justified, and aligned with civil duties under Article 4(3)(d), contributing to access to justice for indigent individuals. This case reaffirmed that certain professional obligations do not constitute forced labour when they serve a legitimate public interest and are proportionate to the benefits gained.[128] Therefore, the ECtHR noted that since Article 4(2) ECHR does not define forced or compulsory labour, the ILO Convention No. 29 definition could serve as a reference,[129] given that this treaty is binding on nearly all CoE Member States.[130] It stated that an obligation to work must be "unjust" or "oppressive" to qualify as compulsory labour. The Court further emphasised that such labour exists if the burden imposed is excessively disproportionate to the benefits marking prior acceptance meaningless.[131] The Court later reaffirmed the approach in *Siliadin v France*[132] *and Stummer v Austria*.[133]

127 United Nations, 2000a; Ktistakis, 2013, p. 65. It is important to emphasise that the ECtHR distinguished between the Palermo Protocol and the Anti-Trafficking Convention, noting that while the former focuses on transnational trafficking involving organised crime, the latter applies to all forms of trafficking, including national cases. It adopted the broader scope of the Anti-Trafficking Convention, emphasising that restricting protection would undermine the Convention's purpose. The Court also noted that internal trafficking is now the most prevalent form and reaffirmed that Article 4 ECHR must be interpreted in light of the Anti-Trafficking Convention. Additionally, it pointed out that, when read alongside UNTOC, the Palermo Protocol does not strictly require a transnational or organised crime element for trafficking to be recognised. See European Court of Human Rights, 2021, pp. 65–66.

128 *Van der Mussele v Belgium*, European Court of Human Rights, Application No. 8619/80, Judgement of 23 November 1983.

129 Hinzpeter, 2020, p. 272.

130 European Court of Human Rights, 2021, p. 61.

131 Hinzpeter, 2020, p. 272.

132 *Siliadin v France*, European Court of Human Rights, Application No. 73316/01, Judgement of 26 July 2005.

133 *Stummer v Austria*, European Court of Human Rights, Application No. 37452/02, Judgement of 7 July 2011.

3.2.3. J. and Others v Austria

In *J. and Others v Austria,* the ECtHR took a more restrictive approach, ruling that Austria had no obligation to investigate the applicants' recruitment and alleged exploitation abroad. The Court commended the Austrian authorities for conducting interviews with trained officers and regularising the applicants' stay, emphasising that, under Article 4, what matters is that their claims were taken seriously and the legal framework was properly applied.[134] In that case, three Filipino domestic workers were trafficked to Dubai, where they faced exploitation and forced labour. They later travelled to Austria with their employers, where they continued to work under abusive conditions before escaping and reporting their situation. The ECtHR examined whether Austria had violated Article 4 (prohibition of slavery and forced labour) by failing to investigate their case properly. The Court ruled that Austria had not breached its obligations, as the exploitation mainly occurred outside its territory. While the authorities assisted the applicants and conducted interviews, they were not required to investigate crimes committed abroad.[135] This decision marked a restrictive approach to states' investigative duties in cross-border trafficking cases. Importantly, in this case, the Court clarified that the key elements of trafficking, including the commodification of human beings, strict surveillance, restricted movement, the use of violence and threats, exploitative living and working conditions, and minimal or no remuneration, are present across all three categories outlined in Article 4.[136]

Finally, based on the above-analysed case law, the ECtHR has recognised protections against forced labour and trafficking, but distinctions between the two remain unclear.[137] Some scholars argue that the broad obligations established in *Rantsev* have been weakened, undermining a human rights-based approach. Although the ECHR does not explicitly prohibit less severe exploitation, such cases may still fall under Article 3.[138] Furthermore, human trafficking falls under Article ECHR, but related conduct may also raise issues under other ECHR provisions, depending on the case. Whether a situation involves human trafficking is a factual determination based on all relevant circumstances. For conduct to qualify as human trafficking under Article 4, it must meet the three key elements as defined in international law: action, means, and purpose. The Court confirmed that trafficking applies to both national and transnational cases, including migrants, regardless of organised crime involvement. Also, Article 4 protects against serious exploitation, such as forced prostitution, even if it does not fall within a trafficking framework. Such cases may also involve slavery or servitude or raise issues under other ECHR provisions.[139] Therefore, based on the above, it is apparent that, even though the ECtHR played an important role

134 Pinto de Albuquerque, 2020, p. 30.
135 *J. and Others v Austria*, European Court of Human Rights, Application No. 58216/12 Judgement of 17 January 2017.
136 European Court of Human Rights, 2021, p. 64.
137 Milano, 2017, p. 114.
138 Ippolito and Pérez González, 2021, pp. 152–155.
139 Europan Court of Human Rights, 2021, pp. 67–68.

in protecting migrant workers from the mentioned rights violations, the approach is still deficient. Namely, the ECtHR should consider providing clearer guidelines on the distinction between forced labour, servitude, and human trafficking under Article 4 of ECHR, to provide a more comprehensive parameter for the national institutions and avoidance of misinterpretations. Additionally, a more consistent application of positive obligations of Member States to prevent and investigate labour exploitation would strengthen migrant protections, just as engaging more with international instruments, including ones provided by the International Labour Organisation. Therefore, a more homogeneous and persistent approach would potentially improve the effectiveness of human rights-based protections for migrant workers.

3.3. ECtHR Case-Law on Discrimination Based on Nationality and Social Security Rights

3.3.1. Gaygusuz v Austria

The right to social security is also recognised within civil and political rights. The ECtHR has ruled that entitlement to benefits, as a pecuniary right, falls under the protection of property rights in Article 1 of Protocol No. 1 ECHR, particularly when a resident has contributed to a pension scheme. However, the Court clarified that restricting these rights does not automatically constitute discrimination if the claimant is neither a national nor a resident of the state. In *Gaygusuz v Austria,* the Court extended this protection beyond contributory schemes, ruling that denying a lawfully resident migrant access to non-contributory benefits solely based on nationality violated Article 14 ECHR and the right to non-discrimination.[140] Namely, the applicant, a Turkish national legally residing and working in Austria, was denied emergency assistance after exhausting his entitlement to unemployment benefits solely on the basis of his nationality. He argued that this refusal constituted discrimination under Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1, which protects the right to property. The ECtHR ruled that Austria's exclusion of non-nationals from emergency assistance, despite their contributions to the unemployment insurance system, amounted to unjustified discrimination. The Court held that emergency assistance was a pecuniary right protected under Protocol No. 1 and that differential treatment based solely on nationality required particularly strong justification, which Austria failed to provide.[141]

Therefore, the Court ruled that discriminating against a migrant worker based on nationality in access to social security violates the ECHR. However, the ECHR is not specifically designed to regulate migrant workers' rights but rather sets a minimum standard based on civil and political rights. For broader protections against discrimination in living and working conditions, Member States should rely on other

140 Ktistakis, 2013, p. 69.
141 *Gaygusuz v Austria,* European Court of Human Rights, Application No. 17371/90, Judgement of 16 September 1996.

instruments, such as the European Convention on the Legal Status of Migrant Workers.[142] Finally, this judgement was initially seen as a breakthrough for migrant workers' rights in social security. However, its impact remained limited, as the ECtHR largely confined its reasoning to legally settled migrants and did not extend it beyond social benefits. The Court has often downplayed the broader challenges faced by migrants, particularly those without legal status, by focusing on narrow legal issues rather than a holistic approach. Moreover, the ruling implicitly upheld immigration control as a valid justification for differential treatment, making its scope more restricted than it may seem.[143]

3.3.2. Andrejeva v Latvia

In the case *Andrejeva v Latvia*, the ECtHR ruled that Latvia had violated Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (right to property). The violation ensued because the Latvian authorities refused to count the applicant's years of service in the former Soviet Union, while she was residing in Latvia and working on what is now Latvian territory when calculating her pension entitlement. This denial was based solely on the fact that she was not a Latvian citizen, leading to unjustified discrimination.[144] Namely, this case concerns the Latvian government's refusal to count the applicant's years of employment in Soviet-era enterprises based outside Latvia when calculating her pension, solely because she was a non-citizen. Ms Andrejeva, originally from Kazakhstan, had lived and worked in Latvia since 1954. Although she was physically employed in Latvia throughout her career, her employer was registered outside Latvian territory during the Soviet period. When she retired, the Latvian authorities denied her pension rights for the years worked in Soviet enterprises outside Latvia, while Latvian citizens in a similar situation received full pension benefits. The ECtHR found that Latvia's refusal to grant Andrejeva full pension rights was discriminatory, as it treated non-citizens less favourably without a legitimate justification. The ruling emphasised that residence, rather than nationality, should determine pension eligibility, especially since Andrejeva had continuously lived and worked in Latvia. The case is significant for the social security rights of non-citizens and highlights the risk of indirect discrimination in post-Soviet legal transitions.[145]

Similarly, in *Savickis and Others v Latvia*,[146] the ECtHR ruled that Latvia had a wide margin of appreciation in deciding pension entitlements, given the historical context of restoring independence after Soviet rule. The case concerned whether excluding non-citizens' employment periods in other Soviet republics from pension calculations

142 Council of Europe, 1977a, p. 9.
143 Dembour, 2015, pp. 256, 259, 280, 281.
144 See Branko, 2023.
145 *Andrejeva v Latvia*, European Court of Human Rights, Application No. 55707/00, Judgement of 18 February 2009.
146 *Savickis and Others v Latvia*, European Court of Human Rights, Application No. 49270/11, Judgement of 9 June 2022.

was discriminatory. Unlike in *Andrejeva v Latvia*, the Court accepted that nationality-based distinction could be justified in this context, as Latvia provided strong reasons for differentiating between citizens and non-citizens, particularly regarding access to state benefits.[147]

To conclude, the ECtHR approach to socio-economic rights requires reconsideration for further improvement. Namely, the ECHR was in the first place constructed to protect civil and political rights, and it did not explicitly consider socio-economic protections. While the Court has extended limited socio-protection to migrant workers, as visible in *Gaygusuz v Austria*, access to nationality, residence, and employment status remains inconsistent and unforeseen. The ESC provides broader socio-economic protections, but enforcement mechanisms remain weaker compared to the ECHR. Therefore, a more integrated approach between the ECHR and ESC is needed to ensure that migrant workers' socio-economic rights are adequately protected. The ECtHR's closer engagement with the jurisprudence of the European Committee of Social Rights and potentially referencing its judgements would help bridge the gap between civil-political and socio-economic rights within the CoE system. Finally, regarding social security rights, the ECtHR should consider applying and developing a proportionality test for balancing the states' economic concerns and the rights of migrant workers to access essential social protections.

4. Conclusion

The CoE, including the ECtHR, has played a crucial role in improving and strengthening legal protections for migrants and migrant workers under the ECHR. Through its evolving case law, the Court addressed multiple aspects of issues related to both migration in general and migrant workers specifically. However, despite these advancements, challenges remain, seeking to untie the limitations of the current legal framework and further develop the existing approach.

Firstly, according to the above comprehensive case-law analysis, especially through Article 4 jurisprudence, it is visible that the ECtHR has reinforced protections against the economic exploitation of migrants. However, the legal borderline between trafficking, forced labour, and servitude is still unresolved, complicated, and inconsistent. As demonstrated by decisions such as *Rantsev v Cyprus* and *J. and Others v Austria*, the extent of positive obligations placed on governments has been incoherent. Without clear standards for differentiating and executing human trafficking, servitude and forced labour, migrants, especially migrant workers, will still be exposed to obstacles in obtaining justice.

Furthermore, another key issue is the restricted recognition of socio-economic rights for migrant workers. Namely, while the ECtHR fostered a nuanced approach that recognises the vulnerabilities of migrants, its decisions remain constricted.

147 See Branko, 2023, pp. 429–455.

Therefore, due to the initial focus of the ECHR on civil and political rights, and the lack of explicit protection of socio-economic rights, overall protection of migrant workers remains insufficient. In this sense, the ESC provides broader and more detailed socio-economic protections, but its enforcement mechanisms remain weaker than the ECHR's. Therefore, the ECtHR should consider engaging more thoroughly in the European Committee of Social Rights' valuable case law by analysing and referring to its decisions. In the CoE's institutional and legal framework, this would contribute to enhancing the clear divergence between socio-economic and civil-political rights. Additionally, when evaluating nationality-based discrimination in social security, employment, and housing, a Court should consider applying a stricter threshold. To guarantee that unequal treatment is supported by compelling public interest rather than political and economic inclinations, a reduced margin of appreciation should be allowed to states. Also, recognition of intersectional vulnerabilities faced by migrant workers would develop a more tailor-based approach toward risks of discrimination and exploitation of different groups of migrant workers.

Looking ahead, future migration trends will present new legal challenges for ECtHR and the broader institutional framework of the CoE. Questions concerning the right to life, the prohibition of inhuman and degrading treatment, and the right to respect for private and family life will become central in addressing claims brought by migrants. This shift will require a more adaptive and forward-looking approach from the ECtHR and the CoE's broader legal framework. Therefore, a more coordinated response is required at the institutional level. The ECtHR, the European Committee of Social Rights, the CoE's Parliamentary Assembly, and the Committee of Ministers should enhance their cooperation to create a more integrated and coherent protection framework. Institutional mechanisms should operate in synergy rather than in isolation, ensuring that migrant workers and other vulnerable groups receive consistent and effective protection.

Bibliography

Literature

Allain, J. (2010) 'Rantsev v Cyprus and Russia: the European Court of Human Rights and Trafficking as Slavery', *Human Rights Law Review*, 10(3), pp. 546–557; https://doi.org/10.1093/hrlr/ngq025.

Bade, K.J. (2003) *Migration in European History*. Malden: Blackwell Publishing.

Baumgärte, M. (2020) 'Facing the challenge of migratory vulnerability in the European Court of Human Rights', *Netherlands Quarterly of Human Rights*, 38(1), pp. 12–29; https://doi.org/10.1177/0924051919898127.

Berg, L. (2007) 'At the border and between the cracks: the precarious position of irregular migrant workers under international human rights law', *Melbourne Journal of International Law*, 8(1), pp. 1–34.

Blanco Sío-López, C., Tedeschi, P. (2015) 'Migrants and European institutions: A study on the attempts to address the economic and social challenges of immigration in EU member state' in Fauri, F. (ed.) *The History of Migration in Europe: Prospectives from economics, politics and sociology*. Abingdon: Routledge, pp. 126–153; https://doi.org/10.13140/2.1.4998.9125.

Branko, L. (2023) 'Recent migration case-law of the European Court of Human Rights', *Europe of Rights & Liberties*, 2(8), pp. 429–455 [Online]. Available at: https://www.europedeslibertes.eu/article/recent-migration-case-law-of-the-european-court-of-human-rights-with-focus-on-socio-economic-deprivation/#footnote-60 (Accessed: 20 January 2025).

Çali, B., Bianku, L., Motoc, I. (2021) 'Migration and the European Convention on Human Rights' in Çali, B., Bianku, L., Motoc, I. (eds.) *Migration and the European Convention on Human Rights*. Oxford: Oxford University Press, pp. 3–18.

Cole, A. (2016) 'All of Us Are Vulnerable, but Some Are More Vulnerable Than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique', *Critical Horizons*, 17(2), pp. 260–277; https://doi.org/10.1080/14409917.2016.1153896.

Costello, C. (2015) 'Constructing Migration Status' in Costello, C. (ed.) *The Human Rights of Migrants and Refugees in European Law*. Oxford: Oxford University Press, pp. 63–102; https://doi.org/10.1093/acprof:oso/9780199644742.001.0001.

Council of Europe (1985) *Human Rights of Aliens in Europe*. Dordrecht: Martinus Nijhoff Publishers.

Dembour, M.B. (2015) 'Social Protection? All are Equal, But Some More So than Others: (After Gaygusuz)' in Dembour, M.B. (ed.) *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*. Oxford: Oxford University Press, pp. 250–281; https://doi.org/10.1093/acprof:oso/9780199667833.003.0010.

Dembour, M.B. (2021) 'The Migrant Case Law of the European Court of Human Rights: Critique and Way Foward' in Çali, B., Bianku, L., Motoc, I. (eds.) *Migration and the European Convention on Human Rights*. Oxford: Oxford University Press. pp. 19–42.

Dembour, M.B., Kelly, T. (2011) 'Introduction' in Dembour, M.B., Kelly, T. (eds.) *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*. Abingdon: Routledge, pp. 1–22; https://doi.org/10.4324/9780203813447.

Dorssemont, F., Lörcher, K. (2013) 'European Convention on Human Rights and the Employment Relation' in Dorssemont, F., Lörcher, K., Schömann, I. (eds.) *The European Convention on Human Rights and the Employment Relation.* London: Hart Publishing, pp. 417–429; https://doi.org/10.5040/9781474200301.

European Court of Human Rights (Grand Chamber) (2021) '*S.M. v Croatia*, Application No. 60561/14, 25 June 2020', *International Labour Rights Case Law*, 7(1), pp. 59–73.

European Legal Network on Asylum (2023) *ECtHR: Switzerland violates ECHR by refusing family reunification of refugees due to their reliance on social assistance* [Online]. Available at: https://elenaforum.org/ecthr-switzerland-violates-echr-by-refusing-family-reunification-of-refugees-due-to-their-reliance-on-social-assistance/ (Accessed: 20 January 2025).

Fauri, F. (2015) 'European Migrants after the Second World War' in Fauri, F. (ed.) *The History of Migration in Europe: Prospectives from economics, politics and sociology.* Abingdon: Routledge, pp. 103–125.

Favell, A. (2008) 'The new face of East-West migration in Europe', *Journal of Ethnic and Migration Studies,* 34(5), pp. 701–716; https://doi.org/10.1080/13691830802105947.

Freeman, G.P., Ögelman, N. (2000) 'State Regulatory Regimes and Immigrants' Informal Economic Activity' in Rath, J. (ed.) *Immigrant Businesses. The Economic, Political and Social Environment*. London: Palgrave Macmillan, pp. 107–123; https://doi.org/10.1057/9781403905338_7.

Guild, E. (1999) *The European Convention on the Legal Status of Migrant Workers (1977) An Analysis of its Scope and Benefits.* Strasbourg: Council of Europe.

Guveli, A., Ganzeboom, H.B.G., Platt, L., Nauck, B., Baykara-Krumme, H., Eroğlu, Ş., Bayrakdar, S., Sözeri, E.K., Spierings, N. (2016) *Intergenerational Consequences of Migration: Socio-economic, Family and Cultural Patterns of Stability and Change in Turkey and Europe*. Hampshire: Palgrave Macmillan; https://doi.org/10.1057/9781137501424.

Hillmann, F., Spaan, E., Van Naerssen, T. (2005) 'Landscapes of Asian migrant labour in Europe' in Spaan, E., Hillmann, F., Van Naerssen, T. (eds.) *Asian Migrants and European Labour Markets: Patterns and processes of immigrant labour market insertion in Europe*. Abingdon: Routledge, pp. 1–18; https://doi.org/10.4324/9780203016053.

Hinzpeter, R. (2020) 'The Obligation to Work and Unemployment Benefits: A Missed Opportunity to Clarify the Notion of Forced Labour', *International Labour Rights Case Law*, 6(3), pp. 270–274.

Hryshyna, Y.M., Barsuk, M., Kaylo, I.Y., Havrylyuk, V.O., Tkachenko, D.V. (2023) 'The role of Council of Europe law and ECtHR practice in the protection of refugee rights', *Tribune of comparative and international law. Juridical Tribune*, 13(3), pp. 490–508.

International Labour Office (1999) *Migrant Workers (Report presented at the International Labour Conference, 87th session, Report III(1B), Agenda Item 3)*. Geneva, June 1999.

Ippolito, F., Pérez González, C. (2021) "Handle with Care' in Strasbourg: The Effective Access of Vulnerable Undocumented Migrants to Minimum Socio- economic Rights' in Çali, B., Bianku, L., Motoc, I. (eds.) *Migration and the European Convention on Human Rights*. Oxford: Oxford University Press. pp. 138–158.

Konjević, T. (2023) 'Free Movement of Workers within the EU: Western Solidarity or Dystopian Challenges for Central-East European Workers?', *Ljubljana Law Review*, 83(1), pp. 119–144; https://doi.org/10.51940/2023.1.119-144.

Ktistakis, Y. (2013) *Protecting Migrants under the European Convention on Human Rights and the European Social Charter: A Handbook for Legal Practitioners*. Strasbourg: Council of Europe Publishing [Online]. Available at: https://rm.coe.int/168007ff59 (Accessed: 31 January 2025).

Mantouvalou, V. (2013) 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', *Human Rights Law Review*, 13(3), pp. 529–556.

Mendola, D., Pera, A. (2021) 'Vulnerability of refugees: Some reflections on definitions and measurement practices', *International Migration*, 60(5), pp. 108–121; https://doi.org/10.1111/imig.12942.

Milano, V. (2017) 'Uncovering Labour Exploitation: Lights and Shadows on the Latest European Court of Human Rights' Case Law on Human Trafficking', *Spanish Yearbook of International Law*, 83(21), pp. 83–117; http://dx.doi.org/10.2139/ssrn.3518371.

Nuhoglu Soysal, Y. (1995) *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: The University of Chicago Press.

Pati, R. (2011) "States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Ranstev v Cyprus and Russia', *Boston University International Law Journal*, 29, pp. 79–142.

Perulli, A., Sychenko, E. (2018) 'Recent jurisprudence of the European Court of Human Rights relevant to employment law', *European Labour Law Journal*, 9(3), pp. 287–298; https://doi.org/10.1177/2031952518799759.

Pinto de Albuquerque, P. (2020) 'The rights of workers, migrant workers and trade unions under the European Convention on Human Rights', *European Human Rights Law Review*, 1, pp. 24–37.

Plender, R. (1985) *Human Rights of Aliens in Europe: Introductory Report by Richard Plender, Director, Centre of European Law, King's College, London' in Council of Europe (1985) Human Rights of Aliens in Europe*. Dordrecht: Martinus Nijhoff Publishers, pp. 33–64.

Räthzel, N. (1999) 'Workers of Migrant Origin in Germany: Forms of Discrimination in the Labour Market and at the Workplace' in Wrench, J., Rea, A., Ouali, N. (eds.) *Migrants, Ethnic Minorities and the Labour Market. Integration and Exclusion in Europe*. Hampshire: Macmillian Press, pp. 35–53; https://doi.org/10.1007/978-1-349-27615-8_3.

Schabas, W.A. (2015) *European Convention on Human Rights: A Commentary*. Oxford: Oxford University Press; https://doi.org/10.1093/law/9780199594061.001.0001.

Selejan-Gutan, B. (2021) 'Cultural Rights of Migrants: Living Together in Dignity?' in Çali, B., Bianku, L., Motoc, I. (eds.) *Migration and the European Convention on Human Rights*. Oxford: Oxford University Press, pp. 175–197.

Stoyanova, V. (2014) 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking', *Cambridge Journal of International and Comparative Law*, 3(2), pp. 407–443; https://doi.org/10.7574/cjicl.03.02.191.

Tilly, P. (2015) 'From economic integration to active political participation of immigrants: The Belgium experience from Paris to the Maastricht Treaty (1950–1993)' in Fauri, F. (ed.) *The History of Migration in Europe: Prospectives from economics, politics and sociology*. Abingdon: Routledge, pp. 217–229.

Venturini, A. (2004) *Postwar Migration in Southern Europe, 1950–2000: An Economic Analysis*. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511510793.

Vourc'h, F., De Rudder, V., Tripier, M. (1999) 'Foreigners and Immigrants in the French Labour Market: Structural Inequality and Discrimination' in Wrench, J., Rea, A., Ouali, N. (eds.) *Migrants, Ethnic Minorities and the Labour Market. Integration and Exclusion in Europe*. Hampshire: Macmillian Press, pp. 72–92; https://doi.org/10.1007/978-1-349-27615-8_5.

Legal Sources

Council of Europe (1950) European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953). ETS No. 5.

Council of Europe (1952) Protocol No. 1 to the European Convention on Human Rights (adopted 20 March 1952, entered into force 18 May 1954). ETS No. 9.

Council of Europe (1955) European Convention on Establishment (adopted 13 December 1955, entered into force 23 February 1965). 529 UNTS 141.

Council of Europe (1957) European Convention on Extradition (13 December 1957, entered into force 18 April 1960). ETS No. 24.

Council of Europe (1963) Protocol No. 4 to the European Convention on Human Rights (adopted 16 September 1963, entered into force 2 May 1968). ETS No. 46.

Council of Europe (1964) European Code of Social Security (16 April 1964, entered into force 17 March 1968). ETS No. 48.

Council of Europe (1972) European Convention on Social Security (adopted 14 December 1972, entered into force 1 March 1977). 1710 UNTS 149.

Council of Europe (1977a) European Convention on the Legal Status of Migrant Workers (24 November 1977, entered into force 1 May 1983). ETS No. 93.

Council of Europe (1977b) European Convention on the Suppression of Terrorism (27 January 1977, entered into force 4 August 1978). ETS No. 90.

Council of Europe (1987) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (26 November 1987, entered into force 1 February 1989). ETS No. 126.
Council of Europe (1996) European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999). ETS No. 163.
Council of Europe (2005) Convention on Action against Trafficking in Human Beings (16 May 2005, entered into force 1 February 2008). ETS No. 197.
United Nations (1951) Convention Relating to the Status of Refugees, Adopted on 28 July 1951, United Nations Treaty Series, 189, 137.
United Nations (1966) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976). Treaty Series No. 999, 171.
United Nations (2000a) Convention against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.
United Nations (2000b) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime (adopted on 15 November 2000, entered into force 25 December 2003). 2237 UNTS 319.

Case-Law

Airey v Ireland, European Court of Human Rights, Application No. 6289/73, Judgement of 9 October 1979, Series A No. 32.
Andrejeva v Latvia, European Court of Human Rights, Application No. 55707/00, Judgement of 18 February 2009.
B.F. and Others v Switzerland, European Court of Human Rights, Application No. 14381/20, Judgement of 10 October 2023.
Beldjoudi v France, European Court of Human Rights, Application No. 12083/86, Judgement of 26 March 1992, Series A No 234.
Berrehab v Netherlands, European Court of Human Rights, Application No. 10730/84, Judgement of 21 June 1988, Series A. No. 138.
C.N. v France, European Court of Human Rights, Application No. 67724/09, Judgement of 11 October 2012.
C.N. v United Kingdom, European Court of Human Rights, Application No. 4239/08, Judgement of 13 November 2012.
Chitos v Greece, European Court of Human Rights, Application No. 51637/12, Judgement of 4 June 2015.
Chowdury and Others v Greece, European Court of Human Rights, Application No. 21884/15, Judgement of 30 March 2017.
Dalia v France, European Court of Human Rights, Application No. 26102/95, Judgement of 19 February 1998, Reports of Judgements and Decisions 1998-I.
Djeroud v France, European Court of Human Rights, Application No. 13560/88, Judgement of 27 August 1991, Series A No. 194.
Gaygusuz v Austria, European Court of Human Rights, Application No. 17371/90, Judgement of 16 September 1996.

J. and Others v Austria, European Court of Human Rights, Application No. 58216/12, Judgement of 17 January 2017.
L.E. v Greece, European Court of Human Rights, Application No. 71545/12, Judgement of 21 January 2016.
M.S.S. v Belgium and Greece, European Court of Human Rights, Application No. 30696/09 (Grand Chamber, Judgement of 21 January 2011), Reports of Judgements and Decisions 2011-I.
Mehemi v France, European Court of Human Rights, Application No. 25017/94 (Judgement of 26 September 1997), Reports of Judgements and Decisions 1997-VI.
Mendizabal v France, European Court of Human Rights, Application No. 51431/99, Judgement of 17 January 2006.
Rantsev v Cyprus and Russia, European Court of Human Rights, Application No. 25965/04, Judgement of 7 January 2010.
Rodrigues da Silva and Hoogkamer v the Netherlands, European Court of Human Rights, Application No. 50435/99 (Judgement of 31 January 2006), Reports of Judgements and Decisions 2006-I.
Savickis and Others v Latvia, European Court of Human Rights, Application No. 49270/11, Judgement of 9 June 2022.
Siliadin v France, European Court of Human Rights, Application No. 73316/01, Judgement of 26 July 2005.
Stummer v Austria, European Court of Human Rights, Application No. 37452/02, Judgement of 7 July 2011.
Van der Mussele v Belgium, European Court of Human Rights, Application No. 8619/80, Judgement of 23 November 1983.

| Chapter 9 |

The Protection of Migrants and Migrant Workers in European Union Law

Magdolna Vallasek

ABSTRACT

The aim of this chapter is to explain how the European Union protects migrants and migrant workers, and what legal instruments it uses to do so. The chapter is guided by two basic ideas. On the one hand, the emphasis is naturally placed on the human rights dimension of the topic under discussion. On the other hand, we also seek to highlight how and why the economic dimension of migration, the idea of competitiveness, is gaining importance in the development of the European Union's legal framework and vision on migration. The free movement of labour clearly has a major impact on the dynamics of the labour market, with all its positive and, where appropriate, negative effects. In this sense, labour migration is a priority in EU policy. The chapter is structured and thematically based on the assumption that the reader already has a basic knowledge of the development of European Union law, human rights and migration, in particular migration for employment purposes, so that the information presented here will deepen this knowledge and possibly introduce new perspectives. For this reason, the chapter will discuss some introductory remarks on vulnerability, migration and labour migration in the context of human rights in the European Union, the importance of the economic approach in the development of migration law in the European Union, focusing from the recent developments on the Blue Card Directive (BCD) and the Pact on Migration and Asylum. Finally, an important part of the chapter will be an analysis of employment and social rights, which will likewise be presented in the light of human rights and, where possible and relevant, case law.

KEYWORDS

migration, migrant worker, human rights, European Union, Member State, social rights

1. Introductory Remarks on Vulnerability, Migration and Work-Related Migration in the European Union in the Context of Human Rights

The legal protection of certain vulnerable categories of persons cannot be analysed and understood without a holistic and integrative understanding of them in an appropriate framework. This is no different for migrants and migrant workers. As is the case for all vulnerable groups in a specific situation, migrants and migrant workers must be treated with the utmost respect for human rights, which is the basis for the

Magdolna Vallasek (2026) 'The Protection of Migrants and Migrant Workers in European Union Law' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 393–428. https://doi.org/10.71009/2026.nj.hrpovg_9

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treatment of these groups and for all subsequent legislation, whether European Union or national. Human rights issues are and must at all times be the minimum standards for our conduct towards our fellow human beings and of the legal instruments.

As explained by scholars,

> 'as a stand-alone field of study, human rights are an expression of the convergence between humanism and legal paradigm. Thus, in the legal version of the study of human rights, humanism is the sum of the human values that it carries within its scope. We can affirm, without the shadow of a scientific doubt, that in the discourse on human rights, the introduction of the subject of values is a necessity. The latter raises humanism and its legal meaning.'[1]

It is along these values that the EU instruments for the protection of migrants and migrant workers will be analysed in this chapter. The focus will be on the legal instruments relating to labour migration, examining how they reflect the principles of equal treatment and non-discrimination, and what specific labour and social security rights arise for this vulnerable group of persons. In our view, human rights in the context of employment become of particular importance in relation to rights and in areas that are at the heart of labour and social law provisions in general, such as atypical forms of employment, where the worker is often inherently more vulnerable than a full-time worker in a typical employment situation, occupational health and safety, or even the possibilities and the potential role of collective bargaining.

It is not the aim of this chapter to analyse specific academic theories on migration, but it is necessary to clarify some aspects that are essential for the protection of migrants and migrant workers in particular, from the perspective of the protection of human rights and rights of migrants in the European Union. Our starting point for the protection offered by the European Union is taken from the introductory idea of the Pact on Migration and Asylum. According to this,

> 'migration has been a constant feature of human history with a profound impact on European society, its economy and its culture. With a well-managed system, migration can contribute to growth, innovation and social dynamism. Key societal challenges faced by the world today – demography, climate change, security, the global race for talent, and inequality – all have an impact on migration. Policy imperatives such as free movement in the Schengen area, safeguarding fundamental rights, ensuring security, and filling skills gaps, all call for an effective migration policy. The task facing the EU and its Member States, while continuing to address urgent needs, is to build a system

1 Voiculescu and Berna, 2023, p. 15.

> that manages and normalises migration for the long term and which is fully grounded in European values and international law.'[2]

The 2024 World Migration Report published by the International Organization for Migration (IOM) similarly highlights that migration can have a positive impact on the host countries' economies.

> 'Migration can also provide an important skills boost, which can be critically important for destination countries experiencing population declines. In addition to enhancing national income and average living standards, immigration can have a positive effect on the labour market by increasing labour supply in sectors and occupations suffering from shortages of workers, as well as helping address mismatches in the job market. These positive labour market effects are not just evident in high-skilled sectors, but can also occur in lower-skilled occupations. Immigration increases both the supply of and the demand for labour, which means that labour immigration (including of lower-skilled workers) can generate additional employment opportunities for existing workers.'[3]

For the purposes of this chapter, we can conclude that the European Union's legislation is indeed faced with the challenge of both providing adequate protection for a vulnerable group of persons and finding a way to achieve the 'well-managed system' in which migration can contribute to growth, innovation and social dynamism. Still, it is very important to notice, that 'the approach of vulnerability is not harmonised across CEAS's (Common European Asylum System) legislative instruments.'[4] Analysing the concept of vulnerability from a judicial point of view the starting point remains the fact that

2 European Commission, 2020. The Pact on Migration and Asylum highlights the urgent need to find the right instruments to tackle the problem, with figures from 2019. According to this, in 2019, 20.9 million non-EU nationals were legally residing in EU Member States, representing around 4.7% of the total EU population. The EU Member States issued around 3.0 million first residence permits to non-EU nationals in 2019, of which around 1.8 million were for a period of 12 months or longer. About 1.82 million irregular border crossings were recorded at the EU's external borders at the height of the refugee crisis in 2015. This has fallen to 142 000 in 2019. The number of asylum applications peaked at 1.28 million in 2015 and reached 698 000 in 2019. An average of around 370,000 applications for international protection are rejected each year, but only around a third of these applicants are sent home. Finally at the end of 2019, the EU was hosting around 2.6 million refugees, equivalent to 0.6% of the EU population. As a comparison to the above data on 1 January 2023, 27.3 million citizens of non-member countries were residing in an EU Member State, representing 6.1% of the EU population. This represents an increase of 3.5 million compared to the previous year. In addition, 13.9 million persons living in one of the EU Member States on 1 January 2023 were citizens of another EU Member State.

3 McAuliffe and Oucho, 2024, p. 6.

4 Gazi, 2021, p. 168.

> 'the approach of EU law and policy to vulnerability is rooted in the principle of equality before the law. It constitutes a cornerstone of EU law enshrined in both the Treaty on European Union (TEU) (Article 2) and the EU Charter (Article 20). Therefore, vulnerable applicants should be able to benefit from the rights and comply with the obligations provided for in the instruments of the CEAS on an equal footing with applicants who are unhindered by such vulnerabilities.'[5]

The European Union is not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, but according to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's law.[6]

In this chapter, we will focus on migrants and migrant workers as a vulnerable group. Their respective rights and situations will be examined within this context, without engaging in a deeper analysis of the broader concept of vulnerability and vulnerable groups. Similarly, it is not our intention to discuss in this chapter the different types of migration, such as economic migration, forced migration, legal migration, irregular migration or long-term migration, etc. emphasising that at the international level, no universally accepted definition for migration exists. As scholars have pointed out

> 'while it is useful to distinguish migrants from non-migrants – for practitioners, policymakers, and researchers alike – the label itself does not reflect who people are, how they identify and what they do. [...] [T]he categorisation of migrants into sub-groups is a valuable tool, both for analytical purposes and for the provision of rights. Yet, we must acknowledge the broad spectrum of experiences inherent in any migration journey, and continually consider the social, political, and analytical repercussions of the labels we use to distinguish some people from others.'[7]

Still, for the purposes of this chapter, two clarifications are necessary. Firstly, it is necessary to talk about the distinction between internal and external migration in the context of the European Union, given that internal migrants benefit from the free movement of persons. In a global context, migration refers to the movement of a person either across international borders (international or external migration), or within a state (internal migration) for more than one year. This applies, regardless of the reason for migration, whether voluntary or involuntary, and the methods used, whether regular or irregular. In the *EU/EFTA context*, migration is the action by which

5 European Asylum Support Office, 2021, p. 21.
6 Ibid., pp. 27–28.
7 Talleraas, 2022, p. 111.

a person either establishes their usual residence in the territory of an EU Member State for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another EU Member State or a third country, or having previously been usually resident in the territory of an EU Member State, ceases to have their usual residence in that EU Member State for a period that is, or is expected to be, of at least 12 months.[8]

Secondly, it is important to distinguish the group of migrant workers as a specific group among migrants, as migrant workers are covered by specific legal instruments in both international law and EU legislation. There is no internationally accepted definition of labour migration. On the other hand migrant workers are defined, using the rather general definition of the International Labour Organization (ILO) as being 'a person who is to be engaged or has been engaged in a remunerated activity in a state of which he or she is not a national'.[9] However, within the category of migrant workers, there are also many sub-categories whose situation may differ in many ways. For example, we distinguish between high-skilled migrant workers (e.g. health professionals, IT sector etc.) and low-skilled workers (e.g. working in constructions, agriculture, domestic and care work, etc.).[10]

2. A Brief Analysis of the Development of the European Union Legislation, With a Special Focus on Economic Considerations in the Context of Human Rights and Migrant Workers

2.1. The Importance of the Economic Approach in the Development of Migration Law in the European Union

The basic aim of this chapter is to describe how and by what means the European Union ensures or seeks to ensure the protection of migrants and migrant workers. In our view, in addition to protection, the promotion of the integration of this target group is of primary importance, since, for example, the success of employment depends on the degree and quality of integration into the society concerned. For this reason, although the history of migrants and migrant workers and the development of legal protection instruments have been described in more detail above in this book, we feel it necessary to briefly analyse the most important elements of EU legislation. Similarly, in what follows, we feel it necessary to place greater emphasis on the development of labour rights and social legislation relating to the employment of migrants.

8 European Commission, 2025.
9 Art. 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
10 Oso, Kaczmarczyk and Salamońska, 2022, pp. 117–135.

As noted earlier, the adoption of the Universal Declaration of Human Rights in 1948, represented one of the first important steps in the thematisation of human rights as a main concept regarding migration, in the European context internal migration being considered as important as the external migration from third countries. The recognition of the right to leave any country, including one's own, and the right to return to one's homeland, as stated in the Universal Declaration of Human Rights, will also provide the cornerstone of future EU legislation. At the same time, we must not forget the fact that the European Union was fundamentally created as an economic community, so the pillar of free movement of workers is dominated by regulations based on the economic interests of the European society.[11]

The idea of the free movement of persons and, consequently, the analysis of the phenomenon of labour migration in the literature on the European Union today strongly underlines the economic importance of migration and its impact on the labour market. However, these effects are nuanced, diverse, not always and under all circumstances positive. In their research Privara, Masárová and Tupá underline, for example, that

> 'the considerably high levels of migration in the European Union, particularly after the EU enlargement in the 2000s, have a significant influence on the demographic composition of the population by age, social and professional structure, impacting the labour market and economic indicators bringing the adjustment of national migration policies to the forefront of the authorities of Member States. Work migration can have both negative and positive impacts on the labour market of the recipient country. To determine whether the external labour migration improves or worsens the labour market conditions, it is necessary to identify whether the country has a supply shortage or a new workforce that creates additional pressure on the market, contributing to increasing unemployment and affecting wages. The controversial nature of

11 'In EU law, however, freedom of movement is not a right in itself, but a right with a purpose, the purpose of which is to enhance the economic well-being of individuals and, through them, of the community as a whole, and to promote the efficient use of labour. The EU's approach is therefore fundamentally different from that of the UN or the ILO in several respects. On the one hand, labour migration is not seen as a necessary evil, but rather, according to the neoliberal school of economics, as a process necessary to achieve maximum economic efficiency. Consequently, the issue of free movement in the EU has traditionally been an economic rather than a legal issue. On the other hand, the starting point for legal regulation is not to protect the human rights of migrants, but to allow them to work and live in other Member States. It is also striking that, in Community law, the free movement of labour is only one of a number of issues alongside the free movement of goods, services and capital, which is in stark contrast to the ILO Constitution, which states that labour is not a factor of production. However, Community law also regulates in detail issues that are not covered by the standards of other integration organisations, which also deal with international migration. Under the *acquis communautaire*, workers in the different EU Member States enjoy equal treatment and equal rights within each other's territories, which, thanks to the interpretation of the European Court of Justice, is now a principle that is widely recognised as being effectively implemented.' Dux, 2007, pp. 150–151.

> the impact of labour migration on economic indicators and the labour market in the recipient countries makes it necessary to identify and consider both negative and positive effects when developing the migration policy. Despite some positive effects that labour migration may have on economic growth, the labour market effects are not apparent. Moreover, it can have a severe negative impact by increasing the shadow economy and the number of illegally employed people.'[12]

In their study analysing labour migration following the enlargement of the European Union to Central and Eastern Europe, Landesmann and Vidovic also argue that it is worth bearing in mind the less positive effects of labour migration, but this time with regard to the country of origin perspective.

> 'Let us add some further remarks concerning patterns of intra-country and international mobility of the labour force: standard economic analysis used to welcome high spatial mobility of the labour force as this would allow a better allocation of persons to jobs and thus support market clearing. The experiences of CEE economies [...] also point to the negative sides of high intra-country and international labour mobility. Migration of the young and better qualified can have long-running hysteretic impacts on the development of regions, leading to the degradation of a significant share of regions to the status of 'peripheral' or 'lagging' regions highly dependent on long run transfers.'[13]

As a conclusion, the economic dimension of labour migration, both internal and external, is clearly present in the development of the European Union's legislation and policies. In fact, the human rights approach to migration and migration for labour purposes is taking shape in European Union legislation beyond and after this economic perspective. One of the four freedoms that underpinned economic integration defined the unrestricted movement of workers between Member States as a condition for the creation of the common market, which was later gradually transformed into the principle of free movement of persons and then into a fundamental right linked to the concept of citizenship of the Union enshrined in Article 17 of the Maastricht Treaty. Every EU citizen has the right to live and work in another country, which leads to a movement from poorer to richer countries. The Union's policy has set the objective of becoming the most competitive economy in the world and creating a knowledge-based society. One of the negative consequences of this has been the brain drain, as the strategy calls for highly qualified workers to be attracted to the European Union. The EU's communications highlight that workers are needed to address the problems of an ageing population and a shrinking workforce, and that legal immigration should

12 Privara, Masárová and Tupá, 2023, pp. 131–132.
13 Landesmann and Vidovic, 2021, p. 187.

therefore continue to be encouraged, as supported by sector-specific cooperation arrangements with other regions.[14]

Focusing on the economic dimensions of the regulation of migration and labour migration, some further clarifications develop from the legal literature. In her study, Gyenei analyses the situation of migrant workers from the premise that the European Union, precisely because of the economic benefits of the freedom of movement, has sought to overcome the barriers posed by national borders by ensuring the fundamental freedom of movement of persons for EU citizens. Subsequently, the demographic and labour market situation has led it to extend some of the rights, hitherto enjoyed only by EU citizens, to third-country nationals. In her view, based on an earlier study by Gellérné Lukács Éva,[15] one way of extending the scope was the conclusion of international treaties, the other the adoption of immigration policy directives under Title IV TEC (now Title V TFEU), on the legal basis of the Amsterdam Treaty, regulating the entry and legal status of certain categories of third-country nationals in the EU. In addition to the general considerations that arose in the context of the creation of the area of freedom, security and justice, the author asks what specific considerations led to the extension of mobility rights to third-country nationals. The answer must be sought in the following text, and we agree with this position. First and foremost, the need to meet the objective of social inclusion of third-country nationals, as set out in the Tampere Conclusions[16]and reaffirmed in the Lisbon Treaty under the concept of "fair treatment"[17]. Excluding non-EU citizens from moving between Member States could have a serious negative impact on their social integration. Among the driving forces behind the inter-Member State mobility rights of third-country nationals, it is also necessary to mention the objective of ensuring labour market flexibility and, in this context, promoting the Union's international competitiveness.[18]

We agree with those voices that underline with regard to labour migration that the EU strategies in this area have been and continue to be heavily influenced by the perception of each Member State of the need to protect its own labour market. This is true despite the fact that, at the same time, the ageing of the population and migration within the European Union are creating a need to replace and supplement the workforce.

> 'The restrictive elements of a common migration policy seem to have been the easiest on which to reach agreement. The result of the legislative activity of the past years is that there are now comprehensive EU law rules for all major forms of migration: family members, asylum seekers, refugees, students, long-term residents and researchers. However, regarding the management of

14 For further details: Erdei and Tulka, 2011, pp. 145–146.
15 Lukács, 2009, p. 13, cited in Gyenei, 2011, p. 73.
16 European Parliament, 2012.
17 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. 2007/C 306/01.
18 Gyenei, 2011, p. 77.

> labour migration, the Member States have been less able throughout these years to agree upon a common policy. Labour migration is one of the areas where the fear of losing national sovereignty is most pronounced. Many governments still regard the decision on who should be allowed to enter and reside in their country as a labour migrant to be a core aspect of this national sovereignty.'[19]

The consequence of this situation, according to the author cited, is that Community regulation of labour migration has been difficult to implement and has been achieved through a number of legal instruments.

The Blue Card Directive will be analysed in more detail later. The document, adopted in 2009, has recently been brought back into the spotlight with its recast. The Directive sets out the conditions for highly skilled workers to work in the European Union and as such is clearly based on the principle of the economic benefits of labour migration.

The Single Permit Directive came somewhat later, after four years of intense negotiations, in 2011. The aim of the Directive was to establish a single application procedure for third-country migrant workers to work in the European Union. The idea behind the single procedure was that it would also make it easier to check the status of migrant workers, but it remained up to each Member State to decide on entry and admission criteria.

> 'Nevertheless, a number of categories are excluded from the scope of this Directive, among them third country family members of EU citizens, posted workers, seasonal workers and intra-corporate transferees [...], au pairs, long-term residents under Directive 2003/109 and self-employed workers. These exclusions exemplify the fragmented approach of the EU to a common labour migration policy.'[20]

The situation of seasonal workers was regulated later, in 2014 by Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.[21] Based on Article 3(b) of the Directive 'seasonal worker' means a third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State. In contrast to the Blue Card Directive,

19 Minderhoud, 2021, p. 31.
20 Verschueren, 2018, cited in Minderhoud, 2021, p. 33.
21 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

in this case the target group is specifically low-skilled workers, and it is not by chance that the level of rights granted is lower, and that special emphasis is placed on the idea that these migrant workers should be temporary in the labour market of each Member State, but leave once they have completed their employment. As defined in Article 14 of the Directive, Member States shall determine a maximum period of stay for seasonal workers which shall not be less than five months and not more than nine months in any 12-month period. After the expiry of that period, the third-country national shall leave the territory of the Member State unless the Member State concerned has issued a residence permit under national or Union law for purposes other than seasonal work. At the same time Member States may determine a maximum period of time within any 12-month period, during which an employer is allowed to hire seasonal workers.

In terms of human rights, the requirement of equal treatment is worth highlighting in the Directive's regulation of the rights of seasonal workers. In essence, equal treatment applies to all important labour and social rights. Based on Article 23, seasonal workers shall be entitled to equal treatment with nationals of the host Member State at least with regard to: the terms of employment, including the minimum working age, and the working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements at the workplace; the right to strike and take industrial action, in accordance with the host Member State's national law and practice, and freedom of association and affiliation and membership of an organisation representing workers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, including the right to negotiate and conclude collective agreements, without prejudice to the national provisions on public policy and public security; back payments to be made by the employers, concerning any outstanding remuneration to the third-country national; branches of social security, as defined in Article 3 of Regulation (EC) No 883/2004; access to goods and services and the supply of goods and services made available to the public, except housing, without prejudice to the freedom of contract in accordance with Union and national law; advice services on seasonal work afforded by employment offices; education and vocational training; recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures and tax benefits, in so far as the seasonal worker is deemed to be resident for tax purposes in the Member State concerned. However, it should be noted that Member States have the right to restrict the equal treatment regarding certain rights, e.g. by excluding family benefits and unemployment benefits, or regarding the education and vocational trainings by limiting its application to those which is directly linked to the specific employment activity and by excluding study and maintenance grants and loans or other grants and loans, etc.

Another piece of legislation, focusing on a similarly specific group of migrant workers, is the so-called Intra Corporate Transferee Directive.[22] For the purpose of this Directive, intra-corporate transferees should encompass managers, specialists and trainee employees, as emphasised above, a special group of workers, and in this case, a highly-skilled group. However, the availability of this highly-skilled workforce in the labour market of certain Member States is limited in time. As stated in the Directive, as intra-corporate transfers constitute temporary migration, the maximum duration of one transfer to the Union, including mobility between Member States, should not exceed three years for managers and specialists and one year for trainee employees after which they should leave for a third country unless they obtain a residence permit on another basis in accordance with Union or national law. The maximum duration of the transfer should encompass the cumulated durations of consecutively issued intra-corporate transferee permits. A subsequent transfer to the Union might take place after the third-country national has left the territory of the Member States. The Directive aims to facilitate mobility of intra-corporate transferees within the Union ('intra-EU mobility') and to reduce the administrative burden associated with work assignments in several Member States. For this purpose, the Intra Corporate Transferee Directive sets up a specific intra-EU mobility scheme whereby the holder of a valid intra-corporate transferee permit issued by a Member State is allowed to enter, to stay and to work in one or more Member States in accordance with the provisions governing short-term and long-term mobility. It is to be observed, however, that

> 'the Intra-Corporate Transferee Directive includes special provisions for EU Member States to ensure or enforce the 'temporariness' of these workers, so that they cannot stay on at the end of the assignment. These workers are also not granted the possibility of crossing the bridge towards a long-term residence status in the receiving Member State.'[23]

The Directive deals with the right to equal treatment as well, mainly in the field of employment and social rights, collective labour rights and the recognition of diplomas and qualifications.

In the following chapter, without going into detail on the European Union's whole legislation on migrants and migrant workers, given that this has been presented in the previous chapter, and partly discussed above, we will briefly discuss two pieces of legislation that we believe are significant milestones in recent legal developments and the emphasised economic approach. These two are the Blue Card Directive and the Pact on Migration and Asylum.

22 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

23 Carrera et al., 2017, cited in Minderhoud, 2021, p. 35.

2.2. The Blue Card Directive and Its Impact on Labour Migration in the European Union and the Protection of Migrant Workers

The clear objective of the Blue Card Directive is to address migration from an economic perspective and to promote its positive impact on competitiveness and economic performance. As it is clearly stated:

> '[t]he Commission communication of 3 March 2010 entitled 'Europe 2020: A strategy for smart, sustainable and inclusive growth' sets the objectives of the Union becoming an economy based on knowledge and innovation, reducing the administrative burden on companies and better matching labour supply with demand. That communication identifies the need for a comprehensive labour migration policy and for better integration of migrants. Measures to facilitate the admission of highly qualified third-country workers have to be seen in that broader context. The conclusions of the European Council of 26 and 27 June 2014 state that in order to remain an attractive destination for talents and skills, Europe must compete in the global race for talent. Strategies to maximise opportunities for legal migration should therefore be developed, including the streamlining of existing rules.'[24]

In brief, the Blue Card Directive lays down the conditions of entry and residence for more than 3 months in the territory of the Member States, and the rights of third-country nationals for the purpose of highly qualified employment and of their family members, and the conditions of entry and residence, and the rights of third-country nationals and of their family members in Member States other than the Member State which first granted an EU Blue Card. It is very important to understand, that 'highly qualified employment' means the employment of a person who is in the following situation: in the Member State concerned, is protected as an employee under national employment law or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, another person; is paid for that work; and, at the same time, has the required higher professional qualifications. On the other hand, the Blue Card Directive does not apply to non-EU nationals seeking international protection, carrying out research projects, who are granted long-term resident status in a Member State or who are covered by an international agreement allowing a temporary stay, rights of free movement or whose expulsion has been suspended. The application of the Directive evidently does not affect the more favourable rules in EU law, including bilateral and multilateral agreements nor the right of Member States to decide on how many non-EU nationals may enter their territory. In order to prove the above admission criteria, applicants for an EU blue card must present a valid work contract or a

24 Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC.

binding job offer for highly qualified employment for at least six months, documents confirming their professional qualifications, valid travel, and where required visa, documents and evidence of having applied for health insurance if this is not covered in the contract.

In a brief summary of the rights and obligations of Member States, the Directive provides that they may require that the conditions laid down in the relevant national legislation, collective agreements or established practice are met and ensure that the wage threshold they set is at least, but not more than 1.6 times the gross national average annual wage. For shortage occupations and for recent (up to 3 years) non-EU graduates, a lower threshold of 80% should apply. They also decide whether the application should be submitted by the non-EU national, the employer or one of the two, if fees may be charged for processing applications provided they are not disproportionate or excessive, all necessary supporting documents and attached conditions be made easily accessible to applicants and contact persons be appointed to receive and forward information.

The Directive regulates the situations in which Member States may or must refuse an application. These are the following: Member States must reject applications where the admission criteria are not complied with, the documents presented are false, the applicant is considered a threat to public policy, security or health or the main purpose of the employer's business is to bring in non-EU nationals. It is also possible to reject applications where the vacancy may be filled by a national, EU citizen or third-country citizen legally living in the European Union, the employer has not met tax and other legal obligations, is bankrupt, is facing insolvency or has illegally employed non-EU nationals, or the applicant's home country has a lack of qualified workers in the profession concerned.

Blue Card holders benefit from a number of advantages under the Directive. The most important is that they enjoy equal treatment to EU nationals in areas such as employment conditions, freedom of association, educational and vocational training, can benefit from the mutual recognition of diplomas, social security and access to goods and services and they can be accompanied by their family members, who also have the right to work. Moreover, they may, in some certain conditions acquire long-term EU resident status, and may, after living legally for 12 months in the Member State that issued the Blue Card, move, live and work with their family in another Member State.

> 'The Blue Card Directive is not the first try of harmonisation of immigration at the EU level. Earlier attempts date from the 1980s, when the Single European Act introduced a policy toward TCNs (Third-Country Nationals), and later the 1990 Dublin and Schengen agreements. This was followed by the Maastricht Treaty and the Treaty on European Union. However, immigration policy was limited to asylum and transit visas, all placed in the third pillar of Justice and Home Affairs. While the Treaty of Amsterdam expanded the area of immigration in the first pillar (e.g. external border controls, visas, other rights of

> TCNs, immigration and asylum), Member States ensured that decisions had to be taken unanimously in the European Council, even after the five transitory years. This procedure for immigration has remained until the Treaty of Lisbon.'[25]

The adoption of the Blue Card Directive by the Council of Europe in 2009 was the first attempt to develop a framework for attracting highly-qualified third-country nationals, facilitating their admission and mobility across the EU. The Directive aimed at fulfilling/contributing to the ambitious goal of 'becoming the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion by 2010' announced at the Lisbon European Council in March 2000.[26]

Despite its ambitious objectives, the Directive has subsequently been the subject of much criticism and has developed a considerable literature, which has analysed its positive features as well as its less positive or even negative ones. The author cited above also notes that the adopted Directive was a result of a series of compromises. What compromises does the author see in the directive? First, he draws attention to the fact that

> 'the high level of flexibility given to Member States in the transposition of the Directive into national legislation led to the creation of 'national' Blue Cards and added to a series of existing national schemes. Hence, it reinforced the heterogeneity of schemes across Member States rather than leading to harmonisation. Also, the Blue Card eligibility criteria were almost impossible to reach for potential employees, while employers were reluctant to go through complicated bureaucratic procedures to issue one.'[27]

Another author has made a similar criticism of the first version of the Blue Card Directive.

> 'The 2009 BCD needed revisions as it did not succeed in bringing the added value envisaged by the European Commission, that of making the EU amongst the most attractive economies for international talent. The 2009 BCD had limited overall success in the EU, with mainly Germany, Poland and France making use of it. In the other Member States the Directive was of minor importance, although it remained in effect for labour migration even during the Covid-19 Pandemic. Among the reasons for this minor role were the demanding entry conditions, the favourable parallel national schemes for highly skilled migrants, as well as the lack of promotion of the BCD at

25 Cerna, 2010, p. 4.
26 Kalantaryan, 2017, p. 1.
27 Ibid., p. 2.

> the Member States level, which meant that potential migrants and employers knew little about it. Still, the demographic challenges faced by the EU and skills shortages in key sectors called for a more effective instrument to attract such workers. The recast BCD, which was agreed upon in October 2021, and must be implemented by the Member States by 18 November 2023, sets out to address these challenges.'[28]

Other scholars are arguing, that

> 'it is commonly admitted that the 2009 directive has been a policy failure because of its lack of added value. Very few Blue Cards have been delivered as national administrations, employers, and workers preferred to use more attractive national systems. A new directive adopted on 20 October 2021, after four years of difficult negotiations, has therefore replaced the 2009 BCD. More Blue Cards should be delivered under this new scheme, in particular to young workers, as the basic conditions have been relaxed. The possibility for Member States to keep national schemes parallel to the EU Blue Card has been maintained. However, it will no longer be possible to treat Blue Card applicants or holders less favourably than highly skilled workers under a national scheme in several areas, so that the competition between the EU blue card and national schemes should accordingly diminish overtime. Moreover, the new BCD will be more attractive as its mobility provisions offer blue card holders in a first Member State more possibilities to relocate and work in a second Member State.'[29]

Despite any criticism and arguments, it is quite obvious that the Blue Card Directive clearly sets out the European Union's approach to migrants and migrant workers. The focus on the employment purpose of migration shifts the treatment of EU citizens towards equality of treatment with third-country nationals, and also signals the EU's openness to migration, but not necessarily dominated by a humanitarian approach to migration, but by the economic benefits. We believe that, at the moment, recent developments will continue to bring this strategy to the fore.

2.3. The Impact of the New Pact on Migration and Asylum and the Regulation (EU) 2024/1351 of the European Parliament and of the Council on Asylum and Migration Management and the Protection of Migrant Workers

In contrast to the perception of migration reflected in the Blue Card Directive, the conceptual background of the New Pact on Migration and Asylum[30] was considered fundamentally different, as its wording is much more strongly oriented towards the

28 De Lange and Vankova, 2022, pp. 491–492.
29 Tsourdi and De Bruycker, 2022, p. 10.
30 European Commission, 2020.

resolution of human rights issues related to migration than the legal instruments presented earlier. "On September 23, 2020, the European Commission released its draft Pact on Asylum and Migration. The timing was not coincidental. Just two weeks earlier,

> '[o]n September 8, 2020, Moria Camp, Europe's first migrant 'hotspot' and its largest refugee camp, had burned to the ground. In the five years since its opening, on the small Greek island of Lesvos, barely four miles off the coast of Turkey, the camp had become a symbol of the failure of European Union (EU) migration policy. It showcased the trudge to Europe for over one million Syrian and other distress migrants, forced to endure life-threatening journeys to seek safety. It also shone a grim spotlight on dramatic failures in refugee protection and basic human rights enforcement in the humanitarian response taking place at the heart of the wealthy Global North.'[31]

The communication itself emphasises the human rights and solidarity perception, when citing President von der Leyen, in her State of the Union Address 2020 as it follows:

> '[w]e will take a human and humane approach. Saving lives at sea is not optional. And those countries who fulfil their legal and moral duties or are more exposed than others, must be able to rely on the solidarity of our whole European Union [...]. Everybody has to step up here and take responsibility.'

Although some authors argue that the Pact represents a paradigm shift in the European Union's approach to migration, there is a substantial literature of critical analyses that point out the document's weaknesses and raise concerns about its human rights aspects. In the literature on the proposed text of the new Pact on Migration and Asylum, it has already been stressed that it could negatively impact vulnerable groups` access to asylum. 'The positive amendments are limited, whereas the responsibility criteria are similar to the existing dysfunctional system.'[32]

Staying with the analysis of the Communication on the New Pact on Migration and Asylum, a typical finding after its publication was that

> 'regarding the format, it is not a programmatic document paving the way for the development of migration and asylum policies in the future. Regarding the content, it is not a document trying to establish a consensus about new orientations of those controversial policies.'[33]

31 Digidiki and Bhaba, 2020, p. 291.
32 Gazi, 2021, p. 175.
33 De Bruycker, 2020.

Despite the understandable criticism, the New Pact on Migration and Asylum represents an important step in the European Union's legislative process on migration, and so does the whole body of EU common legislation on migration and asylum adopted in 2024. As the Regulation (EU) 2024/1351 of the European Parliament and of the Council on asylum and migration management formulate,

> 'in order to reinforce mutual trust between Member States, it is necessary to have a comprehensive approach to asylum and migration management which brings together internal and external components. The effectiveness of such an approach depends on all components being addressed jointly and implemented consistently and in an integrated manner.'[34]

Of the new legislation, it is the treatment of human rights issues that is of most concern. Indeed,

> 'from the human rights perspective, it is the harmonisation of procedural standards that raises the biggest concerns. [...] [T]he restriction of appeals against Dublin transfers, a number of the deadlines to apply for appeals, and the curtailment of automatic suspensive effect of appeals are all problematic – depending on how the CJEU might approach them in light of its case law on effective remedies. On the merits, there are various default protections against non-refoulement, but it is uncertain how they will work in practice. And while the multiple fast track procedures are all subject to the observance of basic standards on paper, there are doubts about whether that is true in practice – leaving the possibility that the protections of EU asylum law will for many be a form of Potemkin village.'[35]

3. Labour Migration and Human Rights, With Focus on the Principle of Equal Treatment and Non-Discrimination

The right to equal treatment and non-discrimination is the most important basis for employment and labour rights in the context of labour migration. However, this issue can show important differences when examined from different perspectives. It is not the same whether we are talking about intra-EU migration in the context of free movement of persons or whether we are talking about migrants from third countries, including workers. Within the European Union, the requirement of equal treatment is based on well-established and long-established legislation, and the case law of the

34 Regulation (EU) 2024/1351 of the European Parliament and of the Council on asylum and migration management.
35 Peers, 2024, p. 113.

Court of Justice of the European Union also marks important milestones. For migrant workers, the principle of equal treatment is therefore quite clear, both in theory and in practice. At the same time, the prohibition of discrimination is an equally important principle in international conventions that go beyond the European Union.

The most fundamental formulation of non-discrimination is found in Article 2 of the Universal Declaration of Human Rights, which states that

> 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'[36]

In the context of labour rights Article 23 declares that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment and everyone, without any discrimination, has the right to equal pay for equal work. Combatting discrimination and ensuring respect for equal opportunities and equal treatment for all employees has also been the focus of the International Labour Organization. Without listing all the relevant ILO conventions, we can mention as examples, among others the Equal Remuneration Convention, 1951 (No. 100),[37] the Discrimination (Employment and Occupation) Convention, 1958

36 Universal Declaration of Human Rights issued by the United Nations General Assembly.
37 Equal Remuneration Convention, 1951 (No. 100).

(No. 111),[38] the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117)[39] or the Equality of Treatment (Social Security) Convention, 1962 (No. 118).[40]

At the level of the Council of Europe, the fundamental document on social matters, the revised European Social Charter states in Part I., 18–20 that the nationals of any one of the Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons. The migrant workers who are nationals of a Party and their families have the right to protection and assistance in the territory of any other Party. And finally, all workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. The Social Charter of course should be analysed in its entirety, all the regulated rights having a special relevance,[41] but at the moment we would like to emphasise the content of Articles 19 and 20 of Part II of the document. Article 19 regulates the right of migrant workers and their families to protection and assistance, while Article 20 deals with the right to equal opportunities and

38 Discrimination (Employment and Occupation) Convention, 1958 (No. 111). 'Art. 1. For the purpose of this Convention the term *discrimination* includes (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.'.

39 Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117). 'Art. 14. It shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation in respect of: (a) labour legislation and agreements which shall afford equitable economic treatment to all those lawfully resident or working in the country; (b) admission to public or private employment; (c) conditions of engagement and promotion; (d) opportunities for vocational training; (e) conditions of work; (f) health, safety and welfare measures; (g) discipline; (h) participation in the negotiation of collective agreements; (i) wage rates, which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking. ll practicable measures shall be taken to lessen, by raising the rates applicable to the lower-paid workers, any existing differences in wage rates due to discrimination by reason of race, colour, sex, belief, tribal association or trade union affiliation. Workers from one country engaged for employment in another country may be granted in addition to their wages benefits in cash or in kind to meet any reasonable personal or family expenses resulting from employment away from their homes. The foregoing provisions of this article shall be without prejudice to such measures as the competent authority may think it necessary or desirable to take for the safeguarding of motherhood and for ensuring the health, safety and welfare of women workers.'.

40 Equality of Treatment (Social Security) Convention, 1962 (No. 118).

41 Popescu, 2022, pp. 94–95.

equal treatment in matters of employment and occupation without discrimination on the grounds of sex.[42]

In the light of the above, it has been noted by scholars about the treatment of the principle of equality that

> 'the European Union's legal system contains a specific approach to the theory of equality, departing considerably from the legal system studied above, which was born and evolved under the auspices of the Council of Europe. The fundamental distinction between these two systems of law is evident, in our view, by reference to the legal cultural foundations on which they are based. [...] Considering these aspects and referring to the theory of equality, it is fair

42 Council of Europe, European Social Charter (Revised). 'Art. 19. – The right of migrant workers and their families to protection and assistance. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake: to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration; to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey; to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries; to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters: remuneration and other employment and working conditions; membership of trade unions and enjoyment of the benefits of collective bargaining; accommodation; to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons; to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory; to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article; to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality; to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire; to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply; to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families; to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker. Art. 20 – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields: access to employment, protection against dismissal and occupational reintegration; vocational guidance, training, retraining and rehabilitation; terms of employment and working conditions, including remuneration; career development, including promotion.'

> to say that the legal system built under the auspices of the Council of Europe has approached the theory of equality in relation to the rights and freedoms of individuals, whereas the European Union initially conceived the theory of equality in its economic dimension."[43]

Returning to the EU legislation on equal treatment and non-discrimination, full specific regulation of the free movement of persons and labour migration was achieved with the adoption of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families. The European Court of Justice has played a prominent role in interpreting the provisions on certain concepts and rights relating to free movement. In this respect, it may be concluded that it has generally interpreted them in an expansive manner.

The next very important step for equal treatment of Community workers was the entry into force of Directive 2004/38/EC,[44] whose provisions, although based on the previous legislation, were updated, unified and in many respects renewed.

Article 24 of the Directive deals with the application of the principle of equal treatment. All Union citizens who reside in a host Member State under this Directive are entitled to equal treatment with the nationals of that Member State, as long as it is expressly provided for in the Treaty and secondary law. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence. However, by way of derogation, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting of student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

For third-country migrant workers, the major paradigm shift in the attitude towards their freedom of movement in the EU is recognised by the Tampere European Council (15 and 16 October 1999) Presidency Conclusions. Before that,

> 'due to the complexity of the issues involved and the complexity of the rules, to which the unclear division of competences has contributed significantly, the legal protection of third-country nationals was far from being resolved,

43 Voiculescu and Berna, 2023, p. 602.

44 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

> which is compounded by the fact that the EU's approach remains restrictive, mainly under pressure from its Member States and to a decreasing extent. The absence or strictness of regulation has not prevented the free movement of non-Community workers in cases of economic necessity [...] In addition, the European Court of Justice has played an important role in protecting the rights of non-Community migrants and, of course, other rights protection institutions, notably the Council of Europe and its bodies, have also provided a degree of certainty. However, again, it was not humanitarian considerations, but the recognition of purely economic rationality that led to the adoption of a series of secondary legislation from the beginning of the millennium onwards to address the situation of migrants from third countries."[45]

The starting point of the Tampere Conclusions is that

> 'from its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union."[46]

This is not unknown from the wording of previous EU documents. What is new, however, is the statement that

> '[t]his freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union."[47]

When developing the idea of fair treatment of third country nationals, the document clearly raises the idea of equal treatment, and not only in consideration of the migrant workers, when declaring that the European Union must ensure fair treatment of third

45 Dux, 2007, pp. 165–166.
46 European Parliament, 2012.
47 Ibid.

country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.

Analysing the context which led to the Tampere Conclusions, Geddes identified five important elements. According to him, these policy shaping elements were the greater intensity of migration flows to and within the EU; all EU Member States becoming to some extent countries of immigration and emigration; a growing policy role for the EU after the Maastricht Treaty came into force in 1993; ostensibly new manifestations of the immigration problem, for example growing concern about irregular flows, people-smuggling and human trafficking; and, finally a more intense politicisation of migration at both Member State and EU levels combining both increased issue salience and increased polarisation.[48] The main conclusion therefore is, that

> 'the Tampere Programme itself was not the driver of these important political developments that have more profound roots in social and political change in EU Member States. The point is that the Tampere and subsequent efforts to develop common migration and asylum policies at EU level have occurred at a time when immigration has become politicised and also an issue that divides both EU citizens and, of course, the Member States.'[49]

It can therefore be concluded that the Tampere Conclusions mark a real theoretical turning point in the integration of third-country nationals in the European Union, in so far as they guarantee them rights that are as close as possible to those of EU citizens through the application of the principle of equal treatment. This idea is however considered by many as being somewhat idealistic, and could not be implemented as planned.

> 'Still, such a pluralist and rights-based model was never implemented and it was gradually watered down through the adoption of various instruments of EU law and policy that progressively transformed integration into a tool for preserving the Member States' sovereignty over immigration.'[50]

48 Geddes, Hadj Abdou and Brumat, 2020, cited in Geddes, 2020, p. 9.
49 Geddes, 2020, p. 8.
50 Bottero, 2022, pp. 520–521.

4. Human Rights Aspects of the EU Regulations' Protection of Migrants and Migrant Workers in the Area of Labour Rights

Whether we are looking at intra-EU labour migration or the situation of migrant workers from third countries, the human rights mirror can be seen in the regulation and concrete practice of employment-related rights. However, we cannot speak of a homogeneous group in this case either, as the situation of migrant workers varies depending on many factors. The situation is very different for a highly skilled migrant worker with an appropriate labour contract and for an unskilled third-country worker in some kind of atypical employment relationship or, maybe even as a platform worker. In their case, there is an increased focus on respect for their human and labour rights and social rights, as they face precarious employment in precarious workplaces and forms. Another major problem for them, especially in the context of the Single Permit Directive, is the lack of flexibility in employment, of the possibility to choose a better, more suitable job instead of an unsuitable, precarious, possibly exploitative job. As De Lange and Falkenhain state in their study,

> 'migrant workers' right to change employer is a topic that commonly lacks political attention. Where migrants fear to lose not only their job but also their residence status, and given low levels of unionisation among migrant workers, they rarely complain about exploitative employment relations or other difficulties stemming from employer dependency and structural insecurity.'[51]

The importance of the choice of employer as an important factor in reducing vulnerability and ensuring respect for human and workers' rights is also highlighted in European Union Agency for Fundamental Rights reports.

> 'The opportunity to change employers reduces the risk of exploitation. It allows workers to leave an abusive employer without the risk of losing their income or permit. EU law entitles most non-EU workers with a residence permit to change employers, although Member States may limit this right. Under EU law, if certain conditions are met, Member States must allow seasonal workers to change employers at least once. But changing the employer is possible only when extending the seasonal work permit. Non-EU workers under the Single Permit Directive are currently not allowed to change employer. They will, however, be able to, once the revised directive is transposed into national legislation. Member States may bar this possibility in the first six months of the worker's stay in the country. They may also require that certain conditions are met, except in cases of serious violations of labour law.'[52]

51 De Lange and Falkenhain, 2024, p. 2.
52 European Union Agency for Fundamental Rights, 2024, p. 10.

Without analysing the protection provided by the labour law directives in their entirety, as this is not necessary in the context of this chapter, we would like to start by stating that EU labour law provides a broad protection by placing the principle of equal treatment at the basis of the legislation. In what follows, we will therefore focus on just two areas of labour law, linked by a multitude of common features, that we believe are or could be of the greatest importance to migrant workers from a human rights perspective.

4.1. Issues Concerning Working Conditions, Including Health and Safety at Work

> 'One of the European Union's most important areas of intervention in the field of employment relations concerns the health and safety of workers at work. There are two reasons for this concern, which is sometimes excessive in terms of regulatory consistency. The first, of a human nature, aims to ensure that working conditions are such that workers can be protected from any factors harmful to their health. [...] The second rationale is economic, because it is impossible to conceive a functional internal market, with integrating effects on socio-economic levels, when the workforce is seriously affected by illness and death, caused by workplaces where worker safety is precarious.'[53]

Working conditions and health and safety are a concern for all workers, but they are even more important for guest workers. This category of workers is more likely to work in precarious jobs and has a fundamentally lower level of capacity for advocacy than other workers. At the same time, ensuring decent working conditions is closely linked to respect for human dignity and human rights, especially Article 4.

Among the EU legal instruments, two directives are of particular importance in this area, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work[54] and Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.[55] The latter has the effect of ensuring the same level of protection of the rights of workers in atypical forms of employment as is provided for other workers. However, for the purposes of the Directive, the term worker refers to any person employed by an employer, including trainees and apprentices but excluding domestic servants, so its personal scope is actually limited.

53 Popoviciu, 2014, p. 307.
54 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.
55 Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by General Assembly resolution 45/158 of 18 December 1990[56] also lists rights relating to working conditions, health and safety at work in Article 25, when it provides that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the state of employment in respect of remuneration and other conditions of work, that is to say, overtime, hours of work, weekly rest, paid holidays, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms. At the same time, the issue of safety and working conditions for migrant workers continues to pose numerous problems in practice even in the present day.

The research made by the EU Agency for Fundamental Rights[57] shows a deeper analysis of the issue of occupational safety and health for migrant workers. In their study, the authors deal with matters related to human dignity (Article 1), prohibition of slavery and forced labour (Article 5), respect for private and family life (Article 7), fair and just working conditions (Article 31) and the right to an effective remedy (Article 47), falling under chapters 'Freedoms', 'Solidarity' and 'Justice' of the Charter of Fundamental Rights of the European Union. The reality concerning the application of these provisions is sometimes striking.

> 'Unscrupulous employers use the weak position of migrant workers to force them to work for endless hours with no or little pay, often in dangerous settings, and without the minimum safety equipment required by law. Workers interviewed for this research had slept in fields or on construction sites, without access to sanitary facilities or running water. They endured these conditions out of fear that if they left they would lose the wages owed to them or, in the case of migrants in an irregular situation, because the employer threatened to report them to authorities. In some cases, they spoke about employers who confiscated their documents, restricted their social contacts, or monitored and controlled their movements inside the workplace to stop them from coming into contact with anyone to whom they could complain.'[58]

In the field of the violations of labour rights, the conclusion of the research was, that '[t]he most common issues that interviewees faced in situations of labour exploitation were issues with pay and with working conditions. Almost all interviewees experienced problems in both of these areas.'[59] Issues regarding the working conditions are mostly related to the working time and free time, and the violation of health and safety regulations of the EU. As highlighted above, the main shortcoming of the rules on

56 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted on 18 December 1990 by General Assembly resolution 45/158.
57 European Union Agency for Fundamental Rights, 2019.
58 Ibid., p. 11.
59 Ibid., p. 42.

health and safety at work is that they apply to a relatively narrow range of workers.[60] The lack of protective equipment, working in toxic environments, inadequate provision of working conditions at height and other similar deficiencies result in a higher risk of occupational accidents among migrant workers, the consequences of which are particularly worrying if the worker does not have adequate accident insurance.

The major conclusion arise to be, that 'EU Member States should increase efforts to enforce labour law effectively in order to protect workers' rights generally, including those of migrant workers, and adequately prevent and address situations of labour exploitation.'[61] The above cited researches consider that it would be of great importance to reinforce workplace inspections, especially in those sectors where the risk of labour exploitation is high. Consequently, we believe that the implementation of the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union can make the enforcement of work-related rights more effective. However, the results of this will be the subject of further investigation in the future. First of all, the new directive, taken as a starting point in the interpretation of the Court of Justice of the European Union, broadens the meaning of the concept of worker and takes as a starting point the fact that many specific categories of workers are in a particularly vulnerable situation. Additionally, a more precise definition of the obligation to provide information and about the minimum working conditions, as well as the means of protection against adverse treatment, could contribute to better protection and promotion of the interests of migrant workers.

4.2. Collective Labour Rights of the Migrant Workers

Linked to the aspects of working conditions and human rights, another area of particular importance for the enforcement of migrant workers' rights is, in our view, the area of collective labour rights. However, we believe that it is precisely this area that raises many problems, and not necessarily because of the shortcomings of the legislation, but because of practical difficulties. Collective labour law, the role of trade unions and collective bargaining, the right to strike are themselves a much discussed and debated topic today. There are many opinions that the trade unions

60 'The Framework Directive on Safety and Health at Work (Directive 89/391) establishes an equal level of safety and health for the benefit of all workers (with the exception of domestic workers), and obliges employers to take appropriate preventive measures to make work healthier and safer. The minimum standards for workplaces are set out in Directive 1989/654/EEC. However, they do not apply to many sectors that are particularly at risk of labour exploitation, including 'workplaces inside means of transport' (e.g. drivers), work in fields and woods (i.e. part of agriculture and forestry), work on fishing boats and 'temporary and mobile work sites' (e.g. construction sites). Whereas workplaces on temporary or mobile construction sites and on fishing boats are covered by other directives, to date there are no directives on the minimum requirements for workers in the agriculture and forestry sector and for drivers. The employer is, however, obliged to carry out a risk assessment and to respect the general rules on risk prevention, as the Framework Directive is fully applicable.' Ibid., p. 47.

61 Ibid., p. 91.

in the Member States of the European Union are in a crisis situation, that their role and importance have declined and that they are unable to play their traditional role appropriately. Indeed, there are many tangible signs of decline, with poor trade union density and the relatively low number of collective agreements, especially at sectoral level, being a real indicator in many countries.[62] Even more challenging, given their specific situation, is the trade union representation of migrant workers, especially those from third countries.

Considering the specific conditions of the last few years, marked by economic and financial crises, it was considered of paramount importance that both the EU and the Member States support the development of social dialogue at the European and national level, thus avoiding the rupture between capital and labour, the decline of employment in Europe, macroeconomic imbalances and the economic exclusion of certain regions and social groups. At EU level, however, the content of the right to collective bargaining and collective action is said to have developed in contradictory ways in terms of the recognition of its communitarian character. The role of social dialogue is enshrined in Articles 151 and 152 of the Treaty on the Functioning of the European Union, but also appears in the Charter of Fundamental Rights of the European Union. On the basis of these, the Court of Justice of the European Union, in particular in the well-known cases Viking C-438/05[63] and Laval C-341/05,[64] has stated that the right to take collective action for the protection of workers is a legitimate interest in order to justify restrictions on the fundamental freedoms guaranteed by the Treaty. The Court also made it clear that since the European Union has not only an economic but also a social purpose, rights under the Treaty provisions on the free movement of goods, persons and services must be balanced against social policy objectives, which include the improvement of living and working conditions, adequate social protection and social dialogue.[65]

The trade union perspective on migrant workers is generally nuanced on the issue of labour migration. This is borne out by a wealth of research on EU enlargement, and concerns about migrant workers from third countries may be even more pronounced.[66] These concerns relate first and foremost to how the influx of labour will maintain higher levels of labour rights, for example in terms of wages, if migrant workers, for example, who are paid lower wages, enter the labour market. Indeed, the situation of migrant workers raises complex problems of collective action in several respects.

> 'Migrant workers` rights to freedom of association and inclusion in collective bargaining are vital for avoiding inequalities. Indeed, the relevant ILO

62 OECD, 2024.
63 Case C 438/05 – *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.
64 Case C-341/05 – *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*.
65 Voiculescu and Berna, 2023, pp. 708–709.
66 Krings, 2009, pp. 49–69.

> standards do cover migrant workers, including those in irregular situations. The ILO`s Committee on Freedom of Association has been very clear on this matter. Yet, it is not always easy for migrant workers to exercise these rights. Some migrations take place to destinations where there are no strong trade union institutions to protect them. In other contexts, migrants are dependent on employers who may not allow trade unionists on to their premises. In addition, trade unions have not always and everywhere been able to include migrant workers among their ranks, and some might have seen their role as primarily protecting local workers.'[67]

However, we believe that the issue of collective labour rights for migrant workers is problematic in other respects as well, especially for those working in atypical forms of employment without a proper employment contract. In such cases, the question arises of the possibility trade unions have to reach and involve these workers, who are particularly disadvantaged by language barriers, a regulatory background that is foreign to them, and fragmentation, as in many cases the workers in the same place do not necessarily know each other.

The political structure and autonomy of trade unions varies widely from country to country, even within the EU. Three elements should be considered in framing a comparative perspective on European trade unions: their purposes, their autonomy and their membership. The purposes of trade unions, their degrees of autonomy, and even their categories of membership should all be understood in a specific national context. Similarly, trade unions in the European context also acquire a specific character: they all, to a greater or lesser extent and more or less willingly, align themselves with the EU's economic system, and their purposes are shaped accordingly. At EU level, trade unions aspire to enjoy collective bargaining in the form of European social dialogue, but also channel much of their efforts towards influencing the political and administrative processes. As to the specific categories of people eligible for trade union membership, traditionally these include employees, as defined in different national systems of labour law. Other groups of potential members are sometimes excluded, in some cases because the law does not protect, or even proscribes, the right of the following groups to unionise: the self-employed, professionals, retired people, unemployed people, people in the armed forces, management employees, domestic servants, members of the clergy, agricultural workers, part-time workers, civil servants, and so on.

In short, trade unions in Europe are characterised by a specific range of purposes, qualities of autonomy and categories of membership.

Some of the migrant workers, especially migrant workers from third countries, work in the gig economy, mainly as platform workers and in their case collective labour rights and trade union representation are even more of a problem. In this case difficulties arise because of the changed working patterns, as there is no single

67 Marino, S., Roosblad, J., Penninx, R., 2017, p. 17.

workplace, nor community of workers, limited human interaction, automation and globalisation. In many cases, fundamental rights seem to have been deleted and protection of human work and dignity was left out of the digital world, governed by automated rules and algorithmic management, and there is a lack of community of platform workers, geographically dispersed. Such factual obstacles are doubled by the existing legislative framework in some Member States, as well as by the existing EU rules on competition, that have turned into "legal" obstacles to the collective representation of platform workers.[68]

Although in their case the regulation is still in development, the starting point could be Article 153 TFUE, in particular point (f) thereof, which states that the Union shall support and complement the activities of the Member States in the field of representation and collective defence of the interests of workers and employers, including co-determination.

Examining the issue at a global level, recent ILO research shows that

> 'one set of fundamental rights that migrant workers are often unable to enjoy concern freedom of association and the right to collective bargaining. [...] Freedom of association and collective bargaining (FACB) are not only fundamental rights safeguarding procedures of organisation and negotiation. They are also enabling rights that make it possible to promote and realise a range of other rights, such as other fundamental principles and rights at work, good conditions of work, fair wages, and access to social protection.'[69]

The same research identified the following key problems as regards the main obstacles to the enforcement of collective labour rights for migrant workers.

> 'The survey results provide insight into specific challenges trade union representatives perceive as impeding their unions' ability to support migrant workers. The major obstacles cited were: legal restrictions on migrants' participation in trade unions; migrants' reluctance to or fear of engaging with trade unions; gender issues and dynamics; anti-union political sentiment; and the nature of the work migrant workers are engaged in (seasonal, temporary, informal). From the migrant workers' perspective, in addition to the existence of legal restrictions against FACB among migrant workers in some countries, in practice, they often face other barriers to organising and joining trade unions, such as: long working hours; lack of days off; isolated workplaces; language barriers; limited knowledge of their rights; fear of anti-union reprisals by employers; and general reluctance to get involved with workers'

68 Roșioru, 2022, pp. 135–152.
69 International Labour Office, 2023, p. 20.

> organisations. Many also fear losing their jobs or facing sanctions from local authorities.'[70]

The barriers are clearly linked to the working conditions and occupational safety and health issues discussed above.

On a European level quite the same results can be found in the very actual Position Paper 2024/153 adopted by the 29th industriAll Europe[71] Executive Committee in Brussels.[72] The criticisms made in the document are current and valid, and at the same time they clearly articulate the need to give greater priority to the enforcement of collective labour law for migrant workers, even at the legislative level.

> 'Meanwhile, there is little progress on the legislation to protect intra-EU mobile workers and third-country migrant workers from social dumping and even from exploitation. The European Labour Authority has carried out more than 100 inspections since it was established in 2019, which have uncovered the exploitation of building workers, lorry drivers, Horeca and factory workers. Non-payment of wages, social security fraud, health and safety breaches and poor-quality accommodation are among the most common rights violations faced by some of Europe's 10 million mobile workers. A high rate of these violations involved both EU and third-country nationals as victims.'[73]

In the light of the above, the breach of the principle of equal treatment is clear. Based on an analysis of the situation in a number of concrete EU Member States, the document sets out the following demands for policymakers, which could also have an impact on EU legislation:

> 'the limitation on subcontracting; limitation of agency work and of the use of intermediaries in order to promote more direct jobs (companies need to hire and invest in their workers, including in training); obligation for companies using subcontracting to inform and consult trade union representatives and allow them to check the working conditions of subcontracted workers and to unionise them; a ban on the use of agencies and intermediaries in the context of posting of workers and of single permits; facilitate the direct employment of third-country nationals with equal treatment; social conditionality in the case

70 Ibid., p. 23.
71 IndustriAll European Trade Union is a federation of independent and democratic trade unions representing manual and non-manual workers in the metal, chemical, energy, mining, textile, clothing and footwear sectors and related industries and activities. It represents 7 million working men and women united within 200 national trade union affiliates in 39 European countries. It is a member of the European Trade Union Confederation (ETUC) and partner of IndustriAll Global Union.
72 IndustriAll Europe 29th Executive Committee, 2024.
73 Ibid., p. 1.

of single permits: ensure that only employers who respect social dialogue, collective bargaining and trade union rights can issue work permits to third-country nationals; social conditionality on public funds (no public money for exploitation): exclude companies that have been involved in the unequal treatment of workers from abroad and/or the exploitation of workers, preventing them from receiving public support; facilitate the recognition and validation of skills and qualifications of workers from abroad to promote equal treatment; increase the number of labour inspectors and inspections (urgent need to comply with the ILO recommendation); strengthen the European Labour Authority and urgently revise the Single Permit Directive.'[74]

5. Closing Remarks

The starting point of this chapter was that the legal protection of certain vulnerable categories of persons cannot be analysed and understood without a holistic and integrative understanding of them in an appropriate framework. This is no different for migrants and migrant workers. As is the case for all vulnerable groups in a specific situation, migrants and migrant workers must be treated with the utmost respect for human rights, which is the basis for the treatment of these groups and for all subsequent legislation, whether European Union or national. Starting out from this, we examined the main aspects of the development of European Union legislation, with a special focus on labour rights, based on economic considerations concerning the context of human rights and protection of migrant workers. Furthermore this chapter deals with the issue of human rights aspects of the EU regulations` protection of migrants and migrant workers in the area of labour rights. From this very extensive topic we have chosen two main areas that we consider are closely linked to each other and to human rights issues: on the one hand the issue of working conditions and safety at work, and on the other hand collective labour rights and the possibility of reaching solutions to the problems of migrant workers through collective bargaining.

According to the findings of our research, we can see that, in the first instance, a more rigorous enforcement of the legal framework based on equal treatment would be needed for migrant workers as well, and much more effective control activities to this end. In the second case, however, the legal framework is not enough, because there are many practical difficulties in the way of proper collective labour representation that go beyond the scope of the legislation in force. Only under such conditions will it be possible to take proper account of human rights aspects in the labour law regulation of migrant workers.

74 Ibid., p. 8.

Bibliography

Boto, M., Maria, J., Brameshuber, E. (eds.) (2022) *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models*. Oxford, Hart Publishing; http://dx.doi.org/10.5040/9781509956227.

Bottero, M. (2022) 'Integration (of Immigrants) in the European Union: A Controversial Concept', *European Journal of Migration and Law*, 24, pp. 516–544; https://doi.org/10.1163/15718166-12340139.

Carrera, S., Geddes, A., Guild, E., Stefan, M. (eds.) (2017) *Pathways towards Legal Migration into the EU*. Brussels: Centre for European Policy Studies.

Cerna, L. (2010) *The EU Blue Card: A Bridge Too Far?* [Online]. Available at: https://www.researchgate.net/publication/228416900_The_EU_Blue_Card_a_bridge_too_far (Accessed: 12 September 2024).

De Bruycker, P. (2020) 'The New Pact on Migration and Asylum: What it is Not and What it Could Have Been', *EU Immigration and Asylum Law and Policy/Droit et Politique de l'Immigration et de l'Asile de l'UE*, 15 December 2020. [Online]. Available at: https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/ (Accessed: 12 September 2024).

De Lange, T., Falkenhain, M. (2024) 'Precarity prevented or reinforced? Migrants' right to change employers in the recast of the EU Single Permit Directive', *Frontiers in Sociology*, 8; https://doi.org/10.3389/fsoc.2023.1267235.

De Lange, T., Vankova, Z. (2022) 'The Recast EU Blue Card Directive: Towards a Level Playing Field to Attract Highly Qualified Migrant Talent to Work in the EU?' *European Journal of Migration and Law*, 24, pp. 489–515, https://doi.org/10.1163/15718166-12340138.

Digidiki, V., Bhaba, J. (2020) 'EU Migration Pact Fails to Address Human Rights Concerns in Lesvos, *Greece' Health and Human Rights Journal*, 22(2), pp. 291–296 [Online]. Available at: https://www.hhrjournal.org/2020/12/perspective-eu-migration-pact-fails-to-address-human-rights-concerns-in-lesvos-greece/ (Accessed: 12 September 2024).

Dux, L. (2007) *A migráns munkavállalók jogvédelmének multilaterális eszközei*. Doktori értekezés, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Doktori Iskola [Online]. Available at: https://juris.u-szeged.hu/download.php?docID=5975 (Accessed: 12 September 2024).

Erdei, N., Tuka, Á. (2011) 'Az Európai Unió migrációs politikája napjainkban' in Tarrósy, I., Glied, V., Keserű, D. (eds.) *Új népvándorlás. Migráció a 21. században Afrika és Európa között.* Pécs: Publikon, pp. 243–257.

European Asylum Support Office (2021) *Vulnerability in the context of applications for international protection – Judicial analysis*. Luxembourg: Publications Office of the European Union; https://doi.org/10.2847/2759.

European Commission (2020) *Communication from the Commission on a New Pact on Migration and Asylum*. Brussels, 23 September 2020. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609%20 (Accessed: 12 September 2024).

European Commission (2025) *EMN Asylum and Migration Glossary: Migration*. 11 June 2025. [Online]. Available at: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary_en (Accessed: 12 September 2025).

European Parliament (2012) *Tampere European Council 15-16.10.1999. Presidency Conclusions* [Online]. Available at: https://www.cvce.eu/en/obj/conclusions_of_the_tampere_european_council_15_and_16_october_1999-en-32135242-b375-47fe-adb4-e02ab2432945.html (Accessed: 12 September 2024).

European Union Agency for Fundamental Rights (2019) *Protecting migrant workers from exploitation in the EU: workers' perspectives*. Luxembourg: Publications Office of the European Union; https://doi.org/10.2811/705015.

European Union Agency for Fundamental Rights (2024) *Six Points for Workplace Inspectors. EU Law Safeguards for Non-EU Workers*. Luxembourg: Publications Office of the European Union; https://doi.org/10.2811/17406.

Galgóczi, B., Leschke, J., Watt, A. (eds.) (2016) *EU labour migration in troubled times: skills mismatch, return and policy responses*. Abingdon–New York: Routledge.

Gazi, T. (2021) 'The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups?', *European Papers*, 6(1), pp. 167–175; https://doi.org/10.15166/2499-8249/460.

Geddes, A. (2020) 'Tampere and the Politics of Migration and Asylum in the EU: Looking Back to Look Forwards' in Carrera, S., Curtin, D., Geddes, A. (eds.) *20 Year Anniversary of the Tampere Programme. Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*. Florence: European University Institute, pp. 7–18; https://doi.org/10.2870/66646.

Geddes, A., Hadj Abdou, L., Brumat, L. (2020) *Migration and Mobility in the European Union*. 2nd edn. London: Red Globe Press.

Gyenei, L. (2011) 'A harmadik országbeli polgárok tagállamközi szabad mozgásának szabályozása az Európai Unióban', *Miskolci Jogi Szemle*, 6(1), pp. 73–89.

IndustriAll Europe 29th Executive Committee (2024) *Position Paper 2024/153. Misusing shortages for a new 'race to the bottom'? Equal treatment for migrant workers now!*. Brussels, 14–15 May 2024. [Online]. Available at: https://news.industriall-europe.eu/documents/upload/2024/5/638515575594131563_Adopted_-_Misusing_shortages_for_a_new_race_to_the_bottom_Equal_treatment_for_migrant_workers_now_-_EN.pdf (Accessed: 12 September 2024).

International Labour Office (2023) *Migrant workers' rights to freedom of association and collective bargaining* Geneva: International Labour Organization [Online]. Available at: https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_protect/%40protrav/%40migrant/documents/publication/wcms_883446.pdf (Accessed: 12 September 2024).

Kalantaryan, S. (2017) 'Revisions in the Blue Card Directive: Reforms, Constraints and Gaps', *EUI Working Papers. RSCAS*, 2017/59.

Krings, T. (2009). 'A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour', *European Journal of Industrial Relations*, 15(1), pp. 49–69; https://doi.org/10.1177/0959680108100165.

Landesmann, M., Vidovic, H. (2021) 'Labour Markets, Demography, Migration and Skills' in Landesmann, M., Székely, I.P. (eds.) *Does EU Membership Facilitate Convergence? The Experience of the EU's Eastern Enlargement - Vol. II. Channels of Interaction*. Cham: Palgrave Macmillan, pp. 155–192; https://doi.org/10.1007/978-3-030-57702-5_8.

Lukács, É. (2009) 'Munkavállalók szabad mozgása az Európai Unióban - gondolatok egy 40 éves évfordulóra', *Föld – rész. Nemzetközi és Európajogi szemle*, 2(1), pp. 9–23.

Marino, S., Roosblad, J., Penninx, R. (eds.) (2017) *Trade Unions and Migrant Workers: New Contexts and Challenges in Europe*. Northhampton: Edward Elgar Publishing.

McAuliffe, M., Oucho, L.A. (eds.) (2024) *World Migration Report 2024*. Geneva: International Organization for Migration.

Minderhoud, P. (2021) 'Regulation of EU Labour Migration: At a Crossroads after the New Pact on Migration and Asylum?', *Utrecht Law Review*, 17(4), pp. 31–44; https://doi.org/10.36633/ulr.749.

OECD (2024) 'Trade Unions: Trade union density', *OECD Employment and Labour Market Statistics* (database); https://doi.org/10.1787/data-00371-en.

Oso, L., Kaczmarczyk, P., Salamońska, J. (2022). 'Labour migration' in Scholten, P. (ed.) *Introduction to Migration Studies. An Interactive Guide to the Literatures on Migration and Diversity*. Cham: Springer, pp. 117–135; https://doi.org/10.1007/978-3-030-92377-8_7.

Peers, S. (2024) 'The new EU asylum laws: taking rights half-seriously', *Yearbook of European Law*, 43, pp. 113–183; https://doi.org/10.1093/yel/yeae003.

Popescu, R.R. (2022) *Dreptul European al muncii. Legislație, doctrină, jurisprudență*. 3rd edn. București: Hamangiu.

Popoviciu, A.C. (2014) *Lucrătorul în dreptul european*. București: C.H. Beck.

Privara, A., Masárová, T., Tupá, M. (2023) 'Migration and Labour Market Competitiveness: The Case of EU', *Journal of Competitiveness*, 15(1); https://doi.org/10.7441/joc.2023.01.08.

Roşioru, F. (2022) 'The 'Smart' Trade Union: New Strategies for Digitalised Labour Market' in Boto, M., José, M., Brameshuber, E. (eds.) *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models*. Oxford: Hart Publishing, pp. 135–152; http://dx.doi.org/10.5040/9781509956227.ch-008.

Talleraas, C. (2022) 'Migration Forms: What Forms of Migration Can Be Distinguished?' in Scholten, P. (ed.) *Introduction to Migration Studies. An Interactive Guide to the Literatures on Migration and Diversity*. Cham: Springer, pp. 111–116; https://doi.org/10.1007/978-3-030-92377-8_6.

Tsourdi, E., De Bruycker, P. (2022) 'The evolving EU asylum and migration law' in Tsourdi, E., De Bruycker, P. (eds.) *Research Handbook on EU Migration and Asylum Law*. Cheltenham: Edward Elgar Publishing; 1–55; https://doi.org/10.4337/9781786439635.00007.

Verschueren, H. (2018) 'Employment and social security rights of third-country nationals under the EU labour migration directives', *European Journal of Social Security*, 20(2); https://doi.org/10.1177/1388262718771792.

Voiculescu, N., Berna, M.B. (2023) *Tratat de drepturile omului*. București: Universul Juridic.

Part IV
Persons with Disabilities

| Chapter 10 |

The International Protection of the Rights of Persons with Disabilities: The United Nations Framework

Nóra Jakab

ABSTRACT

As Václav Havel has stated, among the amazing and remarkable facets, as well as mysteries, of human existence is the fact that various groups of human beings have such definite distinctions from one another. These distinctions manifest themselves in so many forms, including their very own customs, various traditions, various beliefs, various skin colours, and personal forms of dress, among so many other aspects. This wonderful mosaic of variation, which exists due to the numerous and various communities on earth, can indeed be embraced with a sense of tolerance and patience, since it is something that enhances our lives in the end. It is a reality that can be honoured and valued, and even celebrated with genuine joy. This essay gives a concise history of the trajectory of disability throughout the centuries. It is a general principle that culture in any form, e.g., ancient Greek, Egyptian, and Christian, does not discriminate against individuals with disabilities by nature. If this is the case, then it logically follows that prejudices and biases against people with disabilities do not directly result from the surrounding dominant major cultures. Rather, these prejudices are reproduced and come to life again through the ongoing engagement with the surrounding dominant cultures. This happens alongside deeply ingrained, primitive impulses, ancient pagan superstitions, religious beliefs, and the concept of otherness within society. This has been seen in the development of the understanding of the concept of disability since the 1980s, and it indicates the complexity and multifacetedness of society's understanding of disability. This paper shall track these issues over time by showcasing the operations of the United Nations concerning the lives of persons with disabilities. It has made significant contributions in attitudinal transformation, and the Convention on the Rights of Persons with Disabilities has crowned the journey of people with disabilities and parents in living independently.

KEYWORDS

disability history, Human Rights Council, CRPD, Special Rapporteur, Committee on the Rights of Persons with Disabilities, Taigetos, equal treatment

1. History of Disability

In this chapter, I hope to step in and vividly recall the plight of individuals with disabilities, as it may have been seen within the context of reality. Kálmán and Könczei

Nóra Jakab (2026) 'The International Protection of the Rights of Persons with Disabilities: The United Nations Framework' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 431–463. https://doi.org/10.71009/2026.nj.hrpovg_10

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have raised a valid observation in stating that the areas of rehabilitation and research into the history relating to disability are quite uncommon and not very popular in our society today. It is a general assumption that culture per se – and not just Greek and Egyptian culture – and Christianity, does not carry out acts of discrimination or exclusion against such individuals. And if this is so, then the prejudices against disabled people do not have their origin in the great cultures, but are generated and recreated in contact with atavistic, old instincts, pagan superstitions, religious beliefs and the hegemony of the respective great cultures, side by side with and in the face of difference.[1] This will be even more important for the modern concept of disability.

There were many influences in pre-modern societies that threatened a child's upbringing. Malnutrition for pregnant women, war, disease and a lack of medical attention meant that many babies and mothers did not survive childbirth, or that the child was born with physical and/or mental handicaps. The scarcity of extant ancient historical records, however, makes it extremely challenging to construct an accurate and detailed understanding of how disabled adults and children were viewed by the various peoples of the multicultural societies of ancient times. Their striking differences in appearance, body form, growth rate, and health condition were mainly perceived through the lens of superstition and, as a general rule were accounted for as evidence of divine punishment or some sort of moral fault. In fact, the concept of disability as such – as a general category of human experience – did not exist in the minds of individuals living in these ancient societies; it was not thought of as a distinct category separate from the common human experience. Nor was there a monolithic opposition to disability.[2]

In ancient empires, including those in Mesopotamia, individuals with disabilities were regarded as an indication of what would be in the future, with consequences in the afterlife. If there was no earthly cause for the disability, then it was thought to have been brought about by something supernatural. In ancient Egypt, there exists a rich historical document in the form of the Ebers papyrus scroll, which dates back to about 1550 BC. This document of interest includes quotes and excerpts from even older texts by a renowned physician named Imhotep, who lived around 3000 BC. The content of the Ebers papyrus includes a diverse set of recipes, valuable life wisdom, and a list of magical remedies that were intended for use by physicians in those times. These remedies range in nature, addressing a series of ailments such as miscarriages and curing tumours. In addition, the papyrus is surprising in its references to symptoms of mental retardation, contains descriptions of epilepsy, and, for the first time in documented history, gives a detailed explanation of the phenomenon of deafness. The Egyptians were not only interested in the potential for healing individuals with disabilities but also aimed to ease their pain and enhance their social standing. Blind children were taught to play musical instruments by priests, and many of them participated in a variety of temple rituals. During some eras, blind individuals comprised

1 Kálmán and Könczei, 2002, pp. 31–32.
2 See more ibid., p. 31 ff; Braddock and Parish, 2001, pp. 15–17.

the majority of musicians and poets. The patron deity of the mentally disabled was Osiris, the most highly revered Egyptian god. The deaf were not so lucky. In Ancient Egypt, dwarves were occasionally able to achieve high social ranks. An example from the 23rd century BC is Seneb, born with a grave disability, yet who ran a textile factory in the Pharaoh's court. This was not just a mark of social recognition, but also a significant fact in the light of occupational rehabilitation. As a reward for his fidelity to the Pharaoh, Seneb was granted a series of privileges, among them the use of a palanquin. He amassed a considerable fortune.[3]

In the Torah, the most significant written record and foundational text of ancient Judaism, we have the profound injunction, '[t]hou shalt not curse the dumb, nor put obstacles in the way of the blind, but fear thy God.' This conveys something very fundamental to a moral principle. The ancient Jews had a very strongly held belief that it was absolutely imperative that nobody was to be discriminated against or marginalised based on their disabilities. They believed in the idea that all individuals, even though they may have physical disabilities, must be provided with the opportunity to lead a life as equally respected and dignified as the rest of society. While society seems to have recognised a charitable obligation to people with disabilities, disability was also perceived as a punishment meted out by God. The belief that illness was inflicted by an angry deity or by a supranatural power was widespread among ancient people.[4]

Life in the ancient world was nasty, brutish and short. The most privileged were those who happened to be freeborn, well-to-do males in perfect health. But of course the overwhelming majority did not belong to that ideal category. The ancient Greeks, particularly in the city-state of Sparta, where the renowned institution of Taigetos was especially active and prominent, cultivated an extensive and profound appreciation for a healthy, robust, and athletic body. This social appreciation of physical fitness and health was deeply ingrained in their culture. At the same time, it is important to note that if one had incurred some form of disability, either due to the ravages of war or through the consequences of hard physical labour, this physical disability was not considered to be representative of their nature or worth as a human being.[5]

Among the expansive and historically monumental Roman Empire, people who were labelled as being mentally disabled were commonly allocated a guardian whose responsibility was to help them handle their diverse matters and day-to-day activities. Likewise, people who were found unable to communicate verbally, and were apparently deaf, were also considered to be intellectually disabled. As a result of such labelling, they were excluded from the possibility of engaging and being part of public affairs and matters of society independently. Dwarf slaves, along with the mentally disabled, were commonly employed in a variety of ways to entertain and amuse the rich elite of society. The owning of these individuals was regarded as a sign of very

3 Kálmán and Könczei, 2002, pp. 38–39.
4 Braddock and Parish, 2001, p. 14., Kálmán and Könczei, 2002, pp. 32–34.
5 Braddock and Parish, 2001, p. 14.

high prestige and social standing for their owners, elevating their position within an affluent society. It was also very much believed that the presence of these individuals in the home would ensure and lead to good luck and auspicious circumstances to the household.[6]

Medieval man's thinking in small, dispersed villages was governed by awe: beliefs and superstitions. For anything other than good and fair could be the handiwork of evil powers only. Intellectual disability was classified as a disease by medieval man. All diseases were held to be God's punishment, including "madness". There were no treatments for infectious diseases that worked, the most sought-after ones being strict isolation.[7] The Middle Ages were notable for contradictory beliefs held about disability. One common conception of disability was that some disabilities had demonological origin. Kálmán and Könczei entertain the suspicion that deeply ingrained prejudices against people with disabilities were actually based on the general view that such people were somehow less than human. This can be demonstrated by the historical case of the witch-swans and the horrific example of the smuggled children, which are used to bring to light this unsettling attitude.[8]

In Europe, the dissemination of the Christian faith and the growth and establishment of church institutions were accompanied by the emergence of the first institutions aimed at providing care for the poor, needy, and disabled. Monasteries themselves were the very first institutions that opened their doors to receive and provide care for the needy segment of the population, taking a leading position in this endeavour. By the time the late Middle Ages approached, the inner architecture of the monasteries had largely adapted and transformed to fulfil this essential function well. With the development of society, other types of establishments emerged, including guesthouses, poorhouses, orphanages, soup kitchens, and hospitals, which collectively functioned to deliver the overall care and support for those in need.[9]

During the 17th century, a new type of "sensibility", a new way of thinking, rose up in the advanced nations of Europe. This formed the foundation for the stigmatisation, and then the exclusion and ultimately "confinement" within institutions. The initial social feeling was established, followed by a symbolic social status – the idea of "those who should be locked up" – and the initial large lock-up institutions. Consequently, these institutions thus named "workhouses", which were the precursors and prototypes of such institutions, began to make their appearance one after another in Europe from the 17th century onwards. These institutions were referred to as workhouses in England, while in Germany they were referred to as Zuchthaus. Besides this type of institution, there was yet another type of holding facility, which was labelled as a 'hospital" of the "asylum" variety, where the objective was not to afford any type of treatment to the individuals imprisoned therein, but merely to oversee and

6 Ibid., p. 15.
7 Ibid., pp. 17–19.
8 See more Kálmán and Könczei, 2002, p. 46 ff.
9 Braddock and Parish, 2001, p. 25.

guard those who had been condemned to a period of incarceration. In Paris, Louis XIV issued a decree on 27th April 1656 establishing a network of institutions known as the "Hôpital general" (public hospital), which consisted of several institutions. This "umbrella organisation" was intended to receive the poor, the indigent and the chronically sick. It included the Bicêtre and the Salpêtrière. However, by the 18th century the Salpêtrière had become an asylum for mentally handicapped women and the Bicêtère for similarly handicapped men, imprisoning them in prison-like conditions. The actual hospitals of today, such as the Hôtel-Dieu in Paris and the Bethlem Royal Hospital ("Bedlam") in London, did however provide some rudimentary care for the mentally handicapped.[10]

It was in medieval tradition that even Renaissance man viewed mental retardation and mental illness as a form of divine retribution, frequently the result of the parents' sins.[11]

In the first decades of the 19th century, public discourse and the press strongly "thematised" the plight of the mentally handicapped and the insane in closed institutions. The abuses that were made public provoked public outrage. This may also have contributed to the emergence in European and North American asylums of humanistic healing procedures rather than unbridled violence.[12]

The turning point was the wars that took place in the 20th century. In most countries, big care institutions were created. The first rehabilitation legislation was enacted in the USA in 1919, and since the 1920s there has been a federal rehabilitation programme in place. Meanwhile during the 1940s, the horrific concept of a life not worth living emerged, with the emergence of compulsory sterilisation, the murder of disabled individuals, and T/4. Later, as the 20th century has begun, there has been a distinct change in focus that diverts from the simple attention to care and the traditionally understood role of the patient. Rather, focus is redirected to such concepts as self-care, independence, integration, and the inclusion of individuals in their communities. One very notable figure who has come to the forefront in the Independent Living Movement is Ed Roberts, whose work has been invaluable. The movement towards deinstitutionalisation is being driven by disabled individuals themselves, along with their parents, who are involved in a great deal of work claiming that basic human rights that have long been withheld. The greatest advances and outcomes of these efforts are notably visible in the USA, where profound change has occurred. Perhaps the most empowering piece of legislation to have come out of these efforts is undoubtedly the Americans with Disabilities Act, which has made an enormous difference.[13]

In tracing the history of disability, the path travels from Taigetos to equal opportunities, from a transcendent, albeit essentially paternalistic, and later

10 Ibid., p. 20. See also Driver, 2004, pp. 1834–1884.
11 Braddock and Parish, 2001, p. 21.
12 Ibid., p. 29 ff.
13 Kálmán and Könczei, 2002, pp. 58–62.

medicalised approach, to a human rights agenda and the imperative to secure equal opportunities.

2. Legislative History and Protection in the UN

The United Nations, or simply the UN, has also taken serious and concrete steps towards the rights protection of individuals who are disabled and have made significant efforts to enhance and upgrade their overall quality of life through a wide array of schemes and programs solely for this very cause.

3. Policy

In April 2018, the Executive Committee chaired by the Secretary-General underlined the need for the United Nations system to improve its performance in the field of disability inclusion within the framework of supporting Member States in their quest for the 2030 Agenda for Sustainable Development, leaving no one behind and reaching the farthest in all United Nations pillars. In this particular context, and as indicated by its decision 2018/20, the Executive Committee has established a series of important tasks to be carried out: (a) The Executive Office of the Secretary-General is entrusted with the responsibility to coordinate a comprehensive institutional review concerning the current practice of the United Nations system in mainstreaming disability into the various activities of the organisation; (b) Building on the work already undertaken and the above-mentioned review, the sub working group of the Inter-Agency Support Group on the Convention on the Rights of Persons with Disabilities, in collaboration with the Department for General Assembly and Conference Management, should develop a robust policy, an actionable plan, and an accountability framework with the aim of enhancing accessibility across the entire system and ensuring the mainstreaming of the rights of persons with disabilities across the activities of the organisation. Most recently, the Nations Disability Inclusion Strategy has been serving as an important and comprehensive foundation that aims to facilitate sustainable and transformative development regarding disability inclusion across all pillars of the extensive work implemented by the United Nations.

In the broad-ranging Strategy, the various organisations making up the United Nations system reiterate and reaffirm that the full and equal enjoyment of the human rights of all persons with disabilities is an inalienable, integral, and indivisible part of all human rights and fundamental freedoms to which every person is entitled. This important Strategy is the outcome of an intensive and thorough process launched by the Secretary-General in April 2018, particularly aimed at enhancing system-wide accessibility for persons with disabilities, as well as ensuring that their rights are effectively mainstreamed in all applicable frameworks and discussions. The development of this initiative was well guided by a comprehensive and inclusive institutional

review, facilitated very effectively by the Special Rapporteur on the rights of persons with disabilities. The Strategy not only encompasses a system-wide policy but also an accountability framework and other implementation modalities that are key to its effectiveness. The policy states the strongest possible commitment levels and a comprehensive vision for the United Nation's system of disability inclusion in the upcoming decade. Its primary objective is to create an effective institutional foundation that will facilitate the implementation of the Convention on the Rights of Persons with Disabilities successfully. It is also seeking to align itself with the 2030 Agenda for Sustainable Development, along with other international human rights conventions. This policy also entails development and humanitarian action commitments so that there is a synergised response to disability rights promotion and inclusion globally. Some relevant targets are:

- Goal 4: Strive to ensure that there is an equitable and inclusive quality of education for all and develop opportunities for lifelong learning for everyone, including in a major way, persons with disabilities, as specified in Target 4.5.
- Goal 10: Strive for the reduction of inequality among and within various countries, with a key focus on social, economic, and political inclusion for all, with a specific focus on including persons with disabilities, as specified in Target 10.2.
- Goal 11: Strive to make cities and human settlements inclusive, safe, resilient, and sustainable, with a key focus on enhancing accessibility for all individuals, as seen in Target 11.2.[14]

The accountability framework has two major elements that are closely related to each other: (a) an entity accountability framework with a total of 15 common-system indicators, where the framework is largely focused on four specific areas of importance. These are: leadership, strategic planning and management; inclusiveness; programming; and organisational culture. In addition to this, (b) there is also a United Nations country team accountability scorecard having particular reference on the inclusion of disability. This scorecard is in the process of being developed and should be finalised sometime in the latter half of the year 2019. Apart from these elements, this framework also includes detailed timetables, technical guidelines, as well as the division of responsibilities necessary for the effective and thorough implementation of the policy. Through the holistic Strategy that has been presented, the United Nations system will collectively endeavour to strategically incorporate the rights of persons with disabilities into all aspects of its work. This incorporation will not only be externally directed through diversified programming efforts toward outreach and support, but also inwardly within the internal practices and policies of the organisation itself. In addition, the Strategy also seeks to establish a sense of trust and confidence among persons with disabilities that they are not merely valued members of society but whose inherent dignity and rights will be fully realised.

14 United Nations, 2021.

It is also imperative that in the work environment, persons with disabilities are met with an enabling environment that will permit them to participate and engage with full and effective participation on an equal basis with their colleagues in ensuring genuine equality and inclusiveness. Mainstreaming a human rights-based approach to disability, along with the use of targeted measures as specifically designed for this objective, will make the issues, experiences, and voices of persons with disabilities an inherent and vital part of the design, implementation, monitoring, and evaluation of policy and programmes across all political, economic, and societal spheres. This is needed to enable persons with disabilities to benefit on an equal footing, in the same way as their peers. The total aim of this endeavour is to realise the equality of results for everyone and to support the evolution of an inclusive culture within the overall United Nations system.[15]

The key initiatives are:

International Day of Persons with Disabilities: Celebrated annually on December 3rd to sensitise and raise awareness as well as understanding of disability issues. Global Disability Summit: A global platform for governments, organisations, and individuals to share ideas and make commitments on disability inclusion. One of the extremely crucial and significant results that was generated out of the International Year of Disabled Persons was the very meticulous and comprehensive formulation of what is simply referred to as the World Programme of Action concerning Disabled Persons. This critical program was adopted by the General Assembly on 3rd December 1982, by virtue of its resolution number 37/52. The World Programme of Action, simply referred to as the WPA, is a comprehensive global strategy which was specially formulated in order to reinforce not only the prevention of disability but also the process of rehabilitation as well as equalisation of opportunities for disabled individuals. This strategy seeks to ensure and promote the full and effective participation of persons with disabilities in all aspects of social life as well as in the broader context of national development programs. The WPA also provides a vital priority to the pressing need to tackle the topic of disability through an inclusive human rights approach. Its three distinct chapters provide a comprehensive analysis of the fundamental principles, key concepts, and various definitions that are associated with disabilities; they offer a broad outline of the current worldwide situation with respect to individuals who live with disabilities; and they offer a set of carefully reasoned recommendations for effective action that can be taken at the national, regional, and international levels. The concept of "equalisation of opportunities" is a fundamental theme of the Workforce Participation Act and is also the philosophy underlying the efforts to provide individuals with disabilities a full opportunity to participate and engage in all spheres of social and economic life. One of the major principles in support of the overall theme is the principle that matters relating to individuals with

15 Ibid.

disabilities must not be viewed in isolation or as separate problems, but within the overall framework of normal services offered by society at large.[16]

It also important to mention the World Health Organisation (WHO) works on disability and rehabilitation issues, including the promotion of accessible health services and research on disability.[17]

The United Nations Development Programme (UNDP) mainstreams disability into development programming in order to advocate for inclusive development.[18]

The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities have been elaborated taking into account all the valuable experience gained during the period of the United Nations Decade of Disabled Persons, 1983–1992. The International Bill of Human Rights, consisting of a series of important documents, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, and the World Programme of Action relating to Disabled Persons, serves as a vital basis of human rights. Together all these important instruments form the political and moral framework that underlies and supports the elaboration of the Rules. Although it is a fact that the Rules are not compulsory or mandatory in nature, there is potential for these rules to become international customary rules. This can happen when a considerable number of States apply these rules consistently with a clear intention to follow them as fixed standards in international law. In addition, these Rules embody a deep moral and political commitment that States make to actively pursue measures to level the playing field for people with disabilities. In this regard, important principles concerning responsibility, proactive steps, and cooperative efforts are clearly set out and underscored. The areas of greatest priority for enhancing the quality of life, and to enable full participation and equality, have been stated with clarity. The Rules are a vital instrument specially formulated for policy-making processes and tangible actions towards empowering disabled persons and their organisations. Furthermore, they offer a fundamental framework for facilitating technical and economic cooperation among various States, the United Nations, and numerous other international organisations with a shared objective. The primary function of the Rules is to provide guarantees that individuals, including girls, boys, women, and men with disabilities, are afforded an opportunity to experience the same rights and responsibilities that are presented to all other individuals in their own societies. Within all societies in the world, there are several barriers and challenges that restrict individuals with disabilities from enjoying their inherent rights and freedoms, which thereby makes it very difficult for them to participate and engage fully in the broad variety of activities their societies present. It is the primary duty of States to undertake the

16 United Nations, 1982.
17 World Health Organization, no date.
18 United Nations, no date.

requisite and necessary action needed to successfully eliminate such barriers that hamper the full involvement of individuals. It is imperative that disabled persons, as well as their respective organisations, should participate and have an active and meaningful role as partners in this crucial process. The equalisation of opportunities for disabled persons constitutes an essential and integral contribution to the larger and global undertaking intended to mobilise human resources in an overall manner. It is essential that special attention is given to some groups in society who may require additional support and consideration. These among others, include women, children, the aged, those living in poverty, migrant workers, persons with dual or multiple disabilities, and indigenous people and other ethnic minorities. Furthermore, it is essential to note the significant number of refugees who have disabilities since they have special needs that should be given special attention and support.[19] The Standard Rules, as a guiding document, comprise a total of 22 separate rules that encapsulate the entire message of the World Programme of Action, highlighting its primary goals and principles. The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities expressly provides for the appointment of a Special Rapporteur whose role is to closely follow and oversee the implementation of these important Rules.[20]

4. Special Rapporteur on the Rights of Persons with Disabilities

The Special Rapporteur has been assigned the important responsibility to:[21]'[d]evelop a regular dialogue with States and other stakeholders for the identification, exchange and promotion of good practices related to the realization of the rights of persons with disabilities and their participation as equal members of society.'

The Rapporteur is responsible for accepting and actively engaging in the exchange of information and communications on any abuses pertaining to the rights of persons with disabilities; entering into consultation with persons with disabilities, and actively engage their organisations; and ensuring they are included in a participatory way in the implementation of her work.

It is crucial to formulate and implement definite recommendations that specifically target enhancing the promotion and protection of the rights of individuals with disabilities. This entails outlining effective strategies for encouraging the creation of initiatives that are inclusive and fully accessible to all persons living with disabilities.

It offers advisory services and technical assistance with a perspective to reinforcing national endeavours that focus on the efficient realisation of the rights of individuals who have disabilities;

19 See A/RES/48/96, Standard Rules on the Equalization of Opportunities for Persons with Disabilities.
20 Ibid.
21 See at United Nations Human Rights Office of the High Commissioner, no date.

It raises awareness of the rights that individuals with disabilities have, actively confronts the harmful stigma and widespread stereotypes about them, and makes individuals with disabilities adequately aware of their rights and benefits.

It actively and closely engages in the implementation of the United Nations Disability Inclusion Strategy, as well as in other endeavours, to guarantee that the entire UN system is well aligned and adapted to its purpose and is working closely with other UN human rights mechanisms and UN agencies to advance the rights of persons with disabilities in a coherent manner, with the Conference of State Parties to the CRPD and the Commission for Social Development, and participating in their annual sessions.

It acts on information received by the Rapporteur, which pertains to alleged violations of the human rights of individuals who have disabilities. This involves sending urgent appeals and formal communications to the States concerned, in order to clarify the situation and/or inform them of this urgent information to consider and act further.

The Special Rapporteur carries out visits to various countries following an invitation extended by their respective Governments, with the specific purpose of thoroughly examining the current state of protection concerning the human rights of individuals who have disabilities in any particular state. Following the completion of the visit, the Special Rapporteur then composes and submits a detailed report to the Human Rights Council, wherein he or she presents her comprehensive findings, well-reasoned conclusions, and thoughtful recommendations based on his or her observations during the visit.

They attend conferences, seminars, and panels on issues relating to disability matters, and issue press releases.

They also present detailed annual reports to the Human Rights Council and the General Assembly. The reports are presented in accessible formats so that all can easily understand them. The contents of the reports talk of the international situation of protection afforded to individuals with disabilities, and he or she speaks on his or her key concerns along with noting the good practices seen for the rights of individuals with disabilities. Further, the Special Rapporteur also takes this opportunity to develop concrete recommendations for strengthening and improving the protection of human rights of individuals with disabilities.

5. UN Human Rights Council (HRC)

The UN Human Rights Council (HRC) has adopted several resolutions addressing various aspects of disability rights. These resolutions aim to promote and protect the rights of persons with disabilities, enhance accessibility, and address specific issues affecting this population.

There have been resolutions concerning:

- 22nd June 2020, A/HRC/RES/43/2 Awareness raising on the rights of persons with disabilities, and habilitation and rehabilitation;

- 19th June 2020, A/HRC/RES/43/13, Mental health and human rights;
- 19th June 2020, A/HRC/RES/43/7, Right to work;
- 12th July 2019, A/HRC/RES/41/21, Human rights and climate change: the rights of persons with disabilities;
- 4th April 2019, A/HRC/RES/40/14, Rights of the child: empowering children with disabilities for the enjoyment of their human rights, including through inclusive education;
- 6th April 2018, A/HRC/RES/37/22, Equality and non-discrimination of persons with disabilities and the right of persons with disabilities to access to justice;
- 9th October 2017, A/HRC/RES/36/13, Mental health and human rights;
- 18th July 2016, A/HRC/RES/32/23, Protection of the family: role of the family in supporting the protection and promotion of human rights of persons with disabilities;
- 7th July 2016, A/HRC/RES/32/18, Mental health and human rights;
- 8th April 2016, A/HRC/RES/31/6, The rights of persons with disabilities in situations of risk and humanitarian emergencies;
- 7th April 2015, A/HRC/RES/28/4, The right of persons with disabilities to live independently and be included in the community on an equal basis with others;
- 14th July 2014, A/HRC/RES/26/20, A Special Rapporteur on the Rights of Persons with Disabilities;
- 14th April 2014, A/HRC/RES/25/20, The right of persons with disabilities to education;
- 14th March 2013, A/HRC/RES/22/3, The work and employment of persons with disabilities;
- 22nd March 2012, A/HRC/RES/19/11, The rights of persons with disabilities: participation in political and public life;
- 12th April 2011, A/HRC/RES/16/15, Role of international cooperation in support of national efforts for the realisation of the rights of persons with disabilities;
- 14th April 2010, A/HRC/RES/13/11, Human rights of persons with disabilities: national implementation and monitoring and introducing as the theme for 2011 the role of international cooperation in support of national efforts for the realisation of the rights of persons with disabilities;
- 26th March 2009, A/HRC/RES/10/7, Human rights of persons with disabilities: national frameworks for the promotion and protection of the human rights of persons with disabilities;
- 27th March 2008, A/HRC/RES/7/9, Human rights of persons with disabilities.[22]

What follows is a full summary that pinpoints the key resolutions along with an analysis of their probable implications:

22 See more at Human Rights Council, no date.

Resolution 7/9 of 2008 is specifically focused on the human rights of individuals with disabilities. It reasserted the basic imperative to promote, protect, and ensure that all individuals with disabilities can fully and equally enjoy all human rights and fundamental freedoms. Besides, it emphasises the necessity for the creation of respect of the inherent dignity of such individuals. For this purpose, it urgently appeals to all Governments to bring about active measures in favour of, and in support of these principles effectively. It strongly recommended that all stakeholders concerned give due and serious consideration to the rights of persons with disabilities at all phases of the universal periodic review process. These include the crucial consultations conducted by States at national level in preparing the required information to be submitted for review. It underlined the importance of ensuring that national human rights institutions, and non-governmental organisations representing persons with disabilities are actively involved in these consultations. Moreover, it also called on governments to comprehensively address the rights of persons with disabilities. This must be accomplished in close consultation with, *inter alia,* national human rights institutions and organisations advocating on behalf of persons with disabilities when they are discharging their reporting obligations under the relevant United Nations human rights instruments. In addition, it welcomed and appreciated the dedicated efforts of those Governments that have already initiated the taking of such crucial steps.

Resolution 13/11 (2010) concerns the fundamental and essential human rights of persons who have disabilities. It is centred on the national implementation and follow-up of such rights, underscoring their significance in frameworks of society. In addition, as a noteworthy development for 2011, it presents the crucial theme relating to the international cooperation. This cooperation plays a key role in offering assistance for the national activities that are intended to attain the realisation of the rights of persons with disabilities.

It asked States parties to the Convention, emphasising the need to take proactive action when they are creating, strengthening, designating, or retaining domestic mechanisms and structures specifically for the implementation and monitoring of the Convention. The States parties are called upon to seize the opportunity to carry out a comprehensive review and where necessary, strengthen existing structures in place for the important promotion and protection of the rights of persons with disabilities. Such an exercise should include assurances of: (a) Governmental focal points, along with any coordination mechanisms that have been set up to the purpose of implementing the Convention, have an adequate mandate that is broad and enables them to effectively develop, coordinate, and implement a coherent strategy towards domestic implementation of the Convention; (b) Any coordination mechanisms within Government, where they exist, should comprise representation from all Government agencies concerned, and it is important that these mechanisms and/or focal points are in close consultation with, as well as actively engage, civil society organisations, in particular those representing and advocating on behalf of persons with disabilities; (c) The frameworks set up to promote, protect, and monitor the implementation of the Convention should incorporate one or more independent

mechanisms, as appropriate, which give due regard to the principles relating to the status and functioning of national institutions responsible for the protection and promotion of human rights, which are known as the Paris Principles.

Resolution 16/15 (2011) addresses the significance and key role played by international cooperation in providing support for national efforts in achieving and maintaining the rights of individuals with disabilities.

It had called upon the States parties to the Convention that signed it to take necessary measures to ensure that all activities on international cooperation in the field of disability would be in accordance with and consistent with their obligations under the Convention; these activities may comprise a range of programs specifically targeting individuals with disabilities, and ensuring all international cooperation programs are genuinely inclusive of and readily accessible to individuals who have disabilities. It urged all the players involved in this significant endeavour, in using proper and effective measures for international cooperation in support of national efforts aimed at the fulfilment and realisation of the rights of persons with disabilities, to ensure, first and foremost, that proper and adequate attention is given to all persons with disabilities. This includes not just those individuals who are confronted by physical impairments but also those individuals confronted by mental, intellectual, and sensory impairments. It is also crucial that attention is given to matters of gender, specifically considering the complicated interlinkages and interrelationships between gender and disability. It is also crucial to ensure proper and effective coordination among various players who are involved in international cooperation activities, so that all of them will be harmoniously and synergistically working. It also requested the Office of the High Commissioner to take the lead in conducting a detailed study on the participation and involvement of persons with disabilities in public and political life. The initiative should be taken in coordination with a wide range of concerned stakeholders, not just States but also regional organisations, including those engaged in regional integration processes, and a range of agencies associated with the United Nations. The study must also involve the Special Rapporteur on disability on behalf of the Commission for Social Development and on behalf of the Economic and Social Council. Apart from the above, civil society organisations, particularly those organisations representing persons with disabilities, must also be involved, along with national human rights institutions. Also requested is that once completed, the study should be made publicly available through the website of the Office of the High Commissioner in an accessible format. It should be published prior to the commencement of the nineteenth session of the Human Rights Council.

Resolution 19/11 Rights of persons with disabilities: participation in political and public life called upon States parties to ensure that persons with disabilities could effectively and fully participate in political and public life on an equal basis with others, including the right and opportunity for persons with disabilities to vote and be elected, and to participate in the conduct of public affairs. It also called upon States parties to adopt and implement appropriate measures to ensure that persons with disabilities could participate effectively and fully in political and public life on an

equal basis with others, including by, *inter alia*: (a) Providing persons with disabilities with access to the support they may require in exercising their legal capacity and, where necessary, and at their request, allowing assistance in voting by a person of their own choice; (b) Providing reasonable accommodation and eliminating barriers that prevent or limit effective and full participation in political and public life, including physical and communication barriers, such as inaccessible polling stations or the lack of election information or materials in accessible formats; (c) Protecting the right to vote by secret ballot and the right to stand for elections and to effectively hold office, and to have access to public service positions, including by providing reasonable accommodation; (d) Promoting public awareness campaigns and training programmes relevant to the exercise of political rights by persons with disabilities, and ensuring an inclusive education system directed at, *inter alia*, the strengthening of respect for human rights, including political rights; (e) Adopting measures to encourage the active involvement of persons with disabilities in non-governmental organisations and associations concerned with public and political life, including political parties, community-based organisations and public boards, as well as the forming and joining of organisations of persons with disabilities at the local, regional, national and international levels; 6. Further calls upon States parties to ensure that measures to assist persons with disabilities in their participation in political and public life are consistent with the Convention, including the general principle of inclusion in society.

Resolution 22/3 (2013) The work and employment of people with disabilities issued a call to the States parties to take steps and measures which could enable persons with disabilities to equally and fully enjoy the fundamental right to work as other members of society could. These are steps ensuring they have an opportunity to earn a living from work freely chosen or accepted by them. It also stipulates the need for ensuring an open, inclusive, and fully accessible labour market and working environment for persons with disabilities, to allow them to make their contribution to the workforce on an equal basis.

6. Convention on the Rights of Persons with Disabilities (CRPD)

On 13th December 2006, the UN General Assembly adopted the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto, which were signed by Hungary on 30th March 2007. Subsequently, the Parliament of the Republic of Hungary adopted Act XCII of 2007 on the proclamation of the Convention and the Protocol on 25th June 2007. The Convention thus became part of the Hungarian legal order.

Hungary has a three-tiered obligation with regards to the rights enshrined in the Convention: firstly, to respect the rights; secondly, to provide adequate protection to the individual in the event of possible violations; and thirdly, to ensure the necessary framework conditions for the exercise of the declared rights.

The drafting of a new human rights convention on the rights of persons with disabilities had to meet two basic requirements: on the one hand, it had to reflect the paradigm shift from the medical model to the human rights model, thanks to the disability rights movement; on the other hand, it had to set minimum standards that would protect people with disabilities in the most vulnerable situations.[23]

For more than 20 years, organisations have been calling for a convention to protect nearly 600 million people with disabilities. The first Italian proposal was made in 1987 as part of the Decade of People with Disabilities (1983–1992), followed by a Swedish proposal in 1989, but these remained mere proposals. However, the time was ripe for a catalogue of rights.[24] This was confirmed by two exceptional reports which placed disability in the context of international human rights policy for the first time.[25] Previously, for the first forty years within the UN's framework, disability had been treated as a medical or social issue. Therefore, during this period, the focus was on prevention, rehabilitation and social security.[26] Then, in 1982, the idea of equal opportunities was introduced, but disability was still seen as a medical and social problem. *Leandro* Despouy drew attention to the human rights violations that led to disability, thus raising the issue to an international level within the UN. Among these violations, *Despouy* highlighted the use of inhumane treatment in wartime (e.g. amputations), female mutilation, medical experiments on human beings, forced sterilisation in institutions for people with disabilities, psychological violence, sexual harassment.[27] Finally, within a decade of the *United* Nations *Standard Rules for* Persons with Disabilities, the *United Nations Standard Rules* were born. But it was not binding.[28] On 12th March 2000, five non-governmental bodies also called for a human rights convention in the Beijing Declaration.[29] In April 2010 in Geneva, Ireland also raised the issue, but no decision was taken to create a convention due to lack of consensus.[30] However, the resolution did commit the High Commissioner for Human Rights to conduct an inquiry to ensure that measures taken to protect the rights of people with disabilities are more effective.

Following a proposal by Mexico on 19th December 2001, on 26th February 2002 the UN General Assembly established an Ad-Hoc Committee on the Convention by

23 Degener, 2006, p. 104; Lachwitz, 2008, p. 143.
24 Dhanda, 2008, p. 44.
25 Daes, 1986, p. 9; Despouy, 1993, p. 4.
26 Degener, 2006, p. 104; Degener, 2009, p. 34; Lachwitz, 2008, p. 143.
27 Degener, 2006, p. 104.
28 Degener, 2009, p. 34.
29 Beijing Declaration on the Rights of People with Disabilities in the New Century, adopted on 12 March 2000 at the World NGO Summit on Disability, para 7.
30 Within the UN, there have been several declarations on people with disabilities, which is actually one of the reasons why there has been no consensus on a new convention. See Dhanda, 2008, p. 45.

resolution A/RES/56/168.[31] Following the first draft in January 2004, negotiations started in May 2004 at the third meeting of the Commission.[32] The January draft followed a holistic approach, based on the principle of non-discrimination, and sought to declare existing human rights in a catalogue. This is why the Convention can be considered *specific*, although the wording itself is unfortunate, because it suggests that it is a declaration of specific rights. Rather it is specific because some of the articles of the Convention have been drafted through the lenses of autonomy, equal opportunities and the need for participation, and the civil, political, economic, social and cultural rights it contains have been given a disability-specific interpretation. *Aichele* and *Bernstoff* stress however, that the Convention, thanks to the disability rights movement, is new compared to previous human rights conventions and represents the next stage in a process of development in human rights protection, particularly with regard to the definition of disability and the concept of non-discrimination. It is this new perspective and context that sets the Convention apart from other human rights conventions.[33]

The working document, prepared in February 2006, can be considered as a consensus document, which was discussed at the eighth meeting in August and adopted on 13th December of the same year.[34] The first signature took place on 30th March 2007 and the contract entered into force on 3rd May 2007.[35]

7. International and European Law Issues Related to the Convention

The Convention has entered into force. However it is a question of how and when it will become a binding document in the domestic law of the signatory States, since its real strength will be shown by the legal symbiosis between the Convention and the domestic law of the States, i.e. the extent to which assumed international legal obligations and domestic law are compatible. The theoretical background to the establishment of consistency points to monist and dualist tendencies.

31 A/RES/56/168 General Assembly Resolution on the Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, 26 February 2002.

32 Degener, 2006, p. 106. The number of NGOs was 30 at the first meeting of the Commission and 469 at the 7th meeting. Lachwitz, 2008, p. 144.

33 In the meantime, in order to move the stalled negotiations forward, *Don MacKay* made his own proposal after the sixth negotiation. Bielefeldt, 2009, pp. 13–14; Lachwitz, 2008, p. 144; Kotzur and Richter, 2012, p. 81; Aichele and Bernstorff, 2010, pp. 199–204.

34 Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007, and Optional Protocol to the Convention on the Rights of Persons with Disabilities, UN Doc. A/Res/61/106, 24 January 2007. On the genesis of the Convention, see also Rothfritz, 2010, pp. 103–120.

35 As of 24 August 2010, the Convention has been signed by 146 States and ratified by 90; the Optional Protocol has been signed by 89 States and ratified by 56.

According to the monism approach, international law and domestic law are in fact the same law, i.e. there is no theoretical obstacle to applying international law to domestic law. This theory proclaims the principle of the primacy of domestic law, following the work of Hegel, and then another sub-school of the principle of the primacy of international law, following Kelsen. According to the dualism school of thought, international law and domestic law are two separate and unrelated worlds. The link between them must be artificially created, the international legal treaty must be transformed into a form of internal law. This is called transformation. But this does not provide an answer to the question of customary international law in domestic law. This is helped by the principle of adoption, which is the solution proposed by German constitutionalism. It is a general reference in the constitution to the general rules of international law, which are incorporated into domestic law as a whole. A state has to choose between the two approaches, which in fact implies technical differences, but the end result, the implementation of international obligations, must be guaranteed in accordance with the principle of *pacta sunt servanda*.[36] Pursuant to Article Q(2) and (3) of the Constitution, which was promulgated on 25th April 2011 and entered into force on 1st January 2012, customary international law and the so-called general principles of law are an integral part of the internal legal order in Hungary by virtue of the Constitution, while international treaties concluded by the Hungarian State become part of the legal order and applicable to the application of the law when they are promulgated in Hungarian law. This solution is the technique of general adoption and dualism, which build on each other.[37] The Convention was promulgated in Hungary by Act XCII of 2007. Following its promulgation, the question "How to proceed?" arises. International obligations have been taken on, which need to be brought into line with domestic law. Among the many articles of the Convention, currently the most important is Article 12 and the question of the compatibility / incompatibility of the incapacity guardianship in domestic law.

As this transformation results in an international treaty becoming part of domestic law and being enacted into law, the Constitutions of the States Parties take precedence in the hierarchy of legal sources. The Constitutional Court has attempted to resolve the tension arising from the relationship between an international treaty and the Constitution by interpreting the fundamental rights contained in the Constitution in the light of the international treaty.[38]

After adoption or transformation, it is not clear whether the rights and obligations contained in an international treaty can be invoked directly before national courts and other authorities. The fact that the Convention has become part of the domestic legal order does not clearly imply that certain provisions are directly applicable.

36 Kovács, 2011, pp. 57–65; Kotzur and Richter, 2012, pp. 82–83.

37 Kovács, 2011, p. 75. Article Q) of the Fundamental Law (2) '*Hungary shall ensure the consistency of international law and Hungarian law in order to fulfil its obligations under international law. Other sources of international law shall become part of the Hungarian legal system upon their promulgation by law.*'.

38 Kotzur and Richter, 2012, pp. 82–83.

Direct applicability presupposes that the provision is specifically defined in terms of its purpose, content and generally accepted meaning, that is to say, that it has the legal effect corresponding to the provisions of domestic law, and does not require any further normative action on the part of the legislature. Many of the provisions of the Convention require further interpretation, and some of them are not directly applicable, although the Convention affects the whole legal order. The Additional Protocol does, however, provide for the institution of an individual complaint, which may be invoked in cases where a Convention right would be violated. This in turn presupposes the enforceability of the Convention rights. The content of these rights must be examined in conjunction with the Covenants containing civil, political, economic, social and cultural rights.[39]

The Convention is a human rights treaty, which is also relevant for the interpretation of the treaty, as there is no distinction between first, second and third generation rights, as they are universal, indivisible, interdependent and interrelated. This also determines the interpretation of fundamental rights in domestic law. Several provisions require active behaviour by the State. The existing catalogue of fundamental rights does not stipulate that the Convention is only in force if the rights declared in the Convention are to be found in the Constitution; the Convention's own fundamental rights dimension enriches the catalogue of fundamental rights existing in the State party.[40]

The European Union's adoption of the Convention means that European law must be interpreted in accordance with the Convention.[41] International treaties are situated between primary and secondary sources of law. It is for the Court of Justice of the European Union to give guidance on what it means to interpret the law in accordance with the Convention. However, the Court of Justice of the European Union presumes that EU law is interpreted in conformity with international law.[42]

The Convention is a "mixed agreement".[43] The "mixed" nature of the Convention is reflected in the fact that some of the provisions of the international treaty fall within the competence of the European Union, while others fall within the competence of the Member States. There has been much theoretical debate on the nature of such agreements, since this is not only a question of European law but also of public international law. Of particular importance from the point of view of European law is the question of the division of competences, which is set out in detail in the declaration

39 Ibid., pp. 83–84.
40 Ibid., p. 85.
41 Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities. On 15 December 2010, the Council adopted a Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities.
42 Kotzur and Richter, 2012, p. 87.
43 On the role of mixed agreements see Karayigit, 2006, pp. 445–469; Heliskoski, 2001; Leal-Arcas, 2001, pp. 483–513.

in Annex II to the Decision. It *states* that the Community shall have competences shared with the Member States for matters concerning measures on the combating of discrimination on grounds of disability, the free movement of goods, persons, services and capital, agriculture, transport by rail, road, sea and air, taxation, the internal market, equal pay for male and female workers, trans-European networks policy and statistics. The scope of the various issues that fall under the shared and exclusive competence of the Community will evolve and change with time, as a direct result of ongoing development as well as interpretation of the law. This ongoing evolution is a reflection of changing circumstances and legal understanding. Moreover, the declaration of competence is of fundamental significance, among other reasons, because it not only delineates the areas of responsibility but also establishes a form of international accountability in the execution of the Convention. Such a system is necessary to ensure that obligations are discharged in conformity with international standards. If we look at the situation of mixed agreements, as mentioned above, they are situated between primary and secondary sources of law, and the agreements adopted by the European Union and the Member States are part of the Community system of sources of law as long as the provisions fall within the Community's competence.[44] However an interesting question arises. The Convention is a convention on human rights and contains fundamental rights which are already "constitutional law" in the European Union legal order, thanks to the Charter of Fundamental Rights of the European Union. Furthermore, the Charter of Fundamental Rights of the European Union, including Articles 21 (on non-discrimination) and 26 (on the integration of persons with disabilities), is closely linked to the Convention.[45] On this basis, can the Convention be considered a "source of constitutional law" for the EU? The answer to this question will certainly be given in the future, as the interpretation of mixed agreements is a matter for the Court of Justice of the European Union.[46] However, since the Court of Justice takes the Charter of Fundamental Rights of the European Union as a starting point for the interpretation of fundamental rights[47] and the legislation adopted by the European Union is assessed in this light, the Convention will, in any case, have an indirect impact on legislative processes, since the Charter of Fundamental Rights must be applied in accordance with the Convention.

In the framework of a preliminary ruling procedure, the Court of Justice of the European Union decides whether a provision of a mixed agreement can be invoked by individuals before a national court, but only if the provision in question falls within the scope of European law.[48] The case-law of the Court of Justice presents a varied picture of the extent to which a measure of the European Union (by which legislation is also meant) may be challenged on the ground that it is in breach of an international

44 Commission of the European Communities v French Republic, Case C-239/03.
45 Charter of Fundamental Rights of the European Union.
46 Article 267 of the Treaty on the Functioning of the European Union.
47 *Joint Communication from Presidents Costa and Skouris*, 2011.
48 *Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co. Inc*. and *Merck Sharp & Dohme Lda*, Case C-431/05.

agreement which it has concluded. As a general rule, this may be the case for provisions with a direct effect, but since the *Nakajima*[49] and *Fediol*[50] cases, a measure must be reviewed even if it contains a specific obligation or makes express reference to an international agreement. In another case, the Court did not require the direct effect of the provision.[51] The Court's unclear case law leaves open the question of whether EU measures can be reviewed in the light of the Convention if they expressly refer to an international agreement or if they contain a specific obligation, even if the provision of the international agreement does not have direct effect. However, international agreements which do not have a direct effect may nevertheless have an impact on the legal order of the European Union, in the light of Article 216(2) of the Treaty on European Union, i.e. the direct effect of agreements concluded by the Union and the principle of consistent interpretation, which is based on the primacy of international agreements over secondary sources of law.

It may be noted that the case-law of the Court of Justice on mixed agreements is uncertain, but only the Court of Justice can answer the questions raised, particularly with regards to the constitutional significance of the Convention and the relationship between the Convention and European law. It has a huge responsibility, but it is in the exceptional position of being able to interpret the limits of its own jurisdiction.

8. The Convention as the Completion of the Human Rights Model

As the subtitle indicates, the Convention is seen by this author as the culmination of the disability rights movement with its human rights model of disability. In the following, which areas of life are covered by the Convention will be examined.

Article 1 of the Convention sets out the purpose of the Convention, which is '*to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.*'

Alongside the social model of disability, which holds that disability is the responsibility of society, and goes beyond it, the Convention is the most prominent representative of the human rights model of disability.[52] According to the human rights model, a person with a disability is a subject of human rights, which the state has a duty to respect, protect and ensure, i.e. it requires both active and passive behaviour.

Defining the purpose of the Convention has contributed greatly to the empowerment of people with disabilities, also known as *empowerment*.[53] Empowerment is a

49 *Nakajima All Precision Co. Ltd v Council of the European Communities*, Case C-69/89.
50 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities*, Case C-70/87.
51 *Kingdom of the Netherlands v European Parliament and Council of the European Union*, Case C-377/98.
52 Kálmán and Könczei, 2002, pp. 87–89. See for more on this Dhanda, 2008, pp. 43–61.
53 Aichele, 2008.

developmental process whereby, over time, people are empowered to live a better life by their own means. The concept can also be seen as an open normative form that can be filled with beliefs, values and moral judgements. There are different approaches: political, everyday, reflexive, transitive.[54]

In the *political* approach, the concept describes a process whereby people and groups are empowered to play a role in political decision-making. The civil rights and emancipation movements are seen by many as having their origins in this concept.[55]

The everyday approach *to the* concept focuses on the microenvironment of everyday life, in which individuals autonomously determine their lifestyle, personal and material relations. This approach is relevant to social work, since it focuses on the recognition of people's strengths and resources, which are used to provide social assistance.[56]

The reflexive sense refers to the process of gaining vitality, to some change in the life process, usually a release from dependency, such as guardianship. It can also be understood at the level of everyday life and politics.[57]

The *transitive approach* is also important in social work, as it helps in self-determination and provides all the reserved resources needed to lead a successful life.[58]

To sum up, *empowerment* is self-actualisation, empowerment of the self, empowerment of qualities and autonomy. At the same time, it is also a process of people taking control, moving out of disadvantage and using their own and collective skills and resources to determine their own lives, according to their choices, needs, interests and desires.[59] This concept is related to the findings of the measurement of capability, and the concept of decision-making capability, which will be discussed later. Thus, just as mental health law and therapeutic justice, so *empowerment* has emerged from the Independent Living Movement over decades.

To achieve this, the Convention draws a clear distinction between the different areas of life and the state's obligations in relation to them.[60]

Respect for human dignity is a central concept of the Convention, it is repeatedly mentioned in it, and it has become a tool for shaping consciousness. However, it is necessary to shape the consciousness not only of society, but also of the person with a disability. This is the purpose of awareness-raising programmes and training.[61]

The Convention's Preamble (*i)* and *(m)*, Article 3(*d)* (General Principles), Article 24(1)(*a)* (Education) contain the twist that makes disability part of human diversity and humanity. This is called the principle of *diversity*.[62] This turn is also relevant to

54 Herriger, 2010, pp. 13–19.
55 Ibid., pp. 14–15.
56 Ibid., pp. 15–16.
57 Ibid.
58 Ibid., p. 17.
59 Ibid., p. 20.
60 Aichele, 2008, p. 4.
61 Bielefeldt, 2009, pp. 4–5.
62 Ibid., pp. 6–7; Dhanda, 2008, p. 46.

the development of genetic engineering. However, this perception can often give the reader of the Convention the impression that it is a document for the protection of minorities, since each disability group has its own culture, which requires support from the state and society.[63] Also new in Preamble (m) is the notion that ensuring the full participation of people with disabilities helps them to feel a sense of belonging to society *(Zugehörigkeit)*.[64]

It is often the case that human rights conventions, precisely by providing protection, inadvertently delimit the protected subject in society. Thus, the present Convention has a negative protective function, but at the same time it creates a strong demand for progress in the community. According to *Bielfeldt*, this is not the case in any other human rights convention.[65]

The Convention covers eight thematic areas of disability policy, reflecting the achievements of the disability rights movement: general disability policy, women with disabilities, children with disabilities, protection and safety of persons with disabilities, self-determination, freedom and participation rights/freedom from barriers, solidarity, international cooperation.[66]

Disability policy should take into account the fact that international developments and disability rights movements have made disability a human rights issue as well as a medical and social one. In fact, Article 1 (Purpose of the Convention), Article 3 (General principles), Article 4 (General obligations), Article 5 (Equality and non-discrimination), and Article 8 (Raising awareness) lay down the basis for a state's disability policy.[67] Degener does not include Article 12 on equality before the law. However in this author's view, a state's disability policy is largely determined by the state's attitude to the guardianship system. After all, for people with intellectual and psychosocial disabilities, the exercise of all Convention rights is conditional upon the exercise of their capacity to act, either independently or with assistance[68]

Article 6 of the Convention specifically establishes the fact of multiple discrimination against women with disabilities, and in view of this States shall take measures to ensure their full and equal enjoyment of all human rights and freedoms *(empowerment)*.[69] However, we find references to women/gender not only in Article 6, but also in other places: preamble *q*. and *s*. , Article 3(g),Article 8(1)(b), protection from violence and exploitation is also mentioned in Article 16(1), (2), (4), (5); respect for home and family in Article 23; the highest attainable standard of health in Article 25; and an adequate standard of living and social protection in Article 28.[70]

63 Bielefeldt, 2009, p. 8.
64 Ibid., p. 10.
65 Ibid., pp. 12–13.
66 Degener, 2009, pp. 36–51; Kotzur and Richter, 2012, p. 82.
67 Degener, 2009, p. 36.
68 This view is supported by Amita Dhanda. Dhanda, 2008, p. 47.
69 Degener, 2009, p. 36. On the merits of the Convention in combating multiple discrimination, see Dhanda, 2008, p. 51.
70 Degener, 2009, p. 36.

In addition to Article 7 on children with disabilities, age-specific statements are made in the preamble (d) and (r), Article 3 (h), Article 4(3) (inclusion of children with disabilities in legislation), Article 8(2)(b) (raising awareness of the need to include children up to the age of majority), Article 16(5) (child-centred legislation), Article 16(3)(b) (inclusion of children with disabilities in legislation), Article 16(3)(c)(d) and (r)), Article 16(3)(d) and (e), Article 16(5)(d) and (f)), Article 16(2) (children's right to acquire citizenship), Article 23(3), (4) and (5) (family rights), Article 24(2)(a) and (3)(c) (integrated education), Article 25(b) (right to health services) and Article 30(5)(d) (participation in cultural and leisure activities).

On the issue of the protection and safety of persons with disabilities, a mention should be made of the articles on the right to life, on emergencies and humanitarian emergencies, on the liberty and security of person, on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, on freedom from exploitation, violence and abuse, and on the protection of the integrity of the individual.

Self-determination is a central theme of human rights and disability, an expression of the exercise of autonomy, which according to the Convention's approach, focuses on the decision-making capacity and considers the circumstances of decision-making.[71] Article 12 on equality before the law, Article 19 on independent living and inclusion in the community, Article 22 on respect for private life, Article 23 on respect for home and family life, Article 26 on habilitation and rehabilitation are relevant to self-determination.

The rights to freedom and participation, and accessibility in particular:

Article 9 on accessibility, Article 13 on access to justice, Article 18 on freedom of movement and citizenship, Article 20 on personal mobility, Article 29 on participation in political life and public life, Article 30 on participation in cultural and leisure activities.[72] In my opinion, this area includes Article 12 on equal legal capacity before the law, since the existence and exercise of such capacity is a fundamental condition for participation.

With the civil and political freedoms set out in points *(V)* and *(VI)*, the Convention is unique among conventions on people with disabilities, as it includes civil, political and economic, social, and cultural rights within a single convention.[73]

The rights of solidarity concern economic, social and cultural rights.[74] The Convention was not intended to separate these rights from classical civil and political liberties. However, it is impossible to exercise rights in this area without the guarantee of participatory rights. In particular it is a question of the exercise of the right to education under Article 24, the right to health services under Article 25, the right to work and employment under Article 27, and the right to an adequate standard of living and social protection under Article 28.

71 Ibid.; Dhanda, 2008, p. 47.
72 Degener, 2009, p. 37.
73 Dhanda, 2008, p. 46.
74 Steiner and Alston, 1996, p. 256.

Article 12 and Article 27 are understandably separated in the Convention, but Article 27 is based on the assumption that people with intellectual and psychosocial disabilities can be employed. However, Article 27 can only be interpreted in the light of Article 12 in the case of people with intellectual and psychosocial disabilities who, because of incapacity to work, cannot be employed in some States.

Article 32 is unique among human rights conventions in that it provides for international cooperation as a guarantee of its continued development and the achievement of its goals, alongside strict implementation provisions. The Article can act as a catalyst and has an impact on the development of national disability policies.[75]

9. Role of the UN in Defining Disability

In point (e) of the Preamble, it can be seen that disability is a changing concept and that it is also the result of the interaction between persons with disabilities and attitudinal and environmental barriers that prevent them from participating fully and effectively in society on an equal basis with others.

Article 1 sets out the definition of disability, which states that '[a] person with a disability is any person who has a long-term physical, mental, intellectual or sensory impairment which, together with a number of other barriers, may limit that person's full, effective and equal participation in society.'

The concept of disability is undergoing a major shift in two respects: *on the one hand,* the concept of disability is socially constructed, even if it is based on some kind of long-term physical, intellectual, mental or sensory impairment. Through this approach, people with disabilities are transformed from suffering subjects into citizens who actively criticise stigmatising, discriminatory and exclusionary social structures.[76]

On the other hand, this concept is a "dynamic concept" of disability. It is an open concept, as future developments, experiences and findings may lead to further disabilities. That is why the scope of the Convention has been placed within the definition of the objective, which is to provide protection in all conceivable areas of life. It thus encompasses the full spectrum of first and second generation rights, i.e. civil, political, economic, social and cultural rights.

Linked to the concept is the definition of discrimination on the basis of disability in Article 2:

> 'any distinction, exclusion or restriction based on disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others, in the political, economic, social, cultural, civil or any other

75 Degener, 2009, p. 37.
76 Ibid., p. 9.

field. This includes all forms of discrimination, including denial of reasonable accommodation.'

This wording refers to both direct and indirect forms of discrimination. The Convention has a dual protective function: on the one hand, it protects people with disabilities by declaring universal human rights by making rights specific to people with disabilities; and on the other hand, it consistently extends the prohibition of discrimination to all areas of life.[77]

It is worth examining the relationship between the Convention and the WHO concepts of disability. The change in the concept of disability reflects this author's view that disability as a phenomenon and the social issues it raises need to be considered in a systemic way, in its context and in its process. This is how we move from the medical or medical model, where disability is purely a medical issue and a problem for the individual, to the social model, to the human rights model.

The first WHO definition of disability between 1980–1997 placed disability along a linear path, where *impairment* is some kind of disorder of a person's psychological and physiological structure and function, and this corresponds to health impairment; *disability* is a reduced ability to perform certain activities; *and disadvantage* is the social disadvantage resulting from a person's impairment or disability. This is the medical model of disability. That is, disability is a medical issue and a private matter.[78]

The concept has placed people with disabilities in the role of the sick *(Talcott Parsons)*, whereas disability is much more severe and persistent than illness, and as such is interpreted as having a lower status than illness. Although the above WHO definition can still be used in the medical and health sphere, it is no longer used in sociological and social psychological analyses, or in legal analyses of discrimination. This is most evident in the notion of "disadvantage", where disadvantage is defined as an individual's inability to fulfil a normal social role, as if it were an individual problem of the person with a disability, whereas it affects society as a whole.[79] Statistics show that it is largely caused by accidents at work and traffic accidents and cannot be separated from social facts.[80]

In 2002, the WHO created a new concept, because in the space of almost two decades, changes in the life of disabled people had to be reflected in the way disability was understood. The awakening of the disability community and its representatives, the equal opportunities and independent living movements and of course, research have played a major role in this change. Research has an unparalleled merit in finding solutions to the legal problems of people with intellectual and psychosocial disabilities. Related to this are the law of mental health, including issues of capacity measurement and decision-making, and the ethical and legal-theoretical considerations of the

77 Aichele, 2008, p. 4.
78 Kálmán and Könczei, 2002, p. 82.
79 Könczei and Varga, 2000, p. 25.
80 Kálmán and Könczei, 2002, p. 82.

therapeutic justice system on substitute decision-making and its disadvantages in the lives of individuals. All of this enriches the field of disability studies.

The new WHO concept derives from two background factors that are closely interrelated: one environmental, the other individual. It can be said that behind the condition of disability lies the responsibility of society itself, which, if it does not help the individual to participate in the economic and social life of the world with his or her existing abilities, makes him or her disabled. Thus, the impairment of an ability is not in itself a disability. It becomes a disability when society itself treats it in such a way as to disadvantage the impaired person. The environment, and society, are thus given a special role.[81]

The question is: has the WHO figure changed, and if so, in what way, according to the Convention definition?

It is this author's opinion that the conceptual building blocks of the concept itself have not changed much over time. However, importantly, there has been a tremendous shift in emphasis that has occurred directly due to the Convention. Such change has once again pushed to the fore the question of the health, and more importantly of any impairment with which a person may be burdened, and of the many individual and environmental variables that have an important impact on influencing this health. There is also a stark emphasis on understanding the influence of the social, physical, and legal environment and how these interacting pieces together help to make up the overall health of individuals. Cumulatively, these many elements are then combined to bring about the overall activity potential of a particular individual, which in its own turn, significantly influences the level of involvement of that individual in society. The interplay between this relationship and that which we observe through the activity of constructing the notion of disability, if we look at how our investigation of the history of disability comes into play, is mirrored. As Kálmán and Köncezi point out, prejudices against disabled people do not have their origin in the great cultures, but are generated and recreated in contact with atavistic, old instincts, pagan superstitions, religious beliefs and the hegemony of the respective great cultures, side by side with and in the face of difference.

10. Committee on the Rights of Persons with Disabilities

The Committee is a conscientious group of 18 independent members, all of whom are distinctively experienced and insightful in their own respects. They are responsible for overseeing the degree to which the States parties observe and implement the articles included in the Convention on the Rights of Persons with Disabilities.

All State parties are obliged to furnish periodic and regular reports to the Committee regarding how the rights under the Convention are being effectively enforced and implemented. States are required to furnish their first report within two years

81 Könczei and Varga, 2000, p. 26.

of their ratification of the Convention, and subsequently they are required to report every four years, as per Article 35 of the Convention.

The Committee thoroughly examines each individual report and formulates recommendations in detail that are designed to enhance and strengthen the application of the Convention in the given State. It then presents these carefully crafted recommendations in the form of concluding observations to the respective State party.

The Optional Protocol, which is designated as A/RES/61/106 and enters into force simultaneously with the Convention, also provides the Committee with the mandate to receive and consider individual complaints. Additionally, it empowers the Committee to conduct inquiries when there are reliable reports indicating serious and systematic violations of provisions outlined in the Convention.

The Committee also publishes its interpretation of the meaning of human rights provisions, known as general comments, on matters of a thematic nature. The Committee typically sits in Geneva and conducts two sessions each year to discuss its agenda and projects.

The Committee's work, that of monitoring, is carried out according to a modern and contemporary conception of what is understood by disability. In line with the human rights model of disability, we argue that disability should be thought of as a social phenomenon and not a solely medical one. It is truly the barriers within society itself, rather than the individual impairments one has, which serve to exclude and marginalise individuals with disabilities from full participation in various aspects of life. Globally, it has been estimated that almost 15% of the global population, meaning more than one billion individuals, are persons living with disabilities. The Committee has indicated that one of the fundamental reasons for the widespread discrimination and exclusion of people with disabilities in all sectors of society is a result of the insufficient comprehension and improper implementation of the human rights approach to disability. Through its proactive function and coordination with the various States parties, the Committee highly promotes the protection and advancement of human rights of persons with disabilities. Furthermore, it provides such States parties with specific guidelines and advice that are geared towards easing and enhancing the effective realisation of provisions that are embedded in the Convention. The Committee has consistently emphasised and brought to the forefront the important reality that States parties have an obligation to ensure that persons with disabilities, and their organisations, are genuinely included and involved in all efforts and decision-making processes that relate to or impact persons with disabilities.

11. Summary

Tracing the history of disability, we therefore travel from Taigetos to equal opportunities, from a transcendent, albeit ultimately paternalistic, subsequently medicalised reaction to a human rights framework and the imperative to secure equal opportunities.

The United Nations has indeed taken serious and concrete steps that are aimed at the protection of the rights of people who are disabled. It has also taken significant efforts aimed at enhancing and increasing the general quality of life for such individuals through a wide arena of well-designed schemes and programs that are especially dedicated to this very noble mission. Then in 2006, a significant and landmark advancement was achieved with the adoption of the Convention on the Rights of Persons with Disabilities, simply referred to as the CRPD. This historic and unprecedented treaty was a significant step forward in the global acknowledgment of human rights; its primary purpose being to promote, ensure, and safeguard the rights of all individuals who live with disability, thereby acknowledging their inherent dignity and worth as members of society. It firmly upholds and assertively places at the centre the inalienable rights that belong to them, which enable them to engage and become involved in all aspects of society. This ensures that they are provided with the necessary access to key areas such as education, employment, health care, and a wide range of other significant services that contribute extensively and enhance their overall well-being. The United Nations 2030 Agenda for Sustainable Development contains a list of detailed goals and objectives for carefully addressing and meeting the diverse and different needs of people living with disabilities. For example there is a specific goal, Goal 4, aimed at making inclusive and equitable quality education accessible to everyone, including persons living with disabilities, in order to promote and support equal opportunities in learning institutions for all learners. UN Enable is dedicated to spreading disability issues awareness and the rights of individuals with disabilities in the UN system and beyond. It offers resources, advocacy, and assistance for CRPD implementation. An International Day of Persons with Disabilities falls annually on 3rd December, raising awareness of issues of disability and furthering the rights and welfare of individuals with disabilities. The United Nations Human Rights Council takes serious and solemn measures in confronting the daunting challenges confronting people with disabilities, as well as advancing their basic rights, through a sequence of meticulously designed resolutions. In addition, this illustrious Council goes a step further by appointing special rapporteurs who bear the critical mandate of closely monitoring, carefully assessing, and exhaustively reporting on the status and living conditions of people with disabilities worldwide.

Bibliography

Literature

Aichele, V. (2008) *The UN Convention on the Rights of Persons with Disabilities and its Optional Protocol. A Contribution to the Ratification Debate.* Berlin: German Institute for Human Rights.

Aichele, V., Bernstorff, von J. (2010) 'The human right to equal recognition before the law: on the interpretation of Art. 12 of the UN Convention on the Rights of Persons with Disabilities', *Betreuungsrechtliche Praxis*, 19(5), pp. 199–204.

Bielefeldt, H. (2009) *Zum Innovationspotential der UN-Behindertenrechtskonvention*. Berlin: Deutsches Institut für Menschenrechte.

Braddock, D.L., Parish, S.L. (2001) 'An institutional history of disability' in Albrecht, G.L., Seelman, K., Bury, M. (eds.) *Handbook of Disability Studies*. Thousand Oaks: Sage Publications, pp. 11–68; https://doi.org/10.4135/9781412976251.n2.

Daes, E.I. (1986) *Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder.* New York: United Nations Sales Publications.

Degener, T. (2006) 'Menschenrechtsschutz für behinderte Menschen, Vom Entstehen einer neuen Menschenrechtskonvention der Vereinten Nationen', *Vereinte Nationen*, 2006/3, pp. 104–110.

Degener, T. (2009) 'Welche legislativen Herausforderungen bestehen in Bezug auf die nationale Implementierung der UN-Behindertenkonvetion in Bund und Ländern?', *Behindertenrecht, Fachzeitschrift für Fragen der Rehabilitation*, 2009/2, pp. 34–51.

Despouy, L. (1993) *Human Rights and Disabled Persons*. New York: United Nations Sales Publications.

Dhanda, A. (2008) 'Constructing a new human rights lexicon: Convention on the Rights of Persons with Disabilities', *Sur. International Journal on Human Rights*, 8, pp. 43–61.

Driver, F. (2004) *Power and pauperism: the workhouse system*. Cambridge: Cambridge University Press.

Gary L., A., Seelman, K.D., Bury, M. (eds.) (2001) *Handbook of disability studies*. London–New Delhi: Sage Publications–Thousand Oaks.

Heliskoski, J. (2001) *Mixed Agreements As a Technique for Organizing the International Relations of the European Community and Its Member States*. The Hague–London–New York: Kluwer Law International.

Herriger, N. (2010) *Empowerment in social work*. Stuttgart: Kohlhammer.

Human Rights Council (no date) *Human Rights Council resolutions. OHCHR and the rights of persons with disabilities* [Online]. Available at: https://www.ohchr.org/en/disabilities/human-rights-council-resolutions (Accessed: 15 April 2025).

Joint Communication from Presidents Costa and Skouris (2011) European Court of Human Rights, 17 January 2011. [Online]. Available at: https://www.echr.coe.int/documents/d/echr/ue_communication_costa_skouris_eng (Accessed: 19 April 2025).

Kálmán, Zs., Könczei, Gy. (2002) *A Taigetosztól az esélyegyenlőségig*. Budapest: Osiris.

Karayigit, T.M. (2006) 'Why and to What extent a Common Interpretative Position for Mixed Agreements?' *European Foreign Affairs Review*, 11(4), pp. 445–469; https://doi.org/10.54648/eerr2006037.

Könczei, Gy., Varga, M. (2000) 'Health impairment, disability and occupational rehabilitation' in *A book on occupational rehabilitation*. Down Association, "Together – Living".

Kotzur, M., Richter, C. (2012) 'Anmerkung zur Geltung und Verbindlichkeit der Behindertenrechtskonvention im deutschen Recht' in Welke, A. (ed.) *UN Convention on the Rights of Persons with Disabilities with Legal Explanations*. Berlin: German Association for Public and Private Welfare.

Kovács, P. (2011) *Public International Law.* Budapest: Osiris.

Lachwitz, K. (2008)'Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung', *Betreuungsrechtliche Praxis*, 17(4), pp. 37–40.

Leal-Arcas, R. (2001) 'The European Community and Mixed Agreements', *European Foreign Affairs Review*, 2001/4, pp. 483–513; https://doi.org/10.54648/391100.

Rothfritz, L.P. (2010) *Die Konvention der Vereinten Nationen zum Schutz der Rechte von Menschen mit Behinderungen. Eine Analyse unter Bezugnahme auf die deutsche und europäische Rechtsebene*. Frankfurt am Main: Peter Lang Internationaler Verlag der Wissenschaften.

Steiner, H., Alston, P. (1996) *International Human Rights in Context*. Oxford: Clarendon.

United Nations (1982) *World Programme of Action Concerning Disabled Persons* [Online]. Available at: https://www.un.org/development/desa/disabilities/resources/world-programme-of-action-concerning-disabled-persons.html (Accessed: 15 April 2025).

United Nations (2021) *Disability Inclusion Strategy* [Online]. Available at: https://www.un.org/en/content/disabilitystrategy/%20 (Accessed: 15 April 2025).

United Nations (no date) *United Nations Development Programme* [Online]. Available at: https://www.undp.org/ (Accessed: 15 April 2025).

United Nations Human Rights Office of the High Commissioner (no date) *Mandate Special Rapporteur on the rights of persons with disabilities* [Online]. Available at: https://www.ohchr.org/en/special-procedures/sr-disability/mandate (Accessed: 15 April 2025).

World Health Organization (no date) *Disability* [Online]. Available at: https://www.who.int/health-topics/disability#tab=tab_1 (Accessed: 15 April 2025).

Legal Sources

A/HRC/RES/16/15, Role of international cooperation in support of national efforts for the realization of the rights of persons with disabilities, 12 April 2011.

A/HRC/RES/25/20, The right of persons with disabilities to education, 14 April 2014.
A/HRC/RES/26/20, A Special Rapporteur on the Rights of Persons with Disabilities,14 July 2014.
A/HRC/RES/32/23, Protection of the family: role of the family in supporting the protection and promotion of human rights of persons with disabilities, 18 July 2016.
A/HRC/RES/37/22, Equality and non-discrimination of persons with disabilities and the right of persons with disabilities to access to justice, 6 April 2018.
A/HRC/RES/40/14, Rights of the child: empowering children with disabilities for the enjoyment of their human rights, including through inclusive education, 4 April 2019.
A/HRC/RES/41/21, Human rights and climate change: the rights of persons with disabilities, 12 July 2019.
Beijing Declaration on the Rights of People with Disabilities in the New Century, adopted on 12 March 2000.
Charter of Fundamental Rights of the European Union.
Treaty on the Functioning of the European Union.
A/RES/48/96, Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 20 December 1993.
A/HRC/RES/31/6, The rights of persons with disabilities in situations of risk and humanitarian emergencies, 8 April 2016.
A/HRC/RES/43/2, Awareness raising on the rights of persons with disabilities, and habilitation and rehabilitation, 22 June 2020.
'Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities', *Official Journal C*, 340, 15 December 2010, pp. 11–15 [Online]. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:HU:PDF (Accessed: 15 April 2025).
'Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities' *Official Journal L*, 23, 27 January 2010, pp. 35–0061 [Online]. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:HU:PDF (Accessed: 15 April 2025).
A/HRC/RES/32/18, Mental health and human rights, 7 July 2016.
A/HRC/RES/36/13, Mental health and human rights, 9 October 2017.
A/HRC/RES/43/13, Mental health and human rights, 19 June 2020.
A/HRC/RES/43/7, Right to work, 19 June 2020.
A/HRC/RES/22/3, The work and employment of persons with disabilities, 14 March 2013.
A/HRC/RES/28/4, The right of persons with disabilities to live independently and be included in the community on an equal basis with others, 7 April 2015.
A/HRC/RES/7/9, Human rights of persons with disabilities, 27 March 2008.
A/HRC/RES/10/7, Human rights of persons with disabilities: national frameworks for the promotion and protection of the human rights of persons with disabilities, 26 March 2009.

A/HRC/RES/13/11, Human rights of persons with disabilities: national implementation and monitoring and introducing as the theme for 2011 the role of international cooperation in support of national efforts for the realization of the rights of persons with disabilities, 14 April 2010.

A/HRC/RES/19/11, The rights of persons with disabilities: participation in political and public life, 22 March 2012.

| Chapter 11 |

Disability Rights in the Jurisprudence of the European Court of Human Rights

Rodoljub Etinski

ABSTRACT

Persons with disabilities enjoy the same rights and freedoms under the ECHR as all other individuals. However, to achieve substantive equality in the enjoyment of these rights, particularly in terms of opportunities for societal integration, they are entitled to additional specific rights. These specific rights do not constitute new rights but rather represent a novel articulation of existing general rights. Apart from Article 5(1)(e) of the ECHR, no other provisions of the Convention explicitly address persons with disabilities. Consequently, in its interpretation of the ECHR, the ECtHR has relied on other legal instruments dedicated to the protection of persons with disabilities, notably the 2006 Convention on the Rights of Persons with Disabilities, to elucidate the rights guaranteed by the ECHR in relation to persons with disabilities. The synergistic relationship between these two conventions has not been without challenges. Differences between the conventions are evident, particularly regarding the deprivation of liberty for persons with mental disabilities and the interpretation of the right to vote for these individuals.

An analysis of ECtHR case law reveals the specific rights afforded to persons with disabilities, highlighting certain particularities in relation to *locus standi* before the Court and the margin of appreciation afforded to States. Additionally, the jurisprudence illustrates specific interpretations of individual rights. For instance, the ECtHR has considered disability as a relevant factor in assessing the absolute necessity of the use of force under Art. 2(2). In interpreting Arts. 2 and 3 of the Convention, the Court has affirmed that States Parties are obligated to train their law enforcement officers in the appropriate treatment of persons with disabilities when such treatment poses a risk to life. Moreover, States Parties must ensure that their officials provide special care to persons with disabilities. Some specifics exist regarding other rights, including the right to respect for private and family life. Particularly noteworthy is the prohibition of discrimination, which underpins and informs many of these specific rights.

KEYWORDS

persons with disabilities, human rights

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1. Introduction

Persons with disabilities enjoy the rights and freedoms guaranteed by the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention) equally with all other individuals. However, due to their disabilities, they also possess specific additional rights, which impose corresponding obligations on the State Parties. These specific rights are not new rights; rather, they are new specific components of the existing rights and freedoms guaranteed by the ECHR. Disabilities necessitate certain adaptations in the interpretation and application of the Convention to address the particular needs of persons with disabilities and facilitate their full integration into society. This subchapter aims to present and analyse the specific effects of the ECHR as they relate to persons with disabilities. The case law of the European Court of Human Rights (ECtHR or Court) will be the primary source of information on these specifics.

The specifics can be broadly categorised into two groups. The first group pertains to general issues of importance, which will be addressed in the first part of the subchapter. These include the standing of persons with disabilities before the Court, and the influence of disability on the scope of the margin of appreciation afforded to State Parties in implementing the Convention. Although the definition of disability is not the central issue of the first part, it will be discussed briefly. The first part begins with an exploration of how human rights have been modified and specialised concerning persons with disabilities within the framework of the ECHR. This analysis is crucial, given the absence of a direct provision in the Convention addressing persons with disabilities, except for Art. 5(1)(e), which concerns the deprivation of liberty of "persons of unsound mind." To understand this specialisation, it is essential to identify the legal sources that inform the generic provisions of the Convention concerning the specific rights of disabled individuals and to examine the role of the Court's case law in this process. The primary legal source in this context is the 2006 Convention on the Rights of Persons with Disabilities (CRPD). However, the interaction between these two conventions is complex, and certain contradictions between them must be carefully considered.

The second part of the subchapter begins with a brief discussion of the specific implications regarding the right to life (Art. 2 of the Convention) and continues with more detailed examinations of the protection of the dignity of disabled individuals through the prohibition of torture (Art. 3), the protection of their liberty under the right to liberty (Art. 5), and the safeguarding of their private and family life (Art. 8). This section will also address the applicability of the right to a fair trial (Art. 6(1)), to legal capacity disputes and the applicability of that right, and the right to property (Art. 1 of Protocol No. 1) to disability pensions and allowances, as well as the specific considerations regarding the voting rights of mentally disabled persons (Art. 3 of Protocol No. 1). The second part concludes with an examination of one of the most critical issues: the prohibition of discrimination against persons with disabilities,

which underpins the entire text of the subchapter. The subchapter will conclude with a brief third part, which will discuss the emerging role of NGOs in the protection of persons with disabilities under the ECHR, particularly in the countries of Central and Eastern Europe.

The primary source of information on the specific human rights implications for persons with disabilities within the ECHR system is the case law of the ECtHR. Therefore, this subchapter will focus on an analysis of relevant case law, particularly those decisions that reveal the specific implications discussed. The analysis will include references to the Court's general legal findings, which have been reiterated in multiple cases and have thus acquired the status of precedential principles, or as termed by the Court, well-established case law. Additionally, when necessary for understanding the Court's interpretation, a brief presentation of the facts of specific cases will be provided. While this subchapter recognises and respects the significant contributions of the ECtHR to the development of human rights, it will also include critical remarks where the author deems them appropriate. In referencing cases, only the names of the applicants will be mentioned, except in instances where the applicant's name is anonymised, in which case the initials of the applicant and the name of the respondent State will be provided. A complete list of all cases discussed is appended at the end of the subchapter. This subchapter is certainly not the first text that explores cases related to persons with disabilities.[1]

2. First Part – General Issues

2.1. Understanding the Modification and Specifics of Human Rights under the ECHR Regarding Persons With Disabilities

2.1.1. Legal Sources Informing the Generic Provisions of the ECHR on the Specifics of Human Rights for Persons With Disabilities

The ECHR does not contain any provisions that explicitly address persons with disabilities, except for Article 5(1)(e), which permits the deprivation of liberty for "persons of unsound mind." However, this does not imply that the Convention disregards the particular needs of individuals with disabilities, particularly their need for full social integration. The Convention is characterised by its generic and open text, making it suitable for incorporating information from various sources. It is well-known that when the ECtHR cannot resolve a disputed issue by reading the text of the Convention only, it consults other sources. These sources are particularly relevant when they are specialised in the matter before the Court and include, *inter alia*, international treaties, converging practices of the State Parties, acts of various bodies of the Council of Europe, acts of UN bodies, and views of human rights monitoring bodies.

1 See the concise but informative review of relevant case law by Judge Lubarda of the ECtHR, at Lubarda, 2021, pp. 6–19.

In seeking to interpret the Convention regarding the rights and freedoms of persons with disabilities, the ECtHR has primarily consulted the Convention on the Rights of Persons with Disabilities (CRPD),[2] adopted on 13th December 2006 in New York and entering into force on 3rd May 2008.[3] The CRPD binds 190 Parties, including all State Parties to the ECHR. Only the Convention on the Rights of the Child (CRC), the Framework Convention on Climate Change, and the Paris Agreement have more Parties. The CRPD did not establish new rights for persons with disabilities but rather adapted and specified existing rights.[4] It shifted the focus from the impairments of persons with disabilities to the social obstacles impeding their full integration into society and aimed to create an enabling environment. The interdependence of civil and political rights with economic, social, and cultural rights, as established by the CRPD, influenced the ECtHR to strengthen a social dimension for civil and political rights guaranteed by the ECHR, particularly concerning Arts. 2, 3, 8, and 14.[5] The concept of "reasonable accommodation" in the CRPD has significantly contributed to the development of the ECtHR's case law.[6]

The ECtHR has also consulted many other sources regarding the rights of persons with disabilities. These include the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 4th April 1997; the Convention against Torture (CAT); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (A/RES/46/119, 17th December 1991); Recommendation Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorders of 22nd September 2004, among other sources.[7] The manner in which the CRPD and other sources inform the ECHR will be illustrated by a few examples.

One of the issues in the *N. v. Romania (no. 2)* case was whether Romanian law, which exclusively provided for the possibility of full legal incapacitation, was compatible with Art. 8 of the ECHR. Art. 8 does not provide any information on the issue, but Art. 12(4) of the CRPD filled this lacuna. The provision requires, *inter alia*, that measures taken regarding legal incapacitation must be proportional and tailored to the person's circumstances. Since Romanian law distinguished only between full legal capacity and full incapacity without providing for a proportional and "tailor-made" response, the Court found that it was not in accordance with Art. 8 of the ECHR.[8]

2 The CRPD was referred to, for example, in *Enver Şahin*, para. 60; Arnar Helgi Lárusson, para. 57; *L.R. v. North Macedonia* para. 37; *Z.H. v. Hungary*, para. 27; *A.N. v. Lithuania*, para. 80; *Ivinović*, para. 21; *McDonald*, para. 30; *N. v. Romania* (No. 2), para. 32; *G.L. v. Italy*, para. 26; *Guberina*, para. 92.

3 See overview of the CRPD at Nieminen, 2010, p. 386.

4 Bantekas, 2020, p. 62.

5 Broderick, 2018, p. 209.

6 Ibid.

7 Jimenez, 2015, pp. 292–294.

8 *N. v Romania* (no. 2), paras. 63, 66.

The *Béláné Nagy* case is significant as it highlights that external sources consulted by the ECtHR need not necessarily be accepted by the respondent State. The Court found the same information on the minimum period of insurance required prior to contingency as a condition for a disability pension in the European Code of Social Security and ILO Conventions Nos. 102 and 128.[9] This information was relevant in the interpretation of the right to property, since Art. 1 of Protocol No. 1 certainly does not provide such information. However, the respondent State did not accept any of these three documents.

The ECtHR consults not only international conventions but also the interpretations of these conventions by competent bodies. In the *Blokhin* case, the Court referred to Guideline 27 of the Council of Europe Guidelines on child-friendly justice, Art. 23 of the CRC, and General Comment No. 9 of the Committee on the Rights of the Child as sources of information on the deprivation of liberty of a mentally disabled child. It should be noted that the CRPD does not only fill lacunae in the text of the ECHR but also supplements the ECHR in other ways. In the *Guberina* case, the CRPD was of decisive importance in the Court's assessment of whether different treatment of a taxpayer with a disabled child was reasonable and objective.

The relationship between the CRPD and the ECHR cannot be described solely as a process of synergy between the two conventions. There are instances of disharmony between the CRPD and the ECHR, including in the case law of the ECtHR. The most drastic case is the contradiction between Art. 5(1)(e) of the ECHR and Art. 14(1)(b) of the CRPD regarding the deprivation of liberty of persons with mental disabilities. The ECHR allows for such a possibility, whereas the CRPD forbids it. Another area of disharmony relates to the right to vote of mentally disabled persons. Art. 29(a) of the CRPD can be interpreted, as it was by the Committee on the Rights of Persons with Disabilities and the Commissioner for Human Rights of the Council of Europe, to provide all persons with disabilities with the right to vote. We shall see later in the section on the right to vote of persons with disabilities that the ECtHR does not share this view.[10]

2.1.2. Potential of ECtHR Case Law

The case law of the ECtHR is a primary source of information on the content and scope of the protection of persons with disabilities, as guaranteed by the ECHR. Due to this reason, case law will be the focus of this subchapter. Case law contains relevant interpretations of the ECHR in thousands of judgments and decisions. The ECtHR is not formally bound to follow any of its previous judgments, as noted in the *Chapman* case and reiterated in many subsequent cases. However, the Court has also remarked that the interests of legal certainty, foreseeability, and equality before the law require

9 *Béláné Nagy*, para. 103.

10 See an older but exhaustive study on human rights of mentally disabled persons at Wachenfeld, 1991, pp. 109–292.

it not to depart from precedents established in previous cases without good reason.[11] The Court usually adds that since the Convention is primarily a system for the protection of human rights, it must consider changing conditions in State Parties and respond to any emerging consensus regarding the standards to be achieved.

There are several reasons why the Court may depart from interpretations in previous cases. One of them is the emergence of new legal instruments. For example, the conclusion of the CRPD and its acceptance by State Parties to the ECHR has resulted in new interpretations in cases related to persons with disabilities. Another reason is a different factual setting; interpretation is usually tied to the facts of a case, and different facts in a subsequent case may require a different interpretation. A third reason can be a change in the opinions of the ECtHR judges. Frequently, the judges are divided regarding the interpretation or perception of facts. The view of the majority constitutes the view of the Court, and over time, the minority view can become the majority view, leading to a change in the Court's interpretation. Sometimes, the interpretation of an ECHR provision is a process that continues through multiple cases. An interpretation given in the first case may be supplemented by new elements in later cases, eventually achieving completeness and being consistently repeated in subsequent cases.[12]

The following text will demonstrate the influence of the new spirit brought by the CRPD to the case law of the ECtHR. The Court has established factors that determine the breadth of the margin of appreciation and consolidated them in the *S. and Marper* case. These factors are partly modified regarding persons with disabilities. In the *Centre for Legal Resources on behalf of Valentin Câmpeanu* case, the Court departed from its previous interpretation of Art. 34 of the Convention, thus opening the door to a new approach to the issue of *locus standi*. Indeed, it built upon this new approach in later cases, as we shall see soon. However, some case law remains resistant to certain provisions of the CRPD. Studying case law is important not only for learning previous interpretations, but also for understanding the causes and methods the Court uses to modify or depart from them. The specific characteristics of issues related to persons with disabilities may enhance the potential of case law to evolve.

The concepts of disability and social responses to it are complex and dynamic. They encompass progress in the medical understanding of various forms of disabilities, as well as changes in legal, ethical, and social responses to them. In the *Winterwerp* case, the Court observed that the Convention does not define the term "persons of unsound mind" used in Art. 5(1)(e) of the Convention. The Court noted that a definitive interpretation of the term was not possible since its meaning continually evolves 'as research in psychiatry progresses, an increasing flexibility in treatment develops, and society's attitude to mental illness changes, particularly as a greater

11 *Chapman*, para. 70; *Christine Goodwin*, para. 74. Similarly, in *Mamatkulov and Askarov*, para. 121; *Savickis and others*, para. 202.
12 Etinski, 2024, pp. 23–42.

understanding of the problems of mental patients becomes more widespread.'[13] Such dynamism in the protection of human rights for persons with disabilities provides a solid foundation for the evolutive interpretation of the ECHR.

Moreover, it is important to emphasise that persons with disabilities are not a homogenous group. Disability is a common feature shared by all of them, but disabilities can vary greatly, as can social responses to them.[14] These differences are highly relevant for the proper protection of the human rights of this group. This requires an individualised approach that places greater emphasis on the specific facts of each case than is typically required in other human rights cases. The section of this subchapter on the control of Art. 3 of the ECHR over the expulsion of persons with disabilities will illustrate the importance of the specifics of facts. Such an approach is fertile ground for the development and diversification of case law.

2.2. Locus Standi of Persons with Disabilities Before the European Court of Human Rights

Persons with disabilities whose rights and freedoms guaranteed by the Convention are violated have a standing before the ECtHR like all other individuals. However, under certain circumstances, some of them may have a privileged standing. This matter is governed by Art. 34 of the Convention, which states:

> '[t]he Court may receive applications from any person, non-governmental organization, or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.'

Accordingly, an individual must demonstrate, at least *prima facie*, that she or he was a victim of a violation of a right protected by the Convention. In principle, only victims have a standing before the Court. They are the only ones authorised by Art. 34 to lodge an application. The notion of "victim" has been developed in the case law of the Court as an autonomous concept, generally not dependent on the status of the victim in internal legal orders. In developing this concept, the ECtHR has established three types of victims: direct victims, indirect victims, and potential victims. A direct victim is an individual whose right is violated. An indirect victim is an individual who has been affected by a violation of a right of a third person due to a pre-established close link with this third person. A typical example of an indirect victim is a situation where, in breach of Art. 2, an individual loses their life and a member of their family lodges an application. A potential victim must demonstrate by sufficient evidence the existence of a risk of violation. In cases relating to persons with disabilities, applicants are usually direct or indirect victims. However, the status of disability has prompted

13 *Winterwerp*, para. 37.
14 Ribet, 2011, pp. 159–163.

the Court to modify its approach and adapt it to the specific circumstances of some cases. The *Centre for Legal Resources* case has precedential value in this regard.[15]

A Romanian non-governmental organisation, the Centre for Legal Resources (CLR), lodged an application against Romania on behalf of Mr. Valentin Câmpeanu. Mr. Câmpeanu, a young man diagnosed as HIV positive and with "profound intellectual disability," died in a psychiatric hospital under circumstances of gross negligence by the authorities. National law obliged the competent national authorities to appoint a guardian for a person in Mr. Câmpeanu's circumstances, but this was not done. On the morning of the day he died, the CLR visited him and recorded the terrible conditions of his life in the hospital.[16] The CLR initiated internal proceedings to establish liability for his death. Unsatisfied with the results of the internal proceedings, the CLR filed an application with the ECtHR. The Government of the respondent State objected to the Court's jurisdiction *ratione personae*, alleging that the CLR did not have *locus standi* as it was not a direct or indirect victim.[17] Indeed, the CLR was not directly affected, and the link between Mr. Câmpeanu and the CLR was not of such a nature as to qualify the CLR as an indirect victim. Despite this, the ECtHR declared the application admissible and recognised the standing of the CLR. The Court justified this departure from previous case law with the following reasons: The standing of the CLR was recognised by the Romanian authorities in internal proceedings;[18] Mr. Câmpeanu did not have a known next of kin at the time of his death; and the State did not appoint a guardian to take care of his interests despite the obligation under national law to do so.[19] The Court stated:

> '[i]n the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr. Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the Convention. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law.'[20]

The Court found additional support for granting standing to the CLR through an analogy with case law relating to the right of "persons of unsound mind" to a judicial review of their deprivation of liberty under Art. 5(4) of the Convention.

15 See analysis of the case at Boanta et al., 2014, p. 195.
16 *Centre for Legal Resources on behalf of Valentin Câmpeanu*, para. 23.
17 Ibid., para. 80.
18 Ibid., para. 110.
19 Ibid., para. 111.
20 Ibid., para. 112.

Mental illness can restrict or modify access to a national court for these persons, but they must have the opportunity to be heard either in person or through some form of representation.[21]

Later cases transplanted the spirit of *Centre for Legal Resources* into new factual settings. The case of the *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea,* in which the Court used the same approach, was not identical to *Centre for Legal Resources* in terms of facts, but it was similar. In the *L.R. v. North Macedonia* case, the Court applied its approach from *Centre for Legal Resources* to new factual circumstances. The Helsinki Committee for Human Rights (HCHR) in Skopje lodged an application on behalf of L.R., a mentally disabled eight-year-old child who did not receive adequate care and treatment and was placed in an inappropriate institution. Contrary to the facts in *Centre for Legal Resources,* L.R. had parents and a legal guardian appointed by the State. The parents also suffered from mental disabilities, and the guardian did not fulfill his duties. The HCHR instigated internal proceedings for the protection of L.R. In such circumstances, invoking the *Centre for Legal Resources,* the Court accepted the standing of the HCHR despite the fact that the NGO did not receive authority from the parents or the guardian to represent L.R. before the Court. It seems that in *Centre for Legal Resources* and *L.R. v. North Macedonia,* the Court established a new approach regarding standing before the Court, whereby an NGO has standing to represent a disabled individual without proper authorisation in circumstances where the individual is not able to give such authorisation, and nobody else is taking care of the disabled individual. Further precedential potentiality of *Centre for Legal Resources* regarding elderly people has been discussed in the literature.[22]

The issue of standing reappeared in different circumstances in the *Lambert and Others* case. This case introduced a new element to the approach developed in *Centre for Legal Resources* and *L.R. v. North Macedonia* – the presumed intention of a disabled person to be represented before the ECtHR. The circumstances of a case can confirm or deny such presumed intention. *Lambert and Others* was a case in which the Court did not establish such presumed intention. Vincent Lambert sustained a severe brain injury in a traffic incident that left him in a vegetative state. All efforts by medical professionals for his recovery failed. After five years of sustaining him through artificial nutrition and hydration, his medical doctor decided to cease this artificial means of life support. Members of his family, including his parents, wife, and eight siblings, were divided about the decision, and some of them initiated internal legal proceedings alleging the decision's illegality. They failed and lodged an application with the ECtHR. The application was based on the applicants' conviction that Vincent Lambert wished to continue his life at the vegetative level. However, internal proceedings in France did not confirm such a wish of Mr. Lambert.[23] As the ECtHR could not derive

21 Ibid., para. 113.
22 Rexova, 2018, p. 71.
23 *Lambert and Others*, para. 104.

the presumed intention of Vincent Lambert from the circumstances of the case, it denied the applicants' standing.

2.3. The Margin of Appreciation Regarding the Rights and Freedoms of Persons With Disabilities

The margin of appreciation is referred to in Protocol No. 15 to the Convention, whose Art. 1 inserted at the end of the preamble of the Convention a new recital which reads:

> '[a]ffirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

The margin of appreciation doctrine, initially developed by the Convention institutions (the Commission and the Court), has been endorsed by the State Parties and integrated into the Convention text. There are various explanations of the margin of appreciation in the literature. It essentially reflects that some Convention provisions allow for accommodating the fulfillment of obligations to national circumstances.[24] Some obligations can be fulfilled in different ways, allowing State Parties to choose the most appropriate method. The breadth of this margin varies and depends on several factors, including:

> 'the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights [...]. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted'.[25]

Regarding certain rights, the Court views disability as a factor that narrows the margin of appreciation. However for other rights, the Court does not differentiate the treatment of persons with disabilities. For example, considering the margin of appreciation under Art. 3 of Protocol No. 1 (the right to vote), the Court noted that although the margin is generally wide under this Article, it is significantly narrower when a restriction on fundamental rights affects a particularly vulnerable group in society, such as the mentally disabled.[26] The Court explained that this approach was taken because such groups have historically been subject to prejudice with lasting

24 Etinski and Božović, 2019, pp. 7–26.
25 *S. and Marper*, para. 102.
26 *Alajos Kiss*, paras. 41, 42; *Strøbye*, para. 113.

consequences, resulting in their social exclusion. The Court added that: 'such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.'[27]

In other cases, the Court reiterated that:

> 'if a restriction on fundamental rights applies to someone belonging to a particularly vulnerable group in society that has suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.'[28]

These other cases relate to legal incapacitation[29] and the maintenance and development of personal relations between a father and child.[30]

On the other hand, in cases regarding socio-economic issues of human rights for disabled persons, the ECtHR treats disabled persons equally with other individuals and leaves a wide margin of appreciation to the State Parties. In the *Sentges* case, the applicant suffered from Duchenne Muscular Dystrophy, a disease characterised by progressive muscle degeneration, the loss of the ability to walk, and frequently the loss of lung or cardiac functions. He lodged an application to the Court alleging a violation of the right to private life, protected by Art. 8 of the Convention, since the health insurance fund rejected his request for a robotic arm. The robotic arm, which was not covered by health insurance, would secure a certain degree of autonomy for the applicant in his personal contacts. The Court considered, *inter alia*, the fair balance that has to be struck between the competing interests of the individual and the community as a whole and the wide margin of appreciation that the State Parties enjoy regarding positive obligations based upon Art. 8. The margin of appreciation is even wider, the Court remarks, 'when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources.' In an extensive dissent, dedicated to the right to health, Judge Pinto de Albuquerque observed that the Court did not find any legal bases in Arts. 2 and 8 of the Convention for claims by several applicants that the States pay for a particular form of treatment or type of drug because they were unable to pay themselves.[31]

Indeed, the Court has consistently held that a State Party has a wide margin of appreciation in adopting social and economic policies, which may be motivated by the protection of the public purse or the reallocation of funds, or by the implementation of austerity measures in circumstances of profound economic crises, and in adopting

27 Ibid.
28 *N. v. Romania (no. 2)*, para. 55; *Cînța*, para. 41; *G.L v. North Macedonia*, para. 54; *Alajos Kiss*, para. 42.
29 *N. V. Romania (no. 2)*.
30 *Cînța*.
31 Parlty, concurring, partly dissenting opinion of Judge Pinto de Albuquerque, para. 50, in *Lopes de Sousa Fernandes*.

and changing laws for these purposes.[32] This means that enrolling a person in a State social-security system does not exclude the possibility of changing the system regarding the conditions of eligibility for social allowances or their amount.[33] The Court confirmed the possibility of amendments to social-security legislation in response to societal changes and evolving views on the categories of persons who need social assistance, as well as to the evolution of individual situations.[34] National authorities have direct knowledge of the needs of their society and are, according to the Court, better placed than an international judge to assess what is in the public interest on social or economic grounds.[35]

Despite the broadness of the margin of appreciation in such circumstances, the margin is not unlimited. There are a few limits. Changes in social-security policies must be carried out in accordance with general principles underlying the Convention, including the rule of law, as confirmed in the *Béláné Nagy* case. A wide margin of appreciation does not absolve a State Party from ensuring a fair balance between the general interest of the community and the interest of an individual protected by the Convention, another general principle underlying the Convention. The Court will not respect the legislature's policy choice when it is 'manifestly without reasonable foundation.'[36] A wide margin of appreciation in adopting social and economic policies and in changing corresponding legislation does not mean a discretion of a State Party regarding respect for rights based on its laws. Thus, a State Party can change its laws due to budgetary restraints but it cannot invoke these restraints to justify non-fulfillment of its obligations based on these laws.[37]

2.4. Determination of Disability

Art. 1(2) of the CRPD defines persons with disabilities as those who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. However, the ECtHR has not established an autonomous meaning or standard of disability, allowing State Parties a wide margin of appreciation in this regard. In the case of *N. v. Romania*, the Court emphasised that national authorities should have a wide margin of appreciation in complex matters such as determining an individual's mental capacity.[38] This deference is partly due to the fact that national authorities have direct contact with the individuals concerned, placing

32 *Fedulov*, para. 77.
33 Ibid.
34 Ibid.
35 *Wallishauser*, para. 65; *Pyrantienė*, para. 45.
36 *Wallishauser*, para. 65; *Pyrantienė*, para. 46.
37 *Fedulov*, para. 77.
38 *N. v. Romania* (no. 2), para. 54.

them in a better position to make such determinations.[39] Consequently, the ECtHR has accepted a broader definition of disability beyond the CRPD's definition.[40]

Despite this wide margin of appreciation, the ECtHR retains the authority to review national determinations of disability. The Court can reject national determinations if they are deemed obviously arbitrary or discriminatory. For example, in the case of *D.H. and Others*, the Minority Rights Group International, the European Network Against Racism, and the European Roma Information Office argued that assigning Roma children to special schools for the mentally disabled was a form of discrimination.[41] The ECtHR examined the tests used to evaluate the intellectual capacity of pre-school Roma children in the Czech Republic and noted that several international bodies had questioned the appropriateness of these tests.[42] The Court concluded that the tests were likely biased and did not account for the cultural differences of Roma children, leading to an unjustified difference in treatment between Roma and non-Roma children regarding school enrollment.[43] While the *D.H. and Others* case is an exception, the ECtHR generally accepts national determinations of disability. However in this particular case, the Court was reluctant to do so due to the apparent discriminatory nature of the tests.

For the purposes of this text, cases involving individuals designated as disabled by national authorities will be analysed. Additionally, cases where no national designation of disability exists, but where an individual's illness significantly affects their ability to perform everyday activities, will also be considered. For instance, in the *Savran* case, the applicant, who suffered from schizophrenia and received a disability pension, was recognised by Danish authorities as being disabled. This recognition qualified the case for analysis under the context of disability. Conversely, the absence of national recognition of disability in a case where an applicant suffers from schizophrenia will not disqualify the case from analysis in this subchapter of the book. This approach ensures that both formally recognised disabilities and significant impairments affecting daily life are appropriately considered in the examination of the rights and freedoms of disabled individuals under the ECtHR's jurisprudence.

3. Second part – Issues Connected With Particular Articles of the ECHR

3.1. Protection of Life Under Art. 2 of the Convention and Persons with Disabilities

Art. 2 guarantees the right to life, stating:

> '[e]veryone's right to life shall be protected by law. No one shall be intentionally deprived of their life except in the execution of a sentence imposed by

39 Ibid.
40 Grbic, 2019, p. 152.
41 *D.H. and Others v. the Czech Republic*, para. 165.
42 Ibid., para. 200.
43 Ibid., para. 201.

> a court following their conviction of a crime for which this penalty is provided by law.
> Deprivation of life shall not be considered a violation of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defense of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

The case law of the ECtHR indicates that disability can be relevant to several aspects of the right to life. Disability is a factor that the Court considers when determining the scope of application of Art. 2. Disability plays a particular role in the Court's investigation of whether a State Party has fulfilled its positive obligations under Art. 2(1). Similarly, the Court considers disability when assessing whether the use of lethal force by a State under Art. 2(2) was absolutely necessary. The following sections review the case law related to these issues.

3.1.1. Disability as a Factor in Establishing a Breach of the Right to Life

The general understanding of Art. 2 by the ECtHR is that the Article protects life itself as a biophysical process. Despite this, case law reveals that the Article also covers cases where 'the circumstances and the nature of inflicted injuries indicate that the applicant's life was in serious danger.'[44] Cases where bodily injuries result in serious disability are typically considered by the Court as falling under Art. 2. For instance, the Court has found violations of Art. 2 in cases involving: serious wounding of the applicant by police resulting in disability;[45] a minor falling through a hole from the third to the second floor of an unfinished, freely accessible building, causing a serious craniocerebral injury resulting in a disability that will continue to require treatment;[46] serious internal injuries, including fractures of limbs and bones sustained in a car accident leading to long-term serious physical and psychological aftereffects, including disability;[47] electrocution endangering life and causing permanent disability;[48] ill-treatment resulting in the amputation of feet and fingers;[49] wounding with a firearm causing serious bodily injury with life-threatening damage and lasting consequences.[50]

3.1.2. The Positive Obligation of a State Party under Art. 2 and Persons with Disabilities

The Court interprets the first sentence of Art. 2(1) to mean that a State Party is obliged not only to refrain from the intentional and unlawful taking of life but also to take

44 *Krivova*, para. 45; *Igor Shevchenko*, para. 42; *Makaratzis*, para. 49.
45 *Abdulkhanov*; *Taydaş*.
46 *Zinatullin*.
47 *Nicolae Virgiliu Tănase*; *Kotelnikov*; *Igor Shevchenko*.
48 *Binişan; Budayeva and Others*; *Yürekli*; *Petrov*; *X v. France*.
49 *Eduard Popa*.
50 *Sašo Gorgiev*.

appropriate steps to safeguard the lives of those within its jurisdiction.[51] Art. 2 thus imposes not only a negative obligation on the State to ensure that its organs do not deprive someone of their life but also positive obligations. These include the duty of the State to take all reasonable measures to save a life when it knows, or ought to know, that a life is in acute jeopardy. This positive obligation is particularly emphasised in cases regarding persons with disabilities.

The ECtHR deemed the failure of Bulgarian authorities to provide sufficient food, medicine, clothing, and heating to children with serious disabilities in a care center, which led to the deaths of fifteen children, as a violation of Art. 2.[52] In the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu*, the Court found that Romania violated Art. 2 through gross negligence in the care of Mr. Câmpeanu, a young man with HIV and profound intellectual disability, which resulted in his death. The authorities placed him in a neuropsychiatric hospital despite being aware of the lack of heating, appropriate food, and medical staff, as well as a shortage of medical resources, including medication.[53] By acting in this way, the Court noted that the authorities had unreasonably put his life in danger.[54] Furthermore, the continuous failure of the medical staff to provide Mr. Câmpeanu with appropriate care in the hospital was another factor leading to his premature death.[55] This negligence was sufficient for the Court to conclude that the respondent State did not satisfy its positive obligation under Art. 2.[56]

Under Art. 2, the obligation to protect the lives of individuals in custody also implies an obligation to provide them with the medical care necessary to safeguard their lives.[57] In the case of an individual with a disability, the obligation to provide medical care is strengthened by the principle of due diligence. For instance, the police's failure to provide an injured deaf and mute individual the opportunity to inform them of his health problems, resulting in a lack of medical assistance that led to the individual's death, was deemed a breach of the right to life.[58]

In another case, a man suffering from schizophrenia killed another mentally ill man in a prison cell they shared.[59] The Court investigated whether the prison authorities knew that the victim was at risk from the schizophrenic man and if so, whether they took all reasonable measures to prevent such an outcome. Given that information on the perpetrator's mental illness and violent behavior was available and serious enough to justify his compulsory detention, the Court concluded that

51 *L.C.B. v. The Unted Kingdom*, para. 36; *Paul and Audrey Edwards*, para. 54; *Calvelli and Ciglio*, para. 48; *Kurt*, para. 157.
52 *Nencheva et autres*, para. 120.
53 Ibid., para. 143.
54 Ibid.
55 Ibid.
56 Ibid., para. 144.
57 *Taïs*, para. 98; *Huylu*, para. 58.
58 *Jasinskis*, paras. 66–68.
59 *Paul and Audrey Edwards*.

the prison authorities should have known he posed a real risk to others.[60] The Court also noted significant shortcomings in the transmission of information to the prison authorities.[61] It concluded that the failure of the agencies regarding the transmission of information to the prison authorities and the inadequate nature of the screening process upon the perpetrator's arrival constituted a breach of the State's obligation to protect life under Art. 2.[62]

3.1.3. Disability as a Factor in Assessments of the Absolute Necessity of the Use of Force under Art. 2(2)

Mental illness can play a significant role in assessing whether the use of force is absolutely necessary in the defense of any person from unlawful violence under Art. 2(2). When the police use lethal force, the Court considers not only the actions of the officers but also all relevant circumstances, including the planning and control of the police operation. In such cases, the Court examines whether the police operation was planned and controlled by the authorities to minimise recourse to lethal force and human losses, and whether all precautionary measures had been taken.[63] This precautionary obligation is even greater when lethal force is used against a mentally ill person.

The lack of planning and control in an involuntary hospitalisation operation that resulted in the death of a mentally ill man was deemed a violation of Art. 2 in the *Shchiborshch and Kuzmina* case. Mr. Shchiborshch sustained lethal injuries during an involuntary hospitalisation carried out by the police. The Court found that the police, who were not trained to deal with mentally disturbed individuals, acted on their own without qualified medical personnel, contrary to domestic law.[64] The Court further noted that the police used force appropriate for an armed offender but not for a man in a delirious state who did not pose an immediate danger to himself or others.[65] Additionally, the storming of the kitchen where Mr. Shchiborshch had barricaded himself, resulting in his lethal injuries, was not carefully planned and assessed, but instead hastily decided at the scene without any reason for urgent action.

In another case, a man suffering from paranoid schizophrenia died in a psychiatric clinic after a police officer used a taser, an electrical-discharge weapon, to subdue his violent behavior.[66] The exact cause of death was not established, as the man also had cardiac arrhythmia, which could have caused his death. It was beyond doubt that his violent behavior constituted a direct threat to the lives of those present. The Court examined whether the Czech Republic fulfilled its positive obligation to

60 Ibid., para. 60.
61 Ibid., para. 61.
62 Ibid., para. 64.
63 *McCann and Others*, paras. 146–50 and 194; *Andronicou and Constantinou*, paras. 171, 181, 186, 192 and 193; *Makaratzis*, paras. 56–59.
64 *Shchiborshch and Kuzmina*, para. 240.
65 Ibid.
66 *V v. the Czech Republic*.

protect the life of the man and whether the use of force by the police was absolutely necessary. The investigation focused on the protocol that should be followed in a psychiatric clinic in cases of violent behavior by a mentally ill person and on the actions taken by the police to immobilise the violent man. The Court noted that the clinic did not follow techniques recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment for such situations.[67] Furthermore, the medical staff did not inform the police of the patient's health risks and state of agitation.[68] Forcing the patient to the ground with his chest down was deemed a risky immobilisation technique by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[69] The Court observed that immobilising the patient in such a manner lowered the risk of his escape or posing a further direct threat to the lives of the medical staff and police, raising the question of whether the use of a taser was absolutely necessary.[70] The use of a taser was in itself, problematic in light of the Court's case law. The Court observed further:

> 'although the police officers could not have known that P.Z. was suffering from a cardiac anomaly that made the use of a taser even more risky, the mere fact that he was a psychiatric patient should have prompted them to realize that not only was he in a vulnerable position (owing to his hospitalization and the psychiatric episode from which he was suffering) but that he was a person with mental health issues and that it was very likely that he had received medication.'[71]

The Court concluded that the cumulative failures revealed that the State did not fulfill its positive obligation to provide the psychiatric patient 'with adequate care and preserve his life.'[72] The Convention does not protect the right to euthanasia or the right to suicide for disabled persons suffering from degenerative and incurable illnesses.[73]

3.2. Human Dignity of Persons With Disabilities as Protected by Art. 3 of the ECHR

Art. 3 of the Convention reads: '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Art. 3 of the Convention is the main safeguard of the dignity of persons with disabilities. The ECtHR considers disability a relevant factor in assessing the threshold of severity that triggers the protection of Art. 3. The detention of persons with disabilities is under particular scrutiny in light of Art. 3, which imposes specific obligations

67 Ibid., para. 95.
68 Ibid., para. 96.
69 Ibid., para. 97.
70 Ibid., para. 98.
71 Ibid., para. 99.
72 Ibid., para. 101.
73 *Pretty*.

on State Parties regarding the treatment of these individuals. Case law related to Arts 2 and 3 reveals a State Party's obligation to train its officials in the proper treatment of persons with disabilities. Additionally, Art. 3 limits the right of State Parties to expel aliens. Extensive case law exists on these matters, and several cases will be reviewed.

3.2.1. Disability as a Factor Determining the Scope of Applicability of Art. 3

To fall within the scope of Art. 3, the disputed treatment must reach a minimum level of severity. The state of health of a victim and the physical and mental effects of the treatment on the victim are factors that the Court evaluates, along with other considerations, when assessing this minimum level of severity as the threshold for Art. 3 of the Convention.[74] Suffering caused by naturally occurring illness can fall under Art. 3 if it is, or risks being, aggravated by treatment by authorities,[75] or by factors that cannot create a direct or indirect responsibility for the State.[76] Accordingly, disability and the suffering of a disabled person are relevant factors in assessing the level of severity of treatment in the sense of Art. 3.

3.2.2. Art. 3 Controls the Detention of Persons With Disabilities

The Court has developed several general principles under Art. 3 regarding the detention of persons with disabilities. A decision to detain a person with disabilities obliges a State Party to demonstrate special care in providing conditions that correspond to the individual needs resulting from their disability.[77] The ECtHR remarked that detainees with mental disorders are more vulnerable than ordinary detainees and that certain conditions of prison life exacerbate the risk that they suffer from a feeling of inferiority, and that they are under stress and anxiety.[78] State Parties are required to take specific measures to secure the effective protection of vulnerable persons, including taking reasonable steps to prevent ill-treatment that the authorities knew or ought to have known about.[79] Only very weighty reasons can justify any restriction of the rights of persons belonging to particularly vulnerable groups, including those with mental disorders, and any interference with the rights of these individuals must be subject to strict scrutiny.[80] A review of several relevant cases follows.

Keeping a deaf and mute man, suffering from intellectual disability, illiterate, and unable to use official sign language, in prison for almost three months without providing him with timely and adequate conditions corresponding to his special needs, which caused, according to the Court, feelings of isolation and helplessness.

74 *M.S. v. the United Kingdom*, para. 38; *Blokhin*, para. 135; *Savran*, para. 122; *Amirov*, para. 82; *Z.H. v. Hungary*, para. 28.
75 *N. v. the United Kingdom*, para. 29.
76 *Savran*, para. 123.
77 *Price*, para. 30; *Z.H. v. Hungary*, para. 28.
78 *Rooman*, para. 145; *Epure*, para. 69.
79 *Z and Others v. the United Kingdom*, para. 73.
80 *Alajos Kiss*, para. 42.

The lack of comprehension of his own situation and that of the prison order created an experience of anguish and inferiority that met the threshold of inhuman and degrading treatment, especially given that he had been severed from the only person (his mother) with whom he could effectively communicate.[81] The Court considered that 'repeated and inefficacious violent acts against a vulnerable person constitute an infringement of human dignity and attain a severity threshold rendering them incompatible with Art. 3 of the Convention.'[82] This finding was made in circumstances that did not necessitate the use of force against a psychiatrically disordered man.

In the *Raffray Taddei* case, the Court observed that the judge who had applied the sentence did not take into account the medical recommendation for the applicant's hospitalisation in a specialised environment.[83] Due to this omission, the applicant was transferred to an establishment without the necessary infrastructure for treating her illness.[84] The transfer placed her far from her home and children, while doctors repeatedly stated that the distance caused additional suffering for the applicant.[85] The Court concluded that these two factors, together with the prolonged process of deciding on her request for suspension of the sentence, caused her distress that exceeded the inevitable suffering inherent in detention, reaching a level of inhuman or degrading treatment.[86]

Detention for nine years in a prison environment without therapy adapted to his mental health and without prospects for reintegration amounted, according to the Court, to degrading treatment, and accordingly, a violation of Art. 3.[87] The applicant was continuously interned over nine years in the psychiatric wing of a prison, and apart from access to the prison psychiatric service, he did not receive any therapy or personalised medical treatment.[88] Due to the refusal of residential care centers and psychiatric hospitals to admit him, the applicant remained without a realistic prospect of any external therapeutic care, and therefore without hope of reintegration into society.[89] A lack of necessary medical treatment at a temporary detention center for juvenile offenders for a 12-year-old boy suffering from attention deficit hyperactivity disorder violated his rights under Art. 3.[90] Losing his eyesight due to grave defects and delays in the examination and treatment of the applicant's illness by the prison hospital authorities resulted in disability when timely medical treatment could have preserved his eyesight, and was qualified by the Court as inhuman and degrading treatment within the scope of Art. 3.[91]

81 *Z.H. v. Hungary,* paras. 30, 32.
82 *Boukrourou and Others,* para. 87.
83 *Raffray Taddei,* para. 60.
84 Ibid, para. 61.
85 Ibid.
86 Ibid. para. 63.
87 *W.D. c. Belgique,* para. 116.
88 Ibid., para. 103.
89 Ibid.
90 *Blokhin,* para. 148.
91 *Romokhov,* paras. 93, 97.

3.2.3. Other Specific Obligations of a State under Art. 3 Regarding Detained Disabled Persons

Art. 3 of the Convention, as interpreted by the Court, requires State Parties to provide detained persons with conditions compatible with human dignity. The manner in which detention is enforced must not subject detainees to distress or hardship exceeding the unavoidable level of suffering inherent in detention.[92] States must also secure the health and well-being of detainees under such circumstances. Specifically, when authorities decide to detain disabled persons, they must provide conditions that correspond to their special needs resulting from their disabilities.[93] In cases concerning the detention of persons who are ill, the Court examines whether or not the individuals have received adequate medical assistance in prison. Thus, in cases concerning the detention of persons who are ill, the Court examines whether or not the persons have received adequate medical assistance in prison.[94] A failure of the prison authorities to provide a person with disability with adequate therapy suitable of responding properly to the person's medical needs during the period of two and half years is not compatible with Art. 3.[95] However, national law has to provide safeguards of obtaining valid, free and proper consent from persons with disabilities for medical intervention. Usually, the Court considers involuntarily medical treatment under Art. 8. Exceptionally, more severe cases fall under Art. 3. Thus, failures of the national legal system to protect the physical integrity of intellectually disabled women from nonconsensual abortion and forced contraception constitutes a breach of Art. 3.[96]

Prison authorities are obliged to ensure adequate conditions and cannot transfer this obligation to other inmates. The Court articulated this in the *Farbtuhs* case, where prison authorities allowed family members and other inmates to assist a disabled prisoner who was incapable of dressing or undressing himself and attending to his hygiene needs. The Court expressed doubt about the appropriateness of this solution, which left the bulk of responsibility for a severely disabled person in the hands of unqualified prisoners.[97] It remarked:

> 'the anxiety and unease which such a severely disabled person could be expected to feel, knowing that he would receive no professional assistance in the event of an emergency, in themselves raise a serious issue from the standpoint of Article 3 of the Convention.'[98]

In another case, the Court found that the dependence on inmates for intimate hygiene procedures put a disabled prisoner in a very uneasy position, negatively affecting his

92 *Melnītis*, para. 69; *Topekhin*, para. 78.
93 *Z. H. v. Hungary*, para. 29; *Jasinskis*, para. 59; and *Farbtuhs*, para. 56; *Topekhin*. para. 79.
94 *Amirov*, para. 84.
95 *Epure*, para. 87.
96 *G.M. and Others v. the Republic of Moldova*, para. 85; *Akopyan*, para. 102.
97 *Farbtuhs*, para. 80. See also *Semikhvostov*, para. 85.
98 *Farbtuhs*, para. 80.

emotional well-being and hindering his communication with cellmates who might be dissatisfied with the troublesome work they had to perform.[99] Keeping a disabled man in a prison cell where he could not move around and could not leave independently constituted degrading treatment in contravention of Art. 3.[100] Likewise, leaving a seriously disabled prisoner to rely on his cellmates for assistance with using the toilet, bathing, and getting dressed or undressed amounts to degrading treatment.[101]

The obligation to protect the health of a mentally ill person is activated as soon as the person has been placed under the physical control of State authorities. In the *Boukrourou and Others* case, the Court stated that policemen who had intended to arrest a mentally ill person were aware of his illness and were obliged to protect his health during the arrest.[102] Regarding the treatment of prisoners with mental health problems, the Court interpreted Art. 3 to require State Parties to ensure that the health and well-being of prisoners are sufficiently secured by providing appropriate medical assistance.[103] A lack of adequate medical care for persons in custody can result in a violation of Art. 3.[104] If authorities decide to deprive a child of their liberty, they should conduct a medical assessment of the child's health to determine whether or not they can be placed in a juvenile detention center.[105]

The "adequacy" of medical assistance has been a particular concern of the Court. The mere fact that a detainee was seen by a doctor and prescribed treatment does not automatically suffice to meet the requirement of adequate medical assistance.[106] Authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and treatment.[107] A systematic and comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems is required, rather than merely addressing symptoms. This may require regular supervision.[108] Authorities must demonstrate that necessary conditions are created for the prescribed treatment to be effectively followed through.[109] Medical treatment provided within prison facilities must be at a level comparable to that which the State provides to the general population, though not necessarily at the level available in the best national health establishments.[110]

In the *Blokhin* case, the Grand Chamber remarked that the Court had reserved 'sufficient flexibility' in assessing the appropriateness of health care, deciding on a

99 *Topekhin*, para. 86.
100 *Vincent*, para. 103.
101 *Engel*, paras. 27 and 30.
102 *Boukrourou and Others*, para. 65.
103 *Murray*, para. 105; *Kudła*, para. 94; *Blokhin*, para. 136.
104 *Murray*, para. 105; *Naumenko*, para. 112; *M.S. v. the United Kingdom*, paras. 44–46; *Popov*, paras. 210–213 and 231–237; *Blokhin*, para. 136.
105 *Blokhin*, para. 138.
106 *Hummatov*, para. 116.
107 *Melnik*, paras. 104–06; *Hummatov*, para. 115.
108 *Popov*, para. 211; *Hummatov*, paras. 109 and 114; *Amirov*, para. 93.
109 *Holomiov*, para. 117; *Hummatov*, para. 116.
110 *Cara-Damiani*, para. 66.

case-by-case basis.[111] The general guidance of the Court was that the standard should be 'compatible with the human dignity' of a detainee while also considering 'the practical demands of imprisonment.'[112] Concerning children deprived of their liberty, the Court stated that their health should be safeguarded according to medical standards applicable to juveniles in the wider community.[113] Moreover, a medical assessment 'should be made of the child's state of health to determine whether or not he or she can be placed in a juvenile detention center.'[114]

When evaluating whether the detention of mentally ill persons in regular detention facilities is in accordance with Art. 3, the Court considers the adequacy of medical care provided, developments in their health, and conditions of detention. The Court found that a three-year period of detention in a regular facility, where the applicant was examined by a psychiatrist once a month, was adequate for his health conditions and that the deterioration in his health, leading to suicide attempts, was not due to a lack of medical care. A breach of Art. 3 was not established.[115] On the other hand, the detention for several years of a mentally ill person in a facility inappropriate for his mental condition, where prisoners suffered from overcrowding, was contrary to Art. 3.[116] Similarly, insufficient medical care and poor conditions of detention for three and a half years, which together could be a cause of an attempted suicide, amount to inhuman and degrading treatment in breach of Art. 3.[117]

3.2.4. Obligation of a State Party to Train State Officers for Treatment of Persons With Disabilities

The ECtHR has interpreted several Articles of the Convention to oblige State Parties to train their officials in the treatment of disabled individuals, particularly when such treatment could be risky for both the persons with disabilities and the officials. The Court provided these interpretations in the *Shchiborshch and Kuzmina* case, the *Tekin and Arslan* case under Art. 2 of the Convention, and in the *Boukrourou and Others* case under the framework of Art. 3. These cases relate to the loss of life of mentally disabled persons due to inappropriate actions taken by State officers.

In the *Shchiborshch and Kuzmina* case, a thirty-seven-year-old man suffering from a psychiatric disorder lost his life due to forcible action by police officers who tried to move him from his flat to a hospital. In the *Tekin and Arslan* case, a thirty-one-year-old mentally disabled man lost his life in a prison due to the forcible action of prison guards trying to move him to an isolation cell. The Court found violations of Art. 2 in both cases. The circumstances disclosed inadequate actions by State officers, partly due to their lack of training in dealing with mentally disabled people.

111 *Blokhin*, para. 138.
112 *Aleksanyan*, para. 140.
113 *Blokhin*, para. 138.
114 Ibid.
115 *Kudła*, paras. 95–99.
116 *Claes*, para. 100.
117 *Rivière*, para. 76; *Sławomir Musiał*, para. 97; *G. v. France*, paras. 41–46.

In the *Shchiborshch and Kuzmina* case, police officers attempted negotiations with the mentally ill man without success. The Court observed that 'dealing with mentally disturbed individuals clearly requires special training, the absence of which is likely to render futile any attempted negotiations with a person with a mental disorder'.[118] Similarly, in the *Tekin and Arslan* case, the Court reiterated that dealing with mentally disturbed individuals requires special training.[119] In the *Boukrourou and Others* case, relying on the opinion of an Ombudsman, the Court found that a lack of preparedness and appropriate training of police officers in dealing with a person suffering from a mental disorder resulted in a breach of Art. 3.[120] The three cases are limited to persons with mental disabilities. It may be expected that the Court will be ready to apply this interpretation of Arts. 2 and 3 to persons with other disabilities when treatment of State officers might be risky for them.

3.2.5 Obligation of a State Party to Ensure Particular Care in the Conduct of Its Officers Toward Persons With Disabilities

Closely linked to the obligation of a State Party to train its officials in the treatment of persons with disabilities is the obligation of the State to ensure particular care in the conduct of its officers toward these individuals. In other words, the Court expects State authorities to understand how specific disabilities, particularly psychiatric illnesses, can influence an individual's behavior and to consider this when interacting with them. The ECtHR expects particular vigilance in the use of physical force and restraints against psychiatric patients. Noting the evolution of legal standards on seclusion and other coercive measures applied to these patients, the Court in *Aggerholm,* examined the appropriateness of the use of seclusion and the duration of the measure.[121]

Considering the facts in the *Tekin and Arslan* case, the Court identified two significant omissions resulting from the negligence of the Belgian authorities in their treatment of a mentally disabled man. According to the Court, a mentally ill man should never be placed in a cell in the ordinary wing of the prison. Instead, he should be housed in a cell in the psychiatric wing of the prison, staffed with personnel trained in interacting with individuals with psychiatric disorders.[122] Moreover, the forcible operation by the three prison guards was not motivated by the necessity to restrain a person posing a threat to the life or physical integrity of others or himself, which would have justified such an action.[123] Rather, it was a reaction to the offensive behavior of the prisoner. When the guards entered his cell, he was finishing his meal and did not display any signs of aggression. Their reading of the special security measures, ordered by the deputy director of the prison, provoked an angry reaction

118 *Shchiborshch and Kuzmina,* para. 233.
119 *Tekin and Arslan,* para. 97.
120 *Boukrourou and Others,* para. 87.
121 *Aggerholm,* paras. 86, 87.
122 *Tekin and Arslan,* para. 102.
123 Ibid., para. 103.

from the prisoner, which led to the guards' forcible action.[124] Consequently, the Court concluded that the forcible action resulting in the prisoner's death was unnecessary under the circumstances of the case.

In the *Boukrourou and Others* case, the Court similarly found that forcible action by policemen was not driven by the necessity to restrain a person threatening the life or physical integrity of another or himself.[125] When the police arrived at the pharmacy, the mentally ill man was sitting on a chair and was not particularly agitated. Before their arrival, he had been forceful, prompting the pharmacy staff to call the police. The policemen applied force when the psychiatrically ill man refused to leave the premises. The Court noted that the violence only intensified the man's agitation and resistance, reinforcing his feelings of exasperation and incomprehension regarding the events.[126] Under these circumstances, the Court considered that 'the punches inflicted on a vulnerable person who clearly did not understand what the police officers were doing amounted to treatment that was neither justified nor strictly necessary.'[127] In the Court's opinion, the police officers did not give careful thought to the best way to approach the man or how to respond if faced with a negative or aggressive reaction, despite being informed they would encounter a person suffering from a psychiatric disorder.[128] An alternative would have been to have necessary action taken by competent medical staff with police assistance. In the *Shchiborshch and Kuzmina* case, the Court observed that Russian law stipulated that involuntary hospitalisation should be carried out by medical personnel with police assistance. The police officers were not authorised to act independently in such situations.[129]

3.2.6. Art. 3 Limits the Right to Expulsion of a Disabled Alien

The Court confirmed that States Parties have the right, based in international law, to control the entry, residence, or expulsion of aliens.[130] However, this right is subject to other international obligations. Thus, the expulsion of an alien violates Art. 3 of the Convention when the alien faces a serious risk of being treated in a receiving State in a manner contrary to the Article.[131] Suffering that results from naturally occurring illness and is aggravated by expulsion, even when the aggravation is not caused by acts of the receiving State, can fall under the scope of Art. 3.[132] Two cases with different outcomes – *D. v. the United Kingdom* and *N. v. the United Kingdom* – illustrate two lines in the development of case law.

124 Ibid., para. 100.
125 *Boukrourou and Others,* para. 85.
126 Ibid.
127 Ibid.
128 Ibid., para. 87.
129 *Shchiborshch and Kuzmina,* para. 233.
130 *Paposhvili,* para. 172.
131 Ibid., para. 173.
132 Ibid., para. 175.

In *D. v. the United Kingdom*, the Court found that the expulsion of the applicant, who was suffering from AIDS, to St Kitts would expose him to a real risk of dying under the most distressing circumstances, amounting to inhuman treatment.[133] The Court noted several factors: the applicant suffered from an incurable illness in its terminal stage, there was no guarantee he would obtain nursing or medical care in St Kitts, he had no family there willing or able to care for him, and he would not receive any other form of moral or social support. These factors constituted, according to the Court, 'very exceptional circumstances.'[134]

In contrast, the case *N. v. the United Kingdom* involved the decision of British authorities to expel a young woman, a Ugandan national suffering from AIDS, to Uganda. Having examined case law, the Grand Chamber noted that the Court had never found that a decision to remove an alien from a State Party violated Art. 3 on the grounds of the applicant's illness, except in *D. v. the United Kingdom*.[135] The Grand Chamber interpreted Art. 3 to mean that the expulsion of an alien suffering from a serious illness to a country where medical services for treating the illness were inferior to those in a State Party, or where the individual's life expectancy would be significantly reduced, did not constitute "exceptional circumstances" of sufficient weight to violate Art. 3.[136] Referring to the fair balance that should be struck between the general interest of the community and the protection of an individual's rights, the Grand Chamber considered that recognising the right of an alien to receive free and unlimited health care in a State Party without the right to stay in its territory would place too great a burden on the State Party.[137] Unlike in the *D. v. the United Kingdom* case, the applicant's condition was not critical; she was stable due to medical treatment in the United Kingdom, was able to travel, and her condition was not expected to deteriorate as long as she received the necessary treatment.[138]The Grand Chamber observed that

> 'the fact that the rapidity of the deterioration which the applicant would suffer in the receiving country, and the extent to which she would be able to obtain access to medical treatment, support, and care there, including help from relatives, necessarily involved a certain degree of speculation, particularly in view of the constantly evolving situation with regard to the treatment of AIDS worldwide.'[139]

Judges Tulkens, Bonello, and Spielmann dissented. They disagreed with the majority in principle on the appropriateness of the concept of a fair balance between the

133 *D. v. the United Kingdom*, para. 53.
134 Ibid., paras. 52, 53.
135 *N. v. the United Kingdom*, paras. 34–41.
136 Ibid., para. 42.
137 Ibid., para. 44.
138 Ibid., para. 47.
139 Ibid., para. 50.

general interest of the community and an individual's rights, and on the invocation of budgetary restraints in the context of Art. 3. Relying on case law of the Court, they observed that such limits were not appropriate regarding Art. 3.[140] The factual background of the dissent is rooted in the facts established by the House of Lords' judgment: the applicant would not receive adequate treatment for her illness in Uganda, as she would in Great Britain, and her life expectancy would not exceed two years there.[141] The dissenting judges concluded that the applicant would face an early death after a period of significant physical and mental suffering.[142] They believed that these facts were not sufficiently different from those in *D. v. the United Kingdom* to warrant a different outcome.[143]

An attempt by the applicant in *S.H.H. v. the United Kingdom* to invoke factual differences to achieve a result contrary to *N. v. the United Kingdom* failed. The applicant was a disabled Afghan citizen whose asylum application in the UK had been refused. His disability was not due to a naturally occurring illness but was a consequence of a military operation.[144] Furthermore, he argued that the shortages of accommodation and welfare arrangements in Afghanistan were not part of the vicissitudes of life but were a legacy of the armed conflicts that had long affected the country.[145] The Court did not find these different facts to necessitate a different legal solution. It also analysed other arguments by the applicant regarding the increased risk of exposure to violence in Afghanistan due to his disabilities and the poor living conditions for a disabled person there.[146] However, the Court found that a key fact legally equating the two cases was that in both instances 'the future harm would emanate from a lack of sufficient resources to provide either medical treatment or welfare provision rather than the intentional acts or omissions of the authorities of the receiving State.'[147] Three judges dissented.[148] They believed that the severity of the applicant's disability and the lack of family and social infrastructure for him in Afghanistan would turn his expulsion into a breach of Art. 3.[149]

The case *Paposhvili v. Belgium* concerns whether the return of the applicant, a Georgian national suffering from progressive leukemia, to Georgia would comply with Art. 3. The applicant was cured and then died in Belgium. The planned stem cell transplant had not been performed as the applicant did not have a residence permit in Belgium, as required by Belgian law, but treatment with a new targeted

140 *N. v. the United Kingdom*, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, paras. 7, 8.
141 Ibid., para. 9.
142 Ibid., para. 23.
143 Ibid., para. 19.
144 *S.H.H. v. the United Kingdom*, para. 58.
145 Ibid.
146 Ibid., paras. 85–89.
147 Ibid., para. 89.
148 *S.H.H. v. the United Kingdom*, Joint Dissenting Opinion of Judges Ziemele, David Thór Björgvinsson and De Gaetano.
149 Da Lomba, 2014, p. 354.

therapy prolonged his life. The applicant would not have had access to such therapy in Georgia.[150] The Grand Chamber examined case law following *N. v. the United Kingdom,* and observed that the Court had declared numerous applications inadmissible as manifestly ill-founded, which related to the expulsion of HIV-positive aliens or those suffering from other serious physical or mental illnesses.[151] This group of inadmissible cases includes those involving the removal of seriously ill persons whose health conditions were under control due to medication received in the expelling State.[152] The Grand Chamber also noted that the Court deviated from this line of cases in *Aswat,*[153] where it found that the extradition of the applicant to the United States would be contrary to Art. 3. The applicant, being prosecuted for terrorist activities, would be placed in a maximum security prison, and the prison conditions would aggravate his paranoid schizophrenia.[154] The Grand Chamber thus found that limiting the applicability of Art. 3 only to cases where a person facing expulsion is close to death, as supported in case law after *N. v. the United Kingdom,* has deprived aliens who are seriously ill, but not close to death, of the protection of Art. 3.[155] The Grand Chamber also reminded that the Court left the possibility in *N. v. the United Kingdom* that beyond those close to death, other "very exceptional cases" could activate Art. 3, but that later case law has not clarified such cases.[156] In light of the opportunity for further development of the interpretation of Ar. 3, established by reference to other "very exceptional cases" in *N. v. the United Kingdom* and referring to the principle of effectiveness, a key tool in the interpretation of the Convention ('it is essential that the Convention is interpreted and applied in a manner which renders its rights practical and effective and not theoretical and illusory'), the Grand Chamber decided to clarify the phrase:

> '[t]he Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have 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 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.'[157]

150 *Paposhvili*, paras. 44–46.
151 Ibid., para. 179.
152 Ibid.
153 *Aswat*, para. 49.
154 *Paposhvili*, para. 180.
155 Ibid., para. 181.
156 Ibid., para. 181.
157 Ibid., para. 183.

Having said that, the Grand Chamber addressed the issue of the burden of proof. The applicant should submit evidence to the competent national authority to make their fear that they will be exposed to treatment contrary to Art. 3 in the receiving State[158] plausible. In this context, the Grand Chamber noted that a certain degree of speculation is inherent in the preventive purpose of Art. 3. Where such evidence is submitted, the national authority is obliged to carefully consider the foreseeable consequences of removal, taking into account the general situation in the receiving State and the individual's personal circumstances.[159] The national authority should verify on a case-by-case basis whether medical care generally available in the receiving State is sufficient and appropriate for treating the applicant's illness to prevent them from being treated contrary to Art. 3.[160] The assessment of risk should be based on information from reports by the World Health Organization, reputable non-governmental organisations, and medical certificates relating to the concerned person.[161] This does not mean that the level of medical service in the receiving State must be equal to the level in the returning State, nor does Art. 3 provide a right to specific treatment in the receiving State that is not available to the rest of the population.[162] In addition to exploring the general situation, the national authority should consider the extent to which the concerned individual will actually have access to this care and these facilities in the receiving State.[163] In connection with access to care, in previous cases the Court had considered the cost of medication and treatment, the existence of social and medical networks, and the distance to be traveled to receive medical treatment.[164] Where, after the exploration of relevant information by the national authority, serious doubts persist that the removed person will find themselves in a situation incompatible with Art. 3, the returning State must obtain sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available to the concerned person.[165] Having developed the interpretation of Art. 3 in this manner, the Grand Chamber decided that there would have been a violation of Art. 3 of the Convention if the applicant had been removed to Georgia without the Belgian authorities assessing the risk faced by him regarding appropriate treatment in Georgia.[166]

Five years later, in 2016, the Grand Chamber observed in the *Savran v. Denmark* case that there had been no further development in case law since the *Paposhvili v. Belgium* case and confirmed the interpretation of Art. 3 as stated in that case.[167] The Grand Chamber reversed the judgment of the Chamber, which had found that

158 Ibid., para. 186.
159 Ibid., para. 187.
160 Ibid., para. 189.
161 Ibid., para. 187.
162 Ibid., para. 189.
163 Ibid., para. 190.
164 Ibid., para. 190.
165 Ibid., para. 191.
166 Ibid., paras. 205, 206.
167 *Savran*, paras. 132, 133.

the decision of the Danish authorities to expel Mr. Savran, a Turkish national suffering from schizophrenia, to Turkey would not be compatible with Art. 3. The Grand Chamber and the Chamber differed regarding the assessment of the facts of the case. According to expert opinions, a deterioration of the applicant's illness in the event of the interruption of his medication might have serious consequences for himself and his environment, such as 'a risk of aggressive behavior' and 'a significantly higher risk of offenses against the person because of the worsening of the applicant's psychotic symptoms.'[168] The two judicial bodies of the Court disagreed on whether 'aggressive behavior' and 'a significantly higher risk of offenses against the person' could be seen to satisfy the Paposhvili threshold test that removal would expose the applicant to a rapid and irreversible decline in his state of health, resulting in intense suffering or a significant reduction in life expectancy. The Grand Chamber believed these effects are serious and detrimental, but they 'could not be described as "resulting in intense suffering" for the applicant himself.'[169] Thus, according to the Grand Chamber, in this case, the removal of the applicant to Turkey would not violate Art. 3 of the Convention, since even if the interruption of medication resulted in aggressive behavior by the applicant, such behavior could not be qualified as intense suffering for the applicant. However, as we shall see later, the Grand Chamber found that the level of suffering in this case amounted to a breach of Art. 8 of the Convention.

3.3. Liberty of Disabled Individuals as Protected by Art. 5 of the Convention

The contradiction between Art. 5(1)(c) of the ECHR and Art. 14(1)(b) of the CRPD will be addressed first. Other issues include the objective and subjective elements of the application of Art. 5(1)(c), the problem of reducing deprivation of liberty only to acts of State organs, access to a court for a mentally disabled person when consent for deprivation of liberty was given by their guardian, and disability as a factor that should be taken into account when an authority decides on deprivation of liberty will be considered. The obligations of State Parties toward life prisoners with mental disabilities will also be discussed.

Art. 5 of the Convention reads:

> '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; [...].
> [...]

168 Ibid., para. 142.
169 Ibid., para. 143.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial [...].
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

3.3.1. Contradiction Between Art. 5(1)(e) of the ECHR and Art. 14(1)(b) of the CRPD

There is a significant contradiction between Art. 5(1)(e) of the ECHR and Art. 14(1)(b) of the CRPD. Article 14(1) of the CRPD states:

> '1. States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.'

Thus, while Art. 5(1)(e) of the ECHR allows for the lawful detention of 'persons of unsound mind', Art. 14(1)(b) of the CRPD asserts that the existence of a disability shall in no case justify a deprivation of liberty. In other words, any deprivation of the liberty of a person with a disability due to that disability cannot be lawful under the CRPD. Consequently, a large body of ECtHR case law that clarifies the lawfulness of detention of mentally disordered individuals becomes redundant from the perspective of the CRPD. Despite this, the ECHR provision has persisted for the time being. According to some opinions, Art. 5(1)(e) treats mentally disabled persons as 'objects rather than subjects in their own right.' The provision has inaugurated a "medical model" that locates the "problem" of disability within the person, believing that such persons could be "fixed" through medication or rehabilitation.[170] An examination of case law will be the first step in analysing this contradiction.

Any deprivation of liberty in accordance with Art. 5(1) of the ECHR must be lawful. Lawfulness includes adherence to a procedure prescribed by national law.[171] Domestic procedures must provide sufficient guarantees against arbitrariness, and

170 *Jimenez*, 2015, p. 291.
171 *Sýkora*, para. 62.

the deprivation of liberty must be subject to thorough scrutiny by domestic authorities.[172] According to case law, the lawfulness of the deprivation of liberty is not satisfied solely by compliance with national law. The *Winterwerp* case was a precedential case in which the Court established three minimum conditions for the lawful detention of an individual on the basis of their unsoundness of mind under Art. 5(1)(e), which should be fulfilled except in emergency cases: a) a competent authority must reliably establish, based on objective medical expertise, the unsoundness of mind, meaning that a person suffers from a true mental disorder; b) the mental disorder must be of a kind or degree justifying compulsory confinement; c) the validity of continued confinement must depend upon the persistence of such a disorder. [173] These conditions were further developed in later case law.[174] The second condition was clarified to mean that detention of a mentally disordered person may be necessary where the person needs therapy, medication, or other clinical treatment to cure or alleviate the illness, or where the person needs control and supervision to prevent harm to themselves or others.[175] In connection with curing the illness, later case law has indicated that the administration of suitable therapy had become a requirement of the broader concept of the lawfulness of deprivation of liberty.[176]

A resolution of the contradiction between Art. 5(1)(e) of the ECHR and Art. 14(1)(b) of the CRPD may be sought in limiting the deprivation of liberty of mentally disordered persons to cases where it is necessary to control and supervise the individuals to prevent them from causing harm to themselves or to others.[177] The harm should be of a kind that threatens physical integrity or life. In such cases, the reason for the deprivation of liberty would not be mental disability but the protection of rights guaranteed by Arts. 2 and 8 of the Convention. However, this possibility was rejected by the UN Committee on the Rights of Persons with Disabilities. In its Guidelines on the right to liberty and security of persons with disabilities from September 2015, the Committee observed that the practice of depriving persons with disabilities of their liberty when they were deemed dangerous to themselves or others was incompatible with Art. 14 of the CRPD, and considered discriminatory and arbitrary.[178] This possibility has also been criticised in the literature as problematic from the perspective of the principle of equality. A question was raised as to whether we were prepared to extend the deprivation of liberty to people who did not suffer from a mental illness.[179] The answer might be that when there are reliable indications that people who do not suffer from a mental illness are at risk of harming themselves or others, their

172 Ibid., para. 63. See Keys, 2002, pp. 26–56.
173 *Winterwerp,* para. 39; *Stanev,* para. 145; *Sýkora,* para. 62. See on the impact of *Winterwerp* on law beyond Europe at Hopper and McSherry, 2001, pp. 161–173.
174 See analysis of older case law at Lewis, 2002, pp. 293–320.
175 *Hutchison Reid,* para. 52; *Stanev,* para. 146.
176 *Rooman,* para. 208.
177 See consideration of tension between public safety and social inclusion in the light of the ECHR at Fennell, 2005, pp. 90–110.
178 *Rooman,* para. 117.
179 See another opinion Opgenhaffen, 2020, para. 163.

deprivation of liberty might be compatible with the positive obligations based on Arts. 2 and 8 of the Convention.

On the other hand, the Court considered in 2019 that Art. 5, as then interpreted, did not contain a prohibition on detention on the basis of mental disability, in contrast to what is proposed by the UN Committee on the Rights of Persons with Disabilities.[180] The ECtHR recognised the possibility of informal modification of the Convention through consonant practice of its implementation.[181] This means that consonant practices in the State Parties could informally change the text of the Convention. However, for the time being, it seems that the State Parties to the ECHR have not established an informal agreement on modifying the text of Article 5(1)(e) through the implementation of Ar. 14(1)(b) of the CRPD.

3.3.2. Objective and Subjective Conditions for Application of Art. 5(1)(e)

The placement of mentally incapacitated individuals in psychiatric hospitals or social care homes amounts to their deprivation of liberty in the sense of Article 5(1)(e).[182] The case law on conditions under which the placement reaches the stronghold of this provision was examined by the Grand Chamber in the *Stanev* case.[183] The case law discloses an objective and subjective element as relevant.

The objective element can appear in various forms. It can consist of a person's confinement in a particular restricted space for a non-negligible length of time. Regarding deprivation of liberty on mental-health grounds, a person was considered by the Court as detained even during a period when he or she was in an open hospital ward with unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital.[184] The Court also found deprivation of liberty in the following cases: (a) where the applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital;[185] (b) where the applicant had initially consented to his or her admission to a clinic but had subsequently attempted to escape;[186] (c) where the applicant was an adult incapable of giving his or her consent to admission to a psychiatric institution which, nonetheless, he or she had never attempted to leave.[187] Complete and effective control made by medical staff in a hospital by means of medication and supervision over the assessment, treatment, care, residence, and movements of the applicant in a period of two months was considered by the Court as a deprivation of liberty.[188] Tim Opgenhaffen referred to numerous elements that the

180 *Rooman*, para. 205.
181 *Öcalan*, paras. 195 and 196.
182 *Stanev*, para. 132; *Shtukaturov*, paras. 104–10; *D.D. v. Lithuania*, para. 152; *Sýkora*, para. 47.
183 *Stanev*, paras. 116–118.
184 *Ashingdane*, para. 42.
185 *Shtukaturov*, para. 108.
186 *Storck*, para. 76.
187 *H.L. v. the United Kingdom*.
188 *Atudorei*, para. 129; *D.D. v. Lithuania*, para. 146.

Court considered when determining the existence of a *de facto* deprivation of liberty: 'sedation, isolation or restraint, a curfew, the impossibility of release, readmission after an escape (attempt), the need to hand over documents and financial management, restrictions on social contacts, etc.'[189] He remarked that the Court has usually taken an overall picture of all relevant facts, not of only one measure in isolation. In a general way, the Court stated that

> 'in determining whether someone has been deprived of his liberty, the starting point must be the applicant's concrete situation and account must be taken of a whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question.'[190]

The subjective element comprises the absence of valid consent for the deprivation of liberty in question.[191] To be valid, a patient must have the ability to consent, must be properly informed, and must understand the consequences. The patient must give consent explicitly and free from coercion.[192] The Court repeated in many cases that consent can be withdrawn at any time and in any way, including the patient's clear opposition.[193] In summation, the deprivation of liberty under Article 5(1)(e) of the ECHR requires both an objective and a subjective component to be considered. The objective component pertains to the factual situation of confinement and control, while the subjective component relates to the lack of individual's consent to that confinement.

3.3.3. Issue of Limiting Cases of Deprivation of Liberty to Those Perpetrated by State Authorities

The Court interprets Art. 5 to apply only when a deprivation of liberty is carried out by State authorities.[194] For instance, the Plenary Court found that placing a minor in a psychiatric hospital by the decision of his mother, who was his guardian, fell outside the scope of Art. 5.[195] This interpretation is evident in other cases as well. In the *Červenka* case, the Court's reasoning suggests that only placements in public medical or social institutions are covered by Art. 5(1)(e). The Court noted that although the applicant was placed in a private social care institution, his confinement was requested by his public guardian, thus engaging the responsibility of the authorities.[196] This might imply that if the confinement were requested by a family member rather than a public guardian, the deprivation of liberty would not be covered by Art.

189 Opgenhaffen, 2020, p. 149.
190 *Munjaz*, para. 66.
191 *Storck*, para. 74.
192 Opgenhaffen, 2020, p. 150.
193 Ibid.
194 *Nielsen*, para. 64.
195 Ibid., para. 73.
196 *Červenka*., para. 103.

5(1)(e). Similarly, in the *Stanev* case, the Grand Chamber noted that the confinement of a mentally ill person resulted from various actions taken by public authorities and institutions, from the initial request for placement to the implementation of the relevant measures, rather than from private individuals.[197] The Grand Chamber thus concluded that the placement in the social care home was attributable to the national authorities.[198]

Such an interpretation of the law may be problematic from the standpoint of general rules on State responsibility and may contradict other interpretations of Art. 5. According to general rules of State responsibility, acts performing public functions are considered acts of the State even when performed by private individuals and institutions. Art. 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted in the 56/83 General Assembly Resolution of 2002, states:

> '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.'

The deprivation of liberty is fundamentally a governmental function. Deprivation of liberty of mentally ill persons often occurs in circumstances where official authorities are expected to act. Therefore, even if deprivation of liberty is requested or consented to by a family member or private guardian and the individual is placed in a private institution, it should remain under the control of Art. 5(1)(e). Additionally, the Court interprets the first sentence of Art. 5(1) not only as imposing a negative obligation on the State Party to refrain from interfering with the liberty and security of a person, but also as imposing a positive obligation on the State to protect the liberty of those within its jurisdiction.[199] Given the object and purpose of Art. 5 and its importance, this positive obligation should not be limited to acts of deprivation of liberty of the State alone.

3.3.4. Judicial Review of Deprivation of Liberty of Persons with Disabilities

The involuntary deprivation of liberty of individuals of unsound mind, in accordance with Art. 5(1)(e), is subject to judicial review under Art. 5(4). A problem arises when consent is given by a guardian of a mentally incapacitated person, as in such cases the deprivation of liberty remains beyond judicial review. In the *Sýkora* case, the Court found that such a situation is incompatible with the concept of lawfulness as foreseen by Art. 5(1) and with the purpose of the paragraph. The Court decided that a guardian's consent to the deprivation of liberty of their mentally incapacitated ward

197 *Stanev*, para. 122.
198 Ibid., para. 123.
199 Ibid., para. 120.

should be subject to judicial review, which can be instituted automatically or brought about by the ward or another suitable person.[200] According to this interpretation of Art. 5(1)(e), a mentally incapacitated person must have direct access to a court.[201] This is not an isolated instance where an incapacitated person has direct access to a court. In the *Stanev* case, the Grand Chamber noted that the vast majority of State Parties allow anyone deprived of legal capacity to apply directly to the courts for the discontinuation of guardianship.[202] The Court also observed that the fact that a person lacks legal capacity does not necessarily mean they are unable to understand their situation.[203] Even if the placement of such a person in a medical institution can only be voluntary under national law, without sufficient guarantees against arbitrariness, it is not lawful.[204]

Disability is a factor that national authorities must consider when deciding on pre-trial detention and its length in the context of Art. 5(3) and when examining alternative measures to secure the presence of a disabled person at court.[205] However, disability is only one of many relevant factors in this matter. Even the highest grade of disability does not automatically preclude pre-trial detention.[206]

3.3.5. Obligation of a State Party Toward Life Prisoners with Mental Disabilities

The *Murray* case was the first instance in which the Court addressed this issue. It is well-established case law of the Court that life imprisonment without the possibility of release after a certain period and under specific conditions is incompatible with Art. 3 of the Convention. According to the Grand Chamber, the first duty of a State in these circumstances is to assess the needs of life prisoners regarding treatment that would facilitate their rehabilitation and reduce the risk of reoffending, thereby fulfilling the conditions for release.[207] The primary issue to be investigated is whether there are treatments with realistic prospects of helping a life prisoner rehabilitate.[208] A State is not obliged to provide a treatment that is unlikely to be effective. The Grand Chamber noted that certain mental health conditions are not amenable to treatment. Given that a mentally ill life prisoner may not be aware of their need for treatment, a State is obliged to conduct this investigation and assessment without any request from the prisoner.[209] If the assessment confirms that a treatment or therapy may assist a mentally ill life prisoner in rehabilitating, a State Party is obliged to provide the treatment to the extent possible within the constraints of prison conditions.[210] The Grand

200 *Sýkora,* para. 67; *Červenka,* para. 107.
201 *Červenka,* para. 118.
202 *Stanev,* para. 88.
203 *Shtukaturov,* para. 108; *Stanev,* para. 130.
204 *Červenka,* para. 122.
205 *Teymurazyan,* para. 11; *Dirdizov,* para. 109; *Arutyunyan,* para. 106.
206 *Amirov,* paras. 108–113.
207 *Murray,* para. 108.
208 Ibid.
209 Ibid.
210 Ibid.

Chamber added that treatment may include medical, psychological, or psychiatric therapy, as well as participation in occupational or other activities.[211]

3.4. The Right to a Court for Persons with Disabilities under Art. 6(1)

Art. 6 of the ECHR guarantees the right to a fair trial. The relevant portion of Art. 6(1) states: '[i]n the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal'.

This provision holds particular significance for persons with disabilities, especially in cases concerning the deprivation of liberty for individuals with mental disabilities, the deprivation and restoration of legal capacity, and disputes over disability pensions. While the ECtHR has primarily dealt with cases concerning the detention of "persons of unsound mind" under Art. 5(4), it has consistently held that the procedural safeguards provided under Art. 5(4) are analogous to those under Art. 6(1).[212] Additionally, in assessing whether incapacitation proceedings are fair, the Court has referred to its jurisprudence under Art. 5(1)(e) and 5(4).[213] Case law also indicates that disability may influence the determination of what constitutes a reasonable time for proceedings.

3.4.1. The Applicability of Art. 6(1) to Legal Capacity Disputes

The Court has affirmed that Art. 6(1) is applicable to proceedings concerning legal capacity.[214] Individuals who have been fully or partially deprived of their legal capacity retain the right to direct access to a court for the restoration of that capacity.[215] Although the right of access to a court is not absolute, the Court has emphasised that the ability to request a judicial review of an incapacity decision is of paramount importance, as the exercise of all other rights impacted by such a decision depends on it.[216]

The Court has further acknowledged that, in some instances, individuals deprived of legal capacity may be wholly unable to articulate a coherent view. However, it noted that in many cases, persons placed under guardianship due to their inability to manage their affairs can still express their opinions. In such cases, these individuals must be afforded the right to access a court and be heard, either in person, or where necessary, through appropriate representation.[217]

211 Ibid., para. 109.
212 *Stanev*, para. 232; *A.N. v. Lithuania*, para. 88.
213 *Stanev*, para. 232.
214 *Matter*, para. 51.
215 *Stanev*, para. 237.
216 Ibid., para. 241.
217 *A.N. v. Lithuania*, para. 90.

3.4.2. Applicability of Art. 6(1) to Disability Pensions and Allowances

It is well-established case law that Art. 6(1) is applicable to social security disputes. The Court took a precedential position on this issue in the *Feldbrugge* case[218] and the *Deumeland* case[219] in 1986. At that time, rights based on social security schemes were treated as public rights, but the Court found that private law elements in them prevailed over public law features. The right of a carabiniere to receive an "enhanced ordinary pension" if he or she fulfilled the necessary conditions of injury and disability sustained in performing his professional duties was regarded by the Court as a "civil right" within the meaning of Art. 6(1), which was therefore applicable in the case.[220] Disputes involving State negligence in the exercise of its regulatory authority, resulting in HIV infection, were also considered by the Court to fall under Art. 6(1).[221] The Court observed that it was sufficient for the outcome of the proceedings to be decisive for private rights and obligations.

In the *Salesi* case, the Court extended the applicability of Art. 6(1) to welfare assistance disputes.[222] The *Mennitto* case addressed whether the Article applied only to "personal rights" or also to "legitimate interests." The relevant Italian law authorised a local public health service to pay a disability allowance but did not automatically confer the right to receive it on families caring for mentally or physically disabled individuals.[223] Given that the local public health service paid two monthly installments of the allowance, the Court found that the applicant's right was recognised.[224]

The primary issue in disability pension cases in the context of Art. 6(1) often concerns whether judicial proceedings exceeded a reasonable time. According to case law, the reasonableness of the length of proceedings is assessed in light of the particular circumstances of the case, including its complexity and the conduct of the parties involved. In certain cases, the Court considers what is at stake for the applicant.[225] For instance, the importance of a disability pension for the applicant's well-being may be a relevant factor. In the *Kiefer* case, the Court found that the circumstances required expedited proceedings,[226] given that the applicant, having suffered an injury and become partly disabled, was relying on pension benefits intended to compensate for his disablement and loss of working capacity.[227] Similarly, in the *Kurt Nielsen* case, the Court took into account that the outcome of the proceedings was crucial for the applicant's subsistence when assessing reasonable time.[228] However, this does not mean that all proceedings on disability pensions necessitate urgency.

218 *Feldbrugge,* paras. 26–40.
219 *Deumeland,* paras. 60–74.
220 *Francesco Lombardo,* para. 17.
221 *X v. France,* paras. 29, 30.
222 *Salesi,* para. 19.
223 *Mennitto,* para. 25.
224 Ibid., para. 27.
225 *Kurt Nielsen,* para. 19; *Beumer,* para. 45.
226 *Kiefer,* para. 31.
227 Ibid.
228 *Beumer,* para. 52.

In the *Sürmeli* case, the Court observed that proceedings on a claim for damages and a pension in respect of disability resulting from an accident did not inherently require special expedition.[229] Nevertheless, the Court mitigated this general finding by noting that insurance companies had paid the applicant various amounts of damages and that Hanover City Council had temporarily paid him a disability pension.[230] Thus, the applicant did not remain without any disability assistance during the proceedings. Despite this, proceedings that lasted over sixteen years were deemed to have exceeded a reasonable time.[231]

In addition to the reasonable length of proceedings, other issues have also been raised. In the *K.P. v. Finland* case, the Court found that a Finnish court's failure to transmit the opinions of insurance companies and the Social Security Institution deprived the applicant of the possibility to comment on them, thereby violating their right to a fair hearing.[232] The Russian procedural provision on supervisory review, which allowed a higher court to quash a final, binding, and enforceable judgment at the request of a State officer due to erroneous application of law, was found to be contrary to the principle of legal certainty and Art. 6(1) in many cases related to persons with disabilities. Consequently, quashing a final, binding, and enforceable judgment on the disability allowances of persons who participated in the cleanup operation at the Chernobyl nuclear disaster site by way of a supervisory review by a higher court contravened Art. 6 of the Convention and Art. 1 of Protocol No. 1.[233] Similarly, the non-enforcement of final judgments in favor of ill and disabled persons granting them social housing, followed by subsequent amendments through supervisory review, was found to violate Art. 6 and Art. 1 of Protocol No. 1.[234] Non-execution of binding judgments providing victims of the Chernobyl nuclear disaster with social housing in a timely manner breached Art. 6 of the Convention and Art. 1 of Protocol No. 1.[235] The prolonged non-enforcement of a final judgment ordering the Ministry of Finance to sign an agreement with Sberbank, thus enabling disabled individuals, whose disability resulted from their participation in the cleanup operation at the Chernobyl nuclear plant, to obtain a preferential loan, violated Art. 6 of the Convention and Art. 1 of Protocol No. 1.[236]

Additionally, the prolonged non-enforcement of a final judgment ordering compensation for injury sustained in a traffic accident that caused disability was found to be in breach of Art. 6 of the Convention, and Art. 1 of Protocol No. 1.[237] The non-enforcement of the judgment ordering the Social Security Service to provide

229 *Sürmeli*, para. 133.
230 Ibid.
231 Ibid., para. 134.
232 *K.P. v. Finland*, paras. 20–28.
233 *Pugach and Others*; *Davletkhanov and other "Chernobyl pensioners"*; *Mikhaylov*; *Finkov*; *Aleksey Zakharov*; *Sobelin and Others*; *Septa*; *Knyazhichenko*; *Grebenchenko.*
234 *Sypchenko.*
235 *Butenko and Others*; *Malinovskiy.*
236 *Nagovitsyn*.
237 *Kostenko.*

a car with hand controls to an applicant who was permanently disabled as a result of participation in the emergency response operations at the Chernobyl nuclear power plant also violated Art. 6 and Art. 1 of Protocol No. 1.[238] Similarly, non-enforcement of the judgment granting compensation to an applicant who became disabled as a result of a work-related injury was contrary to Art. 6 of the Convention and Art. 1 of Protocol No. 1.[239]

3.5. Private and Family Life of Persons With Disabilities as Protected by Art. 8

Art. 8 of the ECHR states:

> '[e]veryone has the right to respect for his private and family life, his home, and his correspondence.
> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Disability can be considered relevant to the right to respect for private and family life, especially when it causes sufficiently adverse effects on a person's physical and moral integrity. This interpretation stems from the case law of the Court, which is presented below. Disability that creates a relationship of dependence between parents and adult children also engages the right to family life. The review of case law reveals the role of disability in determining the right to private life and family life, as well as its role in balancing the conflicting interests of individuals with disabilities and the community.

3.5.1. Disability and the Right to Private Life

It is well established that the term "private life" in Art. 8 of the Convention has a broad and flexible meaning that does not endure an exhaustive and closed definition. According to case law, Art. 8 protects, among other things, the right to identity and personal development, as well as the right to establish and develop relationships with others and the outside world. In the *Bensaid* case, the Court interpreted Art. 8 to cover mental health as a precondition for the effective enjoyment of the right to respect for private life.[240] This interpretation led the Court to accept in principle, that the suffering of a schizophrenic man, which does not reach the threshold of Art. 3, could be treated as interference with Art. 8. The Court had already come to a similar conclusion in the *Costello-Roberts case*, albeit in a different context: the corporal

238 *Belyayev*.
239 *Aleksandrova*.
240 *Bensaid*, para. 47.

punishment of a child that does not reach the severity required by Art. 3 can be treated as a violation of Art. 8.[241]

In the *Bensaid* case, the Court confirmed, *mutatis mutandis*, this possibility but did not find a breach of Art. 8. The applicant, an Algerian national suffering from schizophrenia, claimed that his proposed expulsion from the United Kingdom to Algeria would be contrary to Arts. 3, 8, and 13 of the Convention. His psychiatrist opined that the likely effect of his removal to Algeria would be a relapse of psychotic symptoms, with substantial suffering including loss of awareness that he was ill and persecutory delusions, including voices telling him to harm other people.[242] The Court found that medical treatment would be available to the applicant in Algeria and that the fact that the applicant's circumstances in Algeria would be less favorable than those in the United Kingdom was not decisive to come under Art. 3.[243] It observed that the risk of the worsening of the applicant's conditions in Algeria was very speculative.[244] Comparing the case with the exceptional circumstances of *D. v. the United Kingdom*, the Court concluded that there was not a sufficiently real risk that the applicant's removal would violate Art. 3.[245] It also concluded that the circumstances of the case did not substantiate that the applicant's moral integrity would be affected to a degree falling within Art. 8 of the Convention.[246] The Court stated:

> "[e]ven assuming that the dislocation caused to the applicant by removal from the United Kingdom, where he has lived for the last eleven years, was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8, namely as a measure "in accordance with the law", pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being "necessary in a democratic society" for those aims.'[247]

In this case, the Court believed that the interests of the community outweighed the interests of the applicant. In the *Savran* case, the Grand Chamber came to a contrary conclusion.[248] Before turning to this case, the *Arquier-Martinez* case will be analysed, as it discloses the relevance of disability regarding the right to family life as protected by Art. 8.

241 *Costello-Roberts*, para. 36.
242 *Bensaid*, para. 16.
243 Ibid., para. 38.
244 Ibid., para. 39.
245 Ibid., para. 40.
246 Ibid., para. 48.
247 Ibid.
248 *Savran*.

3.5.2. Disability and the Right to Family Life

The constant case law of the Court establishes that the relationship between parents and adult children is not covered by the right to family life, except where there are 'additional factors of dependence, other than normal emotional ties.' In the *Arquier-Martinez* case, the Court confirmed that such factors of dependence include the care provided by a mother to her adult daughter, who had been deaf since birth, had difficulty speaking, and had required comprehensive therapeutic provision throughout her life.[249]

The *Savran* case, already analysed in this text with regards to Art. 3, pertains to the issue of whether the failure to revoke the expulsion order of a Turkish national suffering from schizophrenia to Turkey conforms with Arts 3 and 8 of the Convention. The applicant was expelled to Turkey due to his involvement in serious crimes committed in Denmark. The Grand Chamber first confirmed the interpretation of Art. 8 given in the *Bensaid* case, which states that mental health must also be regarded as a crucial part of private life associated with moral integrity. The case law permits that treatment which does not reach the severity of Art. 3, can violate Art. 8 if there are sufficiently adverse effects on physical and moral integrity.[250] Recognising that sufficiently adverse effects of illness on physical and moral integrity can fall under Art. 8, the Grand Chamber implied that disability with such effects also falls under Art. 8. The Grand Chamber consulted case law on the impact of relationships of dependence on the scope of the right to family life, including the *Arquier-Martinez* case. It concluded that schizophrenia, although a serious illness, could not in itself be regarded as sufficient evidence of the applicant's dependence on his family members to avail him of the right to family life.[251] Then, the Grand Chamber investigated whether the Danish refusal to revoke the applicant's expulsion order violated the right to private life. Having found that the expulsion order interfered with the right to private life,[252] the Grand Chamber explored whether a fair balance was struck between the general interest of the community and the applicant's right to private life. In this context, the Grand Chamber observed that due to his mental conditions, the applicant was more vulnerable than an average "settled migrant" facing expulsion and that his health should have been one of the balancing factors.[253] After scrutinising all balancing factors, as established in the case law, the Grand Chamber found that the Danish authorities had failed to assess the impact of the positive effects of medical treatment on the risk of reoffending, to evaluate the strength of the applicant's ties to Denmark in comparison with those to Turkey, and that they were therefore unable to make an individual assessment of the duration of the applicant's removal from Danish

249 *Arquier-Martinez*, para. 65.
250 *Savran*, para. 172.
251 Ibid., para. 178.
252 Ibid., para. 179.
253 Ibid., para. 191.

territory since the expulsion was irreducible and permanent.[254] Thus, it found a violation of Art. 8.

Furthermore, the mental illness of a parent cannot be a sufficient reason for limiting his or her contact rights with a child.[255] It can be a justified reason only when it is established that the mental illness poses a threat to the child or when it would be contrary to the best interests of the child.

3.5.3. The Right of a Person with Disability to Support in Exercising Legal Capacity

The ECHR does not explicitly state the right of everyone to be recognised as a person before the law, as Art. 16 of the ICCPR does. However, there is no doubt that this right is implicit in the text of the ECHR, particularly in Art. 8. Indeed, the ECtHR treats legal incapacitation as an interference with private life as protected by Art. 8 of the Convention.[256] Art. 12 of the CRPD specifies the right to be recognised as a person before the law concerning persons with disabilities.[257] The focus of Art. 12 of the CRPD is on ensuring that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. To achieve this, State Parties to the CRPD are obliged by Art. 12(3) to provide access to the support persons with disabilities may require in exercising their legal capacity. Art. 12(4) requires that State Parties provide safeguards to ensure that

> 'measures relating to the exercise of legal capacity respect the rights, will, and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.'

In connection with these issues, the ECtHR interprets Art. 8 of the ECHR to require that a legally incapacitated person is consulted regarding the appointment of his or her guardian.[258] Similarly, the ECtHR expects, based on Art. 8, that a legally incapacitated person is consulted regarding the enjoyment of his or her rights, although it also considers that the obligation to respect the will or preferences of the person is not unlimited.[259]

3.6. Art. 1 of Protocol No. 1 – The Right to Property and Persons with Disabilities

Art. 1 of Protocol No. 1 to the ECHR provides:

254 Ibid., para. 201.
255 *Cînța*, paras. 47–58.
256 *N. v. Romania (No.2)*, para. 58.
257 See about Art. 12 of the CRPD at Arstein-Kerslake, 2014, p. 83.
258 *N. v. Romania (No.2)*, para. 68.
259 *A.–M.V. v. Finland*.

> "[e]very natural or legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

The following review of case law demonstrates that the ECtHR treats disability pensions and allowances as property rights, and consequently, any reduction of these benefits constitutes an interference with property rights. Similarly, the Court considers the entitlement of a person with a disability, based on national law, to receive medication free of charge as a "legitimate expectation" protected by Art. 1 of Protocol No. 1. This review will also illustrate that the Court views disability as a relevant factor in determining whether interference with the right to property is proportional.

3.6.1. Art. 1 of Protocol No. 1: Disability Pensions and Allowances

Referring to the case law of the Court, the Grand Chamber remarked in the *Béláné Nagy* case that many individuals are, for all their lives or occasionally, dependent for survival on social security and welfare benefits and that Art. 1 of Protocol No. 1 is applicable to social and welfare allowances.[260] In numerous cases, the Court has reiterated that contributions to a pension fund can, under conditions prescribed by domestic law, create a property right.[261] Additionally, the Court has stated that domestic legislation, which provides for the payment of a welfare benefit as of right, regardless of whether it was conditional upon prior payment of contributions, generates a property interest falling within the scope of this Article.[262] Accordingly, the termination or reduction of a disability pension may be classified as an interference with the right to property.[263] Interference is established when the termination or reduction of a benefit results from changes in the law or its implementation, but not from changes in the person's own circumstances.[264] However, the Court has demonstrated flexibility in its readiness to establish interference. For instance, if a person cannot obtain a disability pension because they do not fulfill a condition incompatible with the Convention, the Court is prepared to recognise the legitimate expectation of the person, protected by Art. 1 of Protocol No. 1.[265]

260 *Béláné Nagy*, para. 80. See analysis of the case by Wujczyk, 2017, pp. 272–279.
261 *Kjartan Ásmundsson*, para. 39; *Apostolakis*, paras. 28 and 35; *Bellet, Huertas and Vialatte*; *Skórkiewicz*.
262 *Stec and Others*, para. 51; *Béláné Nagy*, para. 83.
263 *Valkov and Others*, para. 72.
264 *Grudić*, para. 77; *Béláné Nagy*, para. 86.
265 *Klein*, para. 45; *Koua Poirrez*, paras. 37–42; *Béláné Nagy*, para. 87.

In the section on the margin of appreciation, it was stated that the State Parties to the ECHR enjoy a wide margin of appreciation regarding the socio-economic aspects of the rights. Indeed, the Court has reiterated many times that disability pensions, like other pensions and social allowances, fall within a domain of wide margin of appreciation. Simultaneously, the Court has emphasised that this margin remains under its control regarding respect for the fundamental principles underlying the Convention, including the rule of law and a fair balance between the interests of the community and the individual right at stake. Thus a State's social security system can be changed regarding the conditions for acquiring benefits and the quantum of benefits, but when such changes result in the termination or reduction of acquired benefits, they remain under the Court's scrutiny. The following text will shed some light on the control exercised by the Court concerning the termination or substantial reduction of disability pensions.

The *Kjartan Ásmundsson* case is one of the instances where the Court found that the termination of a disability pension was contrary to Art. 1 of Protocol No. 1. Having contributed to the Pension Fund for over twelve years the applicant, a seaman, sustained a serious work accident, became 100% disabled for any professional work as a seaman, and acquired a disability pension. He continued to work onshore beyond his profession. Due to financial difficulties faced by the Pension Fund, the Pension Act was amended such that the basis for the assessment of disability shifted from the beneficiary's inability to perform the same work as before becoming disabled to a general inability to work.[266] According to the new standard, the applicant was found to be only 25% disabled, which was below the threshold for receiving a disability pension. After twenty years of receiving the pension, it was removed from the applicant.[267] The parties agreed, and the Court accepted, that the termination of the disability pension constituted an interference with the applicant's right to property as protected by Art. 1 of Protocol No. 1.[268]

The key question was whether a fair balance had been struck between the general interest of the community and the protection of the right to property. To answer this question, the Court assessed the proportionality between the financial benefit gained by the Pension Fund through the termination of the applicant's disability pension and the burden imposed on the applicant. This assessment was made by comparing the treatment of the applicant with that of other disability pensioners in similar situations. There was a group of 336 pensioners in a similar situation, and the applicant belonged to a small group of 54 disability pensioners whose pensions were terminated by the pension reform.[269] About a hundred members of this group continued to receive their pensions at a reduced level, while the majority received them at the same level.[270] Thus, the question was what the financial effect of the reform was,

266 *Kjartan Ásmundsson*, para. 10.
267 Ibid., para. 12.
268 Ibid., para. 40.
269 Ibid., para. 42.
270 Ibid., paras. 13, 43.

which served as its justification for interfering with the right to property. The Court observed that the interference had a discriminatory character, intensified by the fact that the applicant was affected 'in a particularly concrete and harsh manner' by the total deprivation of the disability pension he had been receiving for nearly twenty years.[271] At the time of termination, his disability pension constituted one-third of his gross monthly income.[272] Gainful employment of a disability pensioner was not incompatible with the rules then in force under certain conditions.[273] Many other disability pensioners used the same opportunity. Considering that the original assessment of the applicant's disability by the Pension Fund was 100% and that the Icelandic Supreme Court confirmed that there was an indisputable right to have disability so assessed, the Court stated that the applicant could have a legitimate expectation that his disability would continue to be assessed based on his incapacity to perform his previous job.[274] Besides, the Court noted that the rate of disability was not changed due to any circumstances of the applicant but due to the pension reform. Against this factual background and in accordance with case law, the Court found that

> 'as an individual, the applicant was made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation to be enjoyed by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities. It would have been otherwise had the applicant been obliged to endure a reasonable and commensurate reduction rather than the total deprivation of his entitlements.'[275]

Thus, the Court weighed the financial gain acquired by the Pension Fund through the termination of 54 disability pensions and the burden imposed on the applicant and found an imbalance. The change was not foreseeable, was harsh for the applicant, and lacked sufficient justification.

Having fulfilled two conditions for a disability pension – the "contribution condition" in terms of duration of service time and the "health condition" in terms of capability for work – Ms. Béláné Nagy was granted a disability pension in 2001. Due to a new methodology of assessment of disability, Ms. Nagy lost her pension in 2010. However, it was later established that the grade of her disability remained the same and only the percentages were changed due to the new methodology. In 2012, new legislation changed the "contribution condition" in such a way that she did not fulfill it and thus could not renew her pension. Since the applicant did not satisfy the "contribution condition" as established by the new legislation, the respondent State argued

271 Ibid., para. 44.
272 Ibid.
273 Ibid.
274 Ibid.
275 Ibid., para. 45.

that the applicant had lost legitimate expectation regarding the pension.[276] The Grand Chamber did not agree. It seems that a crucial reason for disagreement was the fact that she had established the right to a pension under the conditions that had existed before the changes. The Grand Chamber noted that the applicant had contributed to the insurance scheme on a mandatory basis and that she satisfied the statutory conditions for a disability pension which were in force at the time of her retirement. It reiterated that contributions to a pension fund may, in certain circumstances and in accordance with domestic law, create a property right in the sense of Art. 1 of Protocol No. 1. Since the contribution was recognised as sufficient by the respondent State in 2001, the necessary circumstances existed.[277]

Referring to the *Béláné Nagy* case, the Court found that the drastic reduction of a disability pension due to legislative reform was covered by Art. 1 of Protocol No. 1 in the *Lengyel* case. The applicant had been receiving a disability pension since November 2006. Due to a change in the methodology for disability assessment in 2008, her pension was halved in 2012.[278] The parties to the case did not dispute whether the disability pensions constituted a right to property, but rather whether the State's interference with the right was in accordance with the Convention. Referring to its case law, the Court confirmed that a State social security system could be changed and that there was 'the possibility of amendments to social-security legislation which may be adopted in response to societal changes and evolving views on the categories of persons who need social assistance, and also to the evolution of individual situations.'[279] Having reiterated that a State enjoys a wide margin of appreciation regarding the establishment and reform of social security systems, the Court turned to investigating the proportionality of the measure. An important matter was whether the measure damaged the essence of the applicant's right. The Court did not have difficulty in giving a positive answer.[280] The reduction of the pension by half was aggravated, as the Court remarked, by the fact that the applicant had no other significant income and that she belonged to a vulnerable group of disabled persons.[281] Additionally, the Court established that the applicant's level of disability remained fairly stable.[282] Accordingly, the Court found that a fair balance was not struck between the interests at stake – protecting the public interest by rationalising the disability benefits scheme and the burden shifted to the applicant by halving her pension.[283]

276 *Béláné Nagy*, para. 96.
277 Ibid., para. 105.
278 *Lengyel*, paras. 6–11.
279 Ibid., para. 27.
280 Ibid., para. 28.
281 Ibid., para. 29.
282 Ibid., para. 30.
283 Ibid., para. 31.

3.6.2. Art. 1 of Protocol No. 1: Legitimate Expectation and Proportionality

The Court treated an individual's entitlement, based on national legislation, to receive medicines free of charge under prescribed conditions as a substantive property interest recognised under domestic law. This entitlement was sufficiently established to create a "legitimate expectation" for the disabled individual, so that they would receive the medicine if they fulfilled the prescribed conditions. Accordingly, the entitlement was protected by Art. 1 of Protocol No. 1, i.e., by the right to property.[284] Concerning budgetary restraints as a justification for disregarding the entitlement, the Court stated:

> "[n]either the complexity of the State budgetary system, nor the lack of funds or other resources, can relieve the State of its relevant obligations under the Convention. It is for the Contracting States to organize their legal systems in such a way that the competent authorities can meet their obligations in this regard.'[285]

When the Court assessed the lawfulness of State authorities' interference with the right to property, it took into account the amount of inconvenience caused by the interference, including the age and health of the affected individual and the disability resulting from the deterioration of their health.[286] The disability of a landlord was a factor taken into account by the Court in balancing the interests of the community and the owner of an apartment in eviction procedures.[287]

The failure of Bulgarian courts to consider the applicant's argument and to release a portion of money from his bank accounts, frozen in criminal proceedings, necessary for the medical treatment of his severely disabled son, casts doubt on the proportionality of freezing all of his assets and violates Article 1 of Protocol No. 1.[288] The Bulgarian courts did not consider the argument because there was no statutory basis for it. The absence of a statutory basis was, according to the Court, hardly compatible with the need to provide those affected by freezing measures with procedures that make it possible to strike a fair balance between the public interest and their rights.[289] Clearly, the Court opined that a request to release a portion of frozen funds necessary for the medical treatment of a disabled family member had a basis in the Convention.

284 *Fedulov*, paras. 70–72.
285 Ibid., para. 79.
286 *Paplauskienė*, paras. 17, 54, 55; *Pyrantienė*, paras. 31, 62.
287 *Scollo*, para. 38.
288 *Apostolovi.*
289 Ibid., para. 103.

3.7. The Right of Persons With Mental Disabilities to Vote under Art. 3 of Protocol No. 1

Art. 3 of Protocol No. 1 reads: '[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' The Court interpreted Art. 3 of Protocol No. 1 as guaranteeing individual rights, including the right to vote and to stand for election.[290] Universal suffrage is the basic principle of a democratic society. In light of this, the Court observed however, that Art. 3 of Protocol No. 1 does not provide persons with mental disabilities with an absolute right to vote.[291] In the *Caamaño Valle* case, the Court faced conflicting information from Art. 29 of the CRPD and the opinion of the Commissioner for Human Rights of the Council of Europe on one hand, and its case law on the other hand. Art. 29(a) of the CRPD obliges State Parties to

> 'ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected'.

Indeed, this provision could be interpreted to mean that State Parties are obliged to guarantee all persons with disabilities, including those with mental disabilities, the right to vote. This interpretation was advocated by the Committee on the Rights of Persons with Disabilities[292] and the Commissioner for Human Rights of the Council of Europe.[293]

The Court noted however, that at that time there was no consensus among the State Parties to Protocol No. 1 regarding an unconditional right of persons with mental disabilities to vote.[294] Thus, the Court adhered to its interpretation given in the *Alajos Kiss* case. According to this interpretation, an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, is not permitted by Art. 3 of Protocol No. 1.[295] Similarly, an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability requiring partial guardianship, is not compatible with the Article.[296] The Court accepted as a legitimate limitation of the right to vote the aim of 'ensuring that only citizens capable of assessing the consequences of their decisions and

290 *Mathieu-Mohin and Clerfayt*, para. 51; *Selahattin Demirtaş*, para. 385.
291 *Caamaño Valle*, para. 59.
292 *Combrinck*, para. 89.
293 Ibid., paras. 47–48.
294 Ibid., para. 59.
295 *Alajos Kiss*, para. 42; *Caamaño Valle*, para. 60.
296 *Alajos Kiss*, para. 44; *Caamaño Valle*, para. 60.

making conscious and judicious decisions should participate in public affairs.'[297] The Court reiterated this interpretation in the *Anatoliy Marinov* case.[298]

In fact, this aim of legitimate limitation of the right to vote was a matter of agreement between the respondent Government and the applicant in the *Alajos Kiss* case. The Government proposed this as a legitimate aim and the applicant accepted it. The Court then repeated this in two later cases. The formulation of this aim is not without certain difficulties. It is not quite clear how a State authority would ascertain that a person with a mental disability is capable of assessing the consequences of his or her decision, or making a conscious and judicious decision. It might be more appropriate to consider that the intellectual capacity to understand the electoral process qualifies him or her to participate in it.

3.8. Prohibition of Discrimination Against Persons with Disabilities

The prohibition of discrimination, as laid down in Art. 14 of the Convention, reads:

> '[t]he enjoyment of the rights and freedoms set forth in this Convention 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.'

As stated, the prohibition is limited to the rights and freedoms guaranteed by the Convention. Art. 1 of Protocol No. 12, dated 4th November 2000, which extended the prohibition to all rights established by law and to all acts of public authorities. The Article states:

> '[t]he 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.
> No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

The Court interpreted the prohibition of discrimination to mean that analogous or similar situations must be treated equally and that different situations must be treated differently, except when contrary treatment was justified by objective and reasonable justification. Thus, the rule imposes two comparisons: the comparison of factual situations and the comparison of their legal treatments. In the case of a disharmonious relationship between the factual situations and their legal treatment – that is, in the case of the equal treatment of different situations or the different treatment of equal

297 *Alajos Kiss*, para. 38; *Caamaño Valle*, para. 61.
298 *Anatoliy Marinov,* paras. 48–50. See criticism of the position of the Court at Seatzu and Vargiu, 2023, pp. 263–288.

situations – there must be an exploration to determine whether the disharmonious treatment was led by an objective and reasonable aim. This exploration includes a test of proportionality: whether the burden on an individual affected by a disharmonious treatment is proportional to the social aim achieved by such treatment. Additionally, inappropriate treatment must not be based on any ground enumerated in Art. 14 and Art. 1 of Protocol No. 12.

Disability is not indicated as a ground of discrimination among the grounds numbered in the aforementioned Articles. However, the enumeration of the grounds is not exhaustive; the list remains open, and the Court has found that disability is covered by the reference to "other status." Referring to Recommendation 1592 (2003) towards full social inclusion of people with disabilities, adopted by the Parliamentary Assembly of the Council of Europe on 29th January 2003 and the CRPD, the Court observed that 'there is a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.'[299] The case in which the Court recognised disability as a ground of discrimination, the *Glor* case, was the first case in which the Court applied Art. 14 establishing that the applicant was discriminated on the ground of disability.[300]

When interpreting Art. 14 of the ECHR regarding persons with disabilities, the Court takes into account the CRPD and, in particular, the definition of discrimination on the basis of disability as laid down in Art. 2 of the CRPD. This definition includes various forms of discrimination, including the denial of reasonable accommodation. The term "reasonable accommodation" means

> 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'

The concept of "reasonable accommodation" implies a positive obligation on the State Parties to provide necessary modifications and adaptations to enable persons with disabilities to fully enjoy all human rights and fundamental freedoms. This positive obligation has a significant impact on the interpretation of the entire ECHR, particularly Art. 14.

The prohibition of discrimination has been proven in the practice of the ECtHR as an effective means of safeguarding the social inclusiveness of persons with disabilities. The Court has used it to evaluate the seriousness of efforts by a State Party to prevent the marginalisation of disabled individuals. In that sense, positive obligations based on the prohibition of discrimination regarding persons with disabilities are more obligations of means rather than obligations of result. The social inclusiveness of disabled individuals requires significant economic resources, which might not be

299 *Glor*, para. 53.
300 Miller, 2024, p. 180. See other cases related to Art. 14 at Miller, 2024.

immediately available to State authorities. In such circumstances, the Court assesses steps taken by a State to solve the problem and evaluates whether a State has struck a fair balance between the interests of disabled individuals and the interests of the community.

A comparative analysis of the *Enver Şahin* case and the *Arnar Helgi Lárusson* case might cast some light on the issue. The two cases are identical in the fact that State authorities did not secure adequate access to public institutions for wheelchair users. However, only in the first case did the Court find a violation of the prohibition of discrimination in conjunction with the right to education and the right to private life. The differences that led to the different outcomes were as follows: Turkish authorities did not provide a student who used a wheelchair with access to a university, preventing him from continuing his studies. The Icelandic authorities did not provide a wheelchair user with access to two cultural institutions. Thus, in the first case, the right to education, as guaranteed by Art. 2 of Protocol No. 1, and the right to private life, as protected by Art. 8 of the Convention, were at stake. In the second case, only the right to private life was at risk. It seems that the Court attributed more weight to the right to education. In the *Arnar Helgi Lárusson* case, the Court observed that in implementing a policy of improving access to public institutions, the municipality began with educational and sports facilities, which, according to the Court, was neither an arbitrary nor an unreasonable strategy of prioritisation.[301] The main difference that led to the different outcomes was the different levels of care that national authorities expressed in solving the problems. The Turkish university and judicial authorities recognised that the problem existed and proposed a solution – personal assistance to the student – which was not personalised and did not solve the problem. On the other hand, the Icelandic Parliament adopted a resolution to solve the national problem of access for disabled individuals to public institutions, and the municipal authorities advanced in implementing the resolution. Thus, in the *Enver Şahin* case, the Court concluded that the national authorities did not react with requisite care to ensure that the applicant could continue to exercise his right to education on an equal footing with other students.[302] Conversely, in the *Arnar Helgi Lárusson* case, the Court concluded that national and local authorities had taken considerable measures to assess and address accessibility needs in public buildings within the limits of the available budget, and the State took sufficient measures to fulfill its positive obligation to correct factual inequalities affecting the applicant's equal enjoyment of his right to private life.[303]

Lack of adequate care on the part of domestic authorities was the reason for the Court finding a violation of the prohibition of discrimination in connection with the right to education in the *G.L. v. Italy* case. A girl suffering from non-verbal autism received learning support, namely a specialised assistance service, in nursery

301 *Arnar Helgi Lárusson*, para. 63.
302 *Enver Şahin*, para. 75.
303 *Arnar Helgi Lárusson*, para. 64.

school, but in the first two years of primary school, she remained without assistance. The Court found that the authorities had neglected the applicant's real needs and did not find an adequate solution to enable her to attend primary school under conditions similar to those enjoyed by other children.[304] The national authorities did not react with the requisite care to ensure that the applicant could enjoy her right to education on an equal footing with the other pupils.[305]

4. Part Three – Protection of Persons With Disabilities Under the ECHR in Central and Eastern Europe: Specifics and the Growing Role of NGOs

An examination of cases brought before the ECtHR concerning persons with disabilities reveals some of the most severe human rights violations, particularly involving individuals with mental disabilities, in certain Central and Eastern European countries. Among persons with disabilities, those with mental disabilities are undoubtedly one of the most vulnerable groups. The plight of mental patients in Eastern Europe was the focus of a conference at New York Law School in 2002, where speakers documented a range of abusive practices. These included the use of locked bed cages in psychiatric hospitals to restrain patients at night, the application of electroconvulsive therapy, and the isolation of patients in overcrowded social care homes situated in rural areas, effectively severing their ties with the communities. Additionally, there were reports of abusive practices by guardians, who, rather than acting in the best interests of their wards, would voluntarily commit them to these remote social care facilities. This subchapter illustrates that such practices have persisted in some Central and Eastern European countries since 2002. A review of cases also highlights a less flexible and more bureaucratic approach to the human rights of persons with disabilities compared to other European regions.

Winick, who reported on the New York conference, noted that similar abusive practices concerning mental patients were prevalent in the United States over thirty-five years ago. However, public interest lawyers in the U.S. brought about change by initiating judicial proceedings and challenging conditions in mental health facilities. Their efforts attracted public attention and led to new legislation. Winick suggested that a similar process might occur in Eastern Europe, referencing organisations such as Mental Disability Rights International.

Indeed, some non-governmental organizations (NGOs) in Central and Eastern European countries have actively engaged in the promotion and protection of the rights of persons with disabilities, invoking, among other instruments, the ECHR and filing applications with the ECtHR. These NGOs have contributed significantly to the development of ECtHR case law. Two Romanian NGOs – the Centre for Legal Resources and the Association for the Defence of Human Rights in Romania, and the

304 *G.L. v. Italy*, para. 70.
305 Ibid., para. 72.

Helsinki Committee, along with the North Macedonian NGO, the Helsinki Committee for Human Rights in Skopje – successfully advocated for the ECtHR to modify its interpretation of Art. 34 of the ECHR. This change now permits NGOs to represent persons with mental disabilities before the ECtHR without the need for the person's authorisation, under certain conditions, as discussed in section 1.3 of this subchapter. It should be emphasised that, in addition to these three NGOs, others also represent persons with disabilities before the ECtHR. The Mental Disability Advocacy Center, for instance, has represented applicants in numerous cases and has also submitted comments in others.

Bibliography

Literature

Arstein-Kerslake, A. (2014) 'A Call to Action: The Realization of Equal Recognition under the Law for People with Disabilities in the EU', *European Yearbook of Disability Law,* 5, pp. 75–102.

Bantekas, I. (2020) 'Reservations to the Convention on the Rights of Persons with Disabilities: Peer Engagement and the Value of a Clear Object and Purpose', *New York International Law Review,* 33(2), pp. 61–94.

Boanta, A. et al. (2014) 'The Ability of the European Court of Human Rights to Ensure Effective Access to Its Proceedings for People with Disabilities', *Forumul Judecătorilor*, 2014/1, pp. 194–202.

Broderick, A. (2018) 'The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves Or a Potentially Unified Vision of Human Rights', *Cambridge International Law Journal*, 7(2), pp. 199–224; https://doi.org/10.4337/cilj.2018.02.02.

Chainoglou, K. (2012) 'The Framework for Protecting the Rights if Persons with Mental Disabilities in Europe Improved Protection for a Growing Yet Marginalized Group', *Cyprus Human Rights Law Review,* 1(2), pp. 157–183.

Combrinck, H. (2014) 'Everybody Counts: The Right to Vote of Persons with Psychosocial Disabilities in South Africa', *African Disability Rights Yearbook,* 2, pp. 75–100.

Da Lomba, S. (2014) 'Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights', *European Journal of Health Law,* 21(4), pp. 339–364.

Etinski, R., Božović, B. (2019) 'The Function of the Margin of Appreciation in the Jurisprudence of the ECtHR', *Noua Revistă de Drepturile Omului*, 15(3), pp. 7–26.

Etinski, R. (2024) 'Orderly Development of the Case Law of the European Court of Human Rights', *The Annals of the Faculty of Law in Belgrade*, 72(1), pp. 23–44; https://doi.org/10.51204/Anali_PFBU_24102A.

Fennell, P. (2005) 'Convention Compliance, Public Safety, and the Social Inclusion of Mentally Disordered People', *Journal of Law and Society,* 32(1), pp. 90–110; https://doi.org/10.1111/j.1467-6478.2005.316_1.x.

Grbic, S. (2019) 'Legal Transplants and the Development of Law: Protection of the Rights of Persons with Disability and European Convention on Human Rights', *Harmonius: Journal of Legal and Social Studies in South East Europe*, pp. 139–165.

Hopper, S. McSherry, B. (2001) 'The Insanity Defence and International Human Rights Obligations', *Psychiatry, Psychology and Law,* 8(2), pp. 161–173; https://doi.org/10.1080/13218710109525016.

Jimenez, A.E.A. (2015) 'Criminalizing Disability: The Urgent Need of a New Reading of the European Convention on Human Rights', *American University International Law Review,* 30(2), pp. 285–314.

Keys, M. (2002) 'Challenging the Lawfulness of Psychiatric Detention under Habeas Corpus in Ireland', *Dublin University Law Journal*, 24, pp. 26–56.
Lewis, O. (2002) 'Protecting the Rights of People with Mental Disabilities: The European Convention on Human Rights', *European Journal of Health Law*, 9(4), pp. 293–320.
Lubarda, B. (2021) 'The Rights of Persons with Disabilities in the Case-law of the European Court of Human Rights', *Europe of Rights & Liberties/Europe des Droits & Libertés*, 3(1), pp. 6–19.
Miller, A.J. (2024) 'Strengthening the rights of persons with disabilities in Europe to access goods and services', *European Journal of Legal Studies*, 15(2), pp. 173–214; https://doi.org/10.2924/EJLS.2024.010.
Nieminen, L. (2010) 'Human Rights of Persons with Disabilities', *Scandinavian Studies in Law*, 55, pp. 375–390.
Opgenhaffen, T. (2020) 'Deprivation of Liberty in Care. An ECHR and CRPD Approach and Its Consequences for Belgium', *European Journal of Health Law*, 27(2), pp. 147–168; https://doi.org/10.1163/15718093-BJA10003.
Rexova, M. (2018) 'Should NGOs Have Legal Standing on behalf of In-Patients to Protect Their Interests', *Common Law Review*, 15, pp. 69–72.
Ribet, B. (2011) 'Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities', *Yale Human Rights & Development Law Journal*, 14(1), pp. 155–204.
Seatzu, F., Vargiu, P. (2023) 'The Right to Vote of Persons with Disabilities and the Difficult Relationship between the CRPD and the European Court of Human Rights', *San Diego International Law Journal*, 24(2), pp. 263–288.
Wachenfeld, M.G. (1991) 'The Human Rights of the Mentally Ill in Europe', *Nordic Journal of International Law*, 60(2), pp. 109–292.
Winick, B.J. (2002) 'Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law', *New York Law School Journal of International and Comparative Law*, 21(3), pp. 537–572.
Wujczyk, M. (2017) 'Recent Cases before the European Court of Human Rights', *European Journal of Social Security*, 19(3), pp. 272–279; https://doi.org/10.1177/1388262717729593.

Case-Law

A.-M.V. v. Finland, (Application No. 53251/13) Judgment 23 March 2017.
A.N. v. Lithuania, (Application No. 17280/08) Judgment 31 May 2016.
Abdulkhanov v. Russia, (Application No. 35012/10) Judgment 6 July 2021.
Aggerholm v. Denmark, (Application No. 45439/18) Judgment 15 September 2020.
Akopyan v. Ukraine, (Application No. 12317/06) Judgment 5 June 2014.
Alajos Kiss v. Hungary, (Application No. 38832/06) Judgment 20 May 2010.
Aleksandrova v. Russia, (Application No. 28965/02) Judgment 6 December 2007.
Aleksanyan v. Russia, (Application No. 46468/06) Judgment 22 December 2008.
Aleksey Zakharov v. Russia, (Application No. 51380/07) Judgment 12 March 2009.

Amirov v. Russia, (Application No. 51857/13) Judgment 27 November 2014.
Anatoliy Marinov v. Bulgaria, (Application No. 26081/17) Judgment 15 February 2022.
Andronicou and Constantinou v. Cyprus, (Application No. 25052/94) Judgment 9 October 1997.
Apostolakis v. Greece, (Application No. 39574/07) Judgment 22 October 2009.
Apostolovi v. Bulgaria, (Application No. 32644/09) Judgment 7 November 2019.
Arnar Helgi Lárusson v. Iceland, (Application No. 23077/19) Judgment 31 May 2022.
Arquier-Martinez v. Switzerland, (Application No. 65550/13) Judgment 11 December 2018.
Arutyunyan v. Russia, (Application No. 48977/09) Judgment 10 January 2012.
Ashingdane v. the United Kingdom, (Application no. 8225/78) Judgment 28 May 1985.
Aswat v. the United Kingdom, (Application No. 17299/12) Judgment 16 April 2013.
Atudorei v. Romania, (Application No. 50131/08) Judgment 16 September 2014.
Béláné Nagy v. Hungary, (Application No. 53080/13) Judgment 13 December 2016.
Bellet, Huertas and Vialatte v. France, (Application Nos. 40832/98, 40833/98 and 40906/98) Decision 27 April 1999.
Belyayev v. Russia, (Application No. 24620/02) Judgment 25 January 2007.
Bensaid v. the United Kingdom, (Application No. 44599/98) Judgment 6 February 2001.
Beumer v. the Netherlands (Application No. 48086/99) Judgment 29 July 2003.
Binişan v. Romania, (Application No. 39438/05) Judgment 20 May 2014.
Blokhin v. Russia, (Application No. 47152/06) Judgment 23 March 2016.
Boukrourou and Others v. France, (Application No. 30059/15) Judgment 16 November 2017.
Budayeva and Others v. Russia, (Application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) Judgment 20 March 2008.
Butenko and Others v. Russia, (Application Nos. 2109/07, 2112/07, 2113/07 and 2116/07) Judgment 20 May 2010.
Caamaño Valle v. Spain, (Application No. 43564/17) Judgment 11 May 2021.
Calvelli and Ciglio v. Italy, (Application No. 32967/96) Judgment 17 January 2002.
Cara-Damiani v. Italy, (Application No. 2447/05) Judgment 7 February 2012.
Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, (Application no. 47848/08) Judgment 17 July 2014.
Červenka v. the Czech Republic, (Application No. 62507/12) Judgment 13 October 2016.
Chapman v. the United Kingdom (Application No. 27238/95) Judgment of 18 January 2001.
Christine Goodwin v. The United Kingdom, (Application No. 28957/95) Judgment of 11 July 2002.
Cînța v. Romania, (Application No. 3891/19) Judgment 18 February 2020.
Claes v. Belgium, (Application No. 43418/09) Judgment 10 January 2013.
Costello-Roberts v. the United Kingdom, (Application No. 13134/87) Judgment 25 March 1993.
D. v. the United Kingdom, (Application No. 30240/96) Judgment 2 May 1997.
Davletkhanov and other "Chernobyl pensioners" v. Russia, (Application Nos. 7182/03, 10115/04, 21752/04, and 22963/04) Judgment 23 September 2010.
D.D. v. Lithuania, (Application No. 13469/06) Judgment 14 February 2012.
Deumeland v. Germany, (Application No. 9384/81) Judgment 29 May 1986.

Dirdizov v. Russia, (Application No. 41461/10) Judgment 27 November 2012.
Eduard Popa v. the Republic of Moldova, (Application No. 17008/07) Judgment 12 February 2013.
Engel v. Hungary, (Application No. 46857/06) Judgment 20 May 2010.
Enver Şahin v. Turkey, (Application No. 23065/12) Judgment 30 January 2018.
Epure v. Romania, (Application No. 73731/17) Judgment 11 May 2021.
Farbtuhs c. Lettonie, (Application No. 4672/02) 2 December 2004.
Fedulov v. Russia, (Application No. 53068/08) Judgment 8 October 2019.
Feldbrugge v. the Netherlands, (Application No. 8562/79) Judgment 29 May 1986.
Finkov v. Russia, (Application No. 27440/03) Judgment 8 October 2009.
Francesco Lombardo v. Italy, (Application No. 11519/85) Judgment 26 November 1992.
G. v. France, (Application No. 27244/09) Judgment 23 February 2012.
G.L. v. Italy, (Application No. 59751/15) Judgment 10 September 2020.
Glor v. Switzerland, (Application No. 13444/04) Judgment 30 April 2009.
G.M. and Others v. the Republic of Moldova, (Application No. 44394/15) Judgment 22 November 2022.
Grebenchenko v. Russia, (Application No. 30777/03) Judgment 15 February 2007.
Grudić v. Serbia, (Application no. 31925/08) Judgment 17 April 2017.
H.L. v. the United Kingdom, (Application No. 45508/99) Judgment 5 October 2004.
Holomiov v. Moldova, (Application No. 30649/05) Judgment 7 November 2006.
Hummatov v. Azerbaijan, (Application Nos. 9852/03 and 13413/04) Judgment 29 November 2007.
Hutchison Reid v. the United Kingdom, (Application No. 50272/99) Judgment 20 February 2003.
Huylu v. Turkey, (Application No. 52955/99) Judgment 16 November 2006.
Igor Shevchenko v. Ukraine, (Application No. 22737/04) 12 January 2012.
Ivinović v. Croatia, (Application No. 13006/13) Judgment 18 September 2014.
Jasinskis v. Latvia, (App No 45744/08) Judgment 21 December 2010.
K.P. v. Finland, (Application No. 31764/96) Judgment 31 May 2001.
Kiefer v. Switzerland, (Application No. 27353/95) Judgment 28 March 2000.
Kjartan Ásmundsson v. Iceland, (Application No. 60669/00) Judgment 12 October 2004.
Klein v. Austria, (Application No. 57028/00) Judgment 3 March 2011.
Knyazhichenko v. Russia, (Application No. 30685/03) Judgment 15 February 2007.
Kostenko v. Russia, (Application No. 23490/03) Judgment 7 February 2008.
Kotelnikov v. Russia, (Application No. 45104/05) Judgment 12 July 2016.
Kotilainen and Others v. Finland, (Application No. 62439/12) Judgment 17 September 2020.
Koua Poirrez v. France, (Application No. 40892/98) Judgment 30 September 2003.
Krivova v. Ukraine, (Application No. 25732/05) Judgment 9 November 2010.
Kudła v. Poland, (Application No. 30210/96) Judgment 26 October 2000.
Kurt Nielsen v. Denmark, (Application No. 33488/96) Judgment 15 February 2000.
Kurt v. Austria, (Application No. 62903/15) Judgment 15 June 2021.
L.C.B. v. the United Kingdom, (Application No. 23413/94) Judgment of 9 June 1998.
L.R. v. North Macedonia (Application No. 38067/15) Judgment 23 January 2020.

Lambert and Others v. France, (Application No. 46043/14) Judgment 5 June 2015.
Lengyel v. Hungary, (Application No. 8271/15) Judgment 18 July 2017.
Lopes de Sousa Fernandes v. Portugal, (Application No. 56080/13) Judgment, 19 December 2017.
M.S. v. the United Kingdom, (Application No. 24527/08) Judgment 3 May 2012.
Makaratzis v. Greece, (Application No. 50385/99) Judgment 20 December 2004.
Malinovskiy v. Russia, (Application No. 41302/02) Judgment 7 July 2005.
Mamatkulov and Askarov v. Turkey (Application Nos 46827/99 and 46951/99) Judgment of 4 February 2005.
Mathieu-Mohin and Clerfayt v. Belgium, (Application No. 9267/81) Judgment 2 March 1987.
Matter v. Slovakia, (Application No. 31534/96) Judgment 5 July 1999.
McCann and Others v. the United Kingdom, (Application No. 18984/91) Judgment 27 September 1995.
McDonald v. the United Kingdom, (Application No. 4241/12) Judgment 20 May 2014.
Melnik v. Ukraine, (Application No. 72286/01) Judgment 28 March 2006.
Melnītis v. Latvia, (Application No. 30779/05) Judgment 28 February 2012.
Mennitto v. Italy, (Application No. 33804/96) Judgment 5 October 2000.
Mikhaylov v. Russia, (Application No. 22156/04) Judgment 22 October 2009.
Munjaz v. the United Kingdom, (Application No. 13469/06) Judgment 17 July 2012.
Murray v. the Netherlands, (Application No. 10511/10) Judgment 26 April 2016.
N. v. Romania (no. 2), (Application No. 38048/18) Judgement 16 November 2021.
N. v. the United Kingdom, (Application No. 26565/05) Judgment 27 May 2008.
Nagovitsyn v. Russia, (Application No. 6859/02) Judgment 24 January 2008.
Naumenko v. Ukraine, (Application No. 42023/98) Judgment 10 February 2004.
Nencheva et autres c. Bulgarie, (Application No. 48609/06) 18 June 2013.
Nicolae Virgiliu Tănase v. Romania, (Application No. 41720/13) Judgment 25 June 2019.
Nielsen v. Denmark, (Application No. 10929/84) Judgment 28 November 1988.
Nikky Sentges v. The Netherlands, (Application No. 27677/02) Decision 8 July 2003.
Öcalan v. Turkey, (Application No. 46221/99) Judgment 12 March 2003.
Paplauskienė v. Lithuania, (Application No. 31102/06) Judgment 14 October 2014.
Paposhvili v. Belgium, (Application No. 41738/10) Judgment 13 December 2016.
Paul and Audrey Edwards v. the United Kingdom, (Application No. 46477/99) Judgment 14 March 2002.
Petrov v. Bulgaria, (Application No. 19202/03) Decision 8 September 2009.
Popov v. Russia, (Application No. 26853/04) Judgment 13 July 2006.
Pretty v. the United Kingdom, (Application No. 2346/02) Judgment 29 April 2002.
Price v. the United Kingdom, (Application No. 33394/96) Judgment 10 July 2001.
Pugach and Others v. Russia, (Application Nos. 31799/08, 53657/08, 53661/08, 53666/08, 53670/08, 53671/08, 53672/08 and 53673/08) Judgment 4 November 2010.
Pyrantienė v. Lithuania, (Application No. 45092/07) Judgment 12 November 2013.
Raffray Taddei c. France, (Application No 36435/07) 21 December 2010.
Rivière v. France, (Application No. 33834/03) Judgment 11 July 2006.

Romokhov v. Russia, (Application No. 4532/04) Judgment 16 December 2010.
Rooman v. Belgium, (Application No. 18052/11) GCH Judgment 31 January 2019.
S. and Marper v. the United Kingdom, (Application Nos. 30562/04 and 30566/04) Judgment 4 December 2008.
S.H.H. v. the United Kingdom, (Application No. 60367/10) Judgment 29 January 2013.
Salesi v. Italy, (Application No. 13023/87) Judgment 26 February 1993.
Sašo Gorgiev v. the former Yugoslav Republic of Macedonia, (Application No. 49382/06) Judgment 19 April 2012.
Savickis and others v. Latvia, (Application No. 49270/11) Judgment of 9 June 2022.
Savran v. Denmark, (Application No. 57467/15) Judgment 7 December 2021.
Scollo v. Italy, (Application No. 19133/91) Judgment 28 September 1995.
Selahattin Demirtaş v. Turkey, (No. 2) (Application No. 14305/17) Judgment 22 December 2020.
Semikhvostov v. Russia, (Application No. 2689/12) Judgment 6 February 2014.
Septa v. Russia, (Application No. 30731/03) Judgment 15 February 2007.
Shchiborshch and Kuzmina v. Russia, (Application No. 5269/08) Judgment 16 January 2014.
Shtukaturov v. Russia, (Application No. 44009/05) Judgment 27 March 2008.
Skórkiewicz v. Poland, (Application No. 39860/98) Decision 1 June 1999.
Sławomir Musiał v. Poland, (Application No. 28300/06) Judgment 20 January 2009.
Sobelin and Others v. Russia, (Application Nos. 30672/03, 30673/03, 30678/03, 30682/03, 30692/03, 30707/03, 30713/03, 30734/03, 30736/03, 30779/03, 32080/03 and 34952/03) Judgment 3 May 2007.
Stanev v. Bulgaria, (Application No. 36760/06) Judgment 17 January 2012.
Stec and Others v. the United Kingdom, (Application Nos. 65731/01 and 65900/01) Decision 6 July 2005.
Storck v. Germany, (Application No. 61603/00) Judgment 16 June 2005.
Strøbye v. Denmark, (Application Nos. 25802/18 and 27338/18) Judgment 2 February 2021.
Sürmeli v. Germany, (Application No. 75529/01) Judgment 8 June 2006.
Sýkora v. the Czech Republic, (Application No. 23419/07) Judgment 22 November 2012.
Sypchenko v. Russia, (Application No. 38368/04) Judgment 1 March 2007.
Taïs v. France, (Application No. 39922/03) Judgment 1 June 2006.
Taydaş v. Turkey, (Application No. 52534/09) Judgment 26 November 2013.
Tekin and Arslan v. Belgium, (Application No. 37795/13) Judgment 5 September 2017.
Teymurazyan v. Armenia, (Application No. 17521/09) Judgment 15 March 2018.
The case of Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania, (Application No. 2959/11) Judgment 24 March 2015.
Topekhin v. Russia, (Application No. 78774/13) Judgment 10 May 2016.
V v. the Czech Republic, (Application No. 26074/18) Judgment 7 December 2023.
Valkov and Others v. Bulgaria, (Application Nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05) Judgment 25 October 2011.
Vincent v. France, (Application No. 6253/03) Judgment 24 October 2006.
W.D. c. Belgique, (Application No. 73548/13), 6 September 2016.
Wallishauser v. Austria, (No. 2), (Application No. 14497/06) Judgment 20 June 2013.

Winterwerp v. the Netherlands, (Application No. 6301/73) Judgment 24 October 1979.
X v. France, (Application No. 18020/91) Judgment 31 March 1992.
Yürekli v. Turkey, (Application No. 48913/99) Judgment 17 July 2008.
Z and Others v. the United Kingdom, (Application No. 29392/95) Judgment 10 May 2001.
Z.H. v. Hungary, (Application No. 28973/11) Judgment 8 November 2012.

Chapter 12

The Protection of Persons with Disabilities in European Union Law

Kateřina Štěpánková

ABSTRACT

This chapter deals with protection of persons with disabilities within the framework of the European Union legislative efforts. It provides a comprehensive overview of the relevant primary law resources and particular secondary law resources together with the soft law principles, which of course cannot be omitted. Naturally, the Court of Justice of the EU case law is no less important and thus forms a large part of the chapter as well. This is precisely what illustrates the actual implication of the basic law resources. Therefore, not only is the absolutely crucial general case law included herein, but also a number of specific cases, the foundation of which is connected with the legislation of the Central and Eastern European member states. The chapter provides a comprehensive view of the issue of disabled persons protection within the EU Member States, which is a key issue from the perspective of the relevant EU authorities. Nevertheless, it cannot be stated that it is completely closed. In particular, to achieve a similar status for the disabled individuals to that of non-disabled persons, it shall still be necessary not to rest on its laurels and continue its efforts in this regard.

KEYWORDS

European Union, disabled people, EU primary and secondary law resources, EU soft law, EU case law, relevant statistics, Central European case law

1. Introduction

First, it is essential to emphasise that persons with disabilities may be perceived as a separate minority group, whose members are entitled not only to general human rights, but also to specific human, social, and employment rights reflecting the special needs and vulnerabilities hereof. Both international and national legislation forming the rights of persons with disabilities constitute a very important part of the protection of their human rights. For instance, the European Union's accession to the UN Convention on the Rights of Persons with Disabilities (CRPD[1]) in 2010 may definitely be regarded as an important milestone within the protection of rights of persons with

1 Further commented on in the relevant chapter dedicated to the UN's influence hereon.

Kateřina Štěpánková (2026) 'The Protection of Persons with Disabilities in European Union Law' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 525–555. https://doi.org/10.71009/2026.nj.hrpovg_12

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disabilities. One reason for this is that, thanks to this step, the EU has become the first local organisation to accede to this convention. This underlines the fact that the EU takes its commitment to protect and promote the rights of persons with disabilities very seriously. At the same time, the CRPD represents a major transition to a socio-contextual model of disability based on the interaction between persons with various forms of disability and environmental barriers. However, the impact of the CRPD is not only limited to the above mentioned but also extends to the case law sphere, as the Court of Justice of the European Union (CJEU) is obliged to take the CRPD into account as far as possible within its decisions. This convention, therefore, also has a significant impact on the *de facto* approximation of the case law perspective among its signatory states.

From the EU law perspective, the disabled persons shall be viewed as persons with a limitation – which results, in particular, from physical, mental, or psychological impairments that create various barriers that may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. This definition essentially reflects the evolution of the CJEU's position. Following the influence of the CRPD, there has been a material shift from an individually conceived model of disability (which can be observed in the CJEU judgment Chacón Navas)[2] to a significantly more progressive approach revealed in its judgment in HK Danmark (based on the socio-contextual model of disability).[3] Precisely because the EU legislation does not explicitly define the concept of disability itself, the definition provided by the CJEU in this regard seems even more important for the EU legal context. At the same time, it cannot be overlooked that the CRPD also provides a relevant and applicable legislative definition of disability, which is very similar to the definition in the above mentioned CJEU case law.[4]

Undoubtedly, persons with various forms of disabilities face numerous obstacles in leading their everyday lives. Thus, it seems more than appropriate that the disabled be given adequate benefits precisely so that they can achieve the same participation in society as persons without disabilities. The Treaty on the Functioning of the European Union (effective as of 2007) already focused on combating unequal treatment towards people with disabilities. We shall also see that a number of the disabled persons' obstacles do not primarily result from their physical, mental, or psychological impairments themselves, but rather from obstacles (artificially) placed in their

2 Judgment of the Court (Grand Chamber) of 11 July 2006, *Sonia Chacón Navas v Eurest Colectividades SA*, Case C-13/05.

3 For more details, see section 3.4 below.

4 According to the Article 1 of the UN Convention: '*[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*.' The above-mentioned definition is widely spread and shall also be used as an inspiration to define the range of the disabled persons within this chapter as the EU obviously is one of the signatory parties to this Convention as well.

way by the society. This is usually the case with the issue of employment for disabled people, as they tend to be traditionally burdened by a high unemployment rate.

It might therefore be summarised that in case of persons with disabilities, various international entities (the EU itself included) have gone a long way in trying to balance the disadvantages they face compared to the rest of the population. This intention is habitually conducted through a set system of benefits. For these reasons, the chapter below shall focus on the steps that the European Union has taken to achieve this goal so far.

2. A Brief Look at the Relevant Statistics

Undoubtedly, relevant statistics are of great importance in terms of a preliminary insight into the issue of disability, finding out the scope of the EU population actually facing issues with disability, the employment rate of disabled persons, and their participation within the labour market of the respective EU member states, as well as acquiring basic information connected to the issue of discrimination on the grounds of the disability.[5]

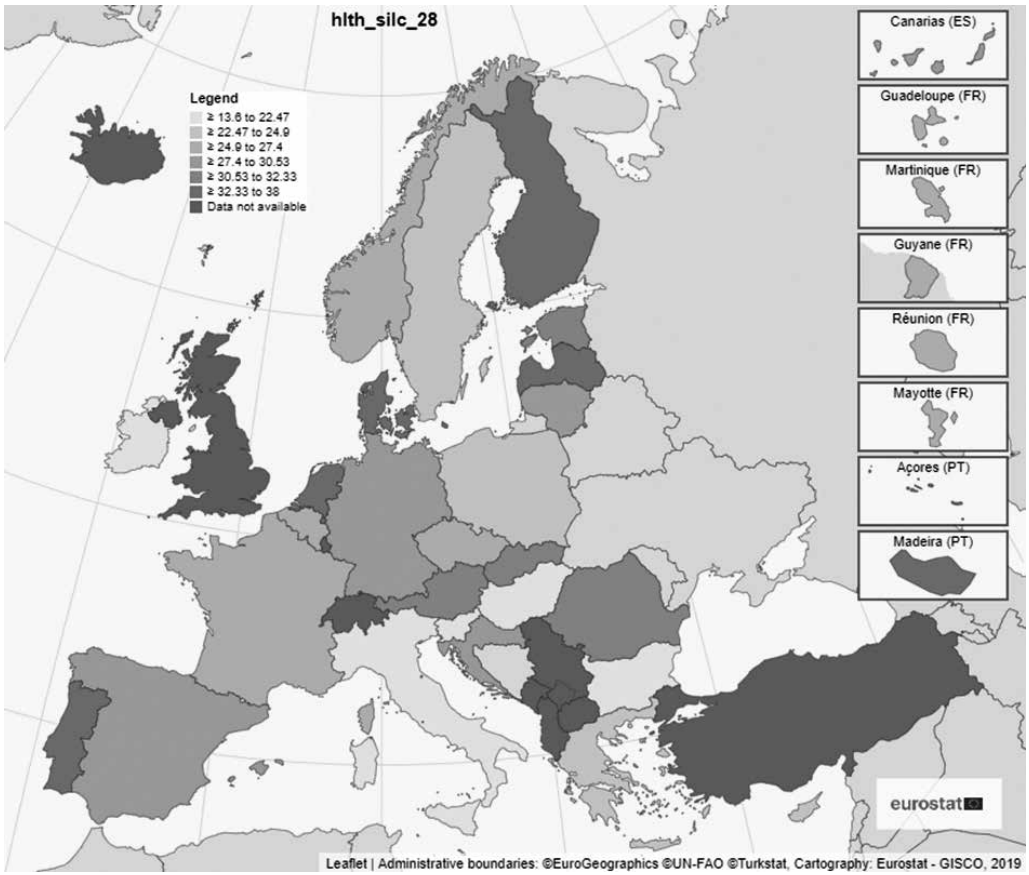
2.1. Number of Persons with Various Disabilities in the EU Member States' Population

The number of disabled persons tends to vary greatly across EU member states. For instance, in 2023, the share of disabled persons out of the total population was estimated to range from 13.6% in Bulgaria to 38% in Latvia. The percentage rate of the population of disabled persons in Hungary has been continuously decreasing since 2015, from the initial 27.8% to 22.4% in 2023. Compared to the Czech Republic, which has currently reached 27.3%, the rate is lower. In the long term, however, Slovakia has the highest share of the disabled persons from the V4 countries (with 30.6% in 2023).[6]

5 The relevant data below is based on information available from Eurostat, which is the official statistical office of the European Union.

6 Eurostat, 2024e.

Percentage of disability (activity limitation) by sex, age and citizenship in 2023[7]



2.2. The Disability Employment Gap

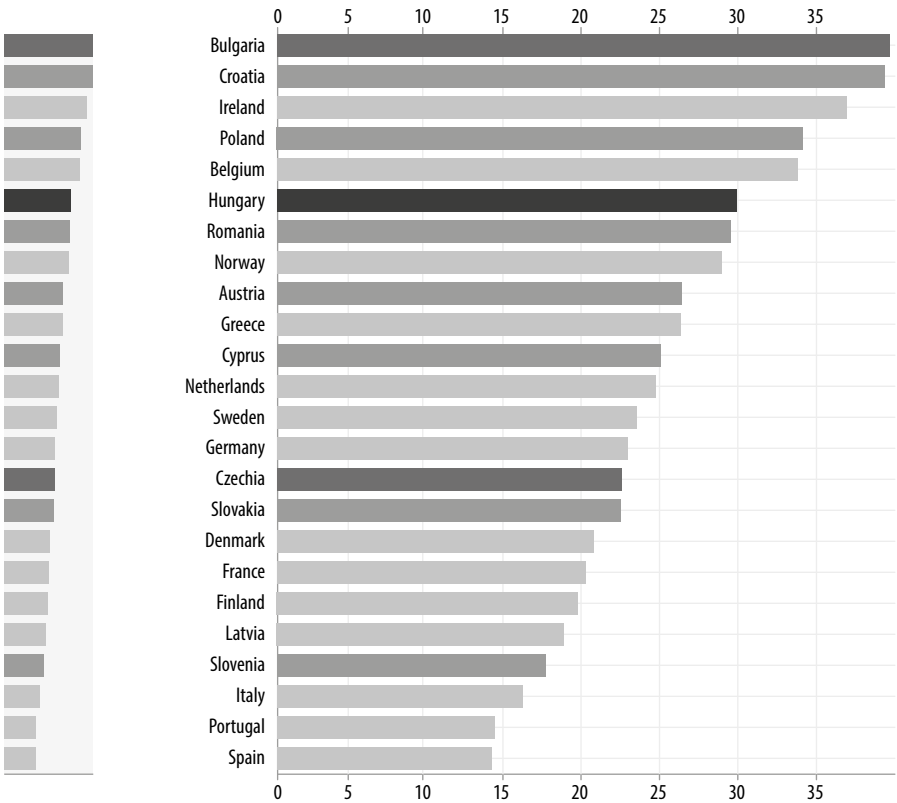
The employment rate is one of the key indicators based on which it is possible to identify the extent of inequality in the position of persons with and without disabilities. The so-called *disability employment gap* is a term that covers the difference between employment rates of the disabled people and, by contrast, employment rates of people without disabilities.[8]

7 Source of data: Eurostat, no date c.

8 The disability employment gap is defined as '*the difference between the employment rates of people with no and those with some or severe limitation in their daily activities, aged 20-64. The employment rate is calculated by dividing the number of persons aged 20 to 64 in employment by the total population of the same age group*.' Eurostat (2024) *Disability employment gap by level of activity limitation and sex*. Available at: Eurostat, 2024b.

In 2023, the overall disability employment gap in the EU between persons with and without disabilities reached 25.7%. To be specific, it ranged from 13.8% in Spain to 39.5% in Bulgaria. Based on the above-mentioned, it is evident that these values may not necessarily directly correlate with each other. It is, for example, apparent that in 2023 Bulgaria had the lowest percentage rate of the disabled persons out of the total population within the EU. Nevertheless, it also gained the highest EU disability employment gap. According to the Eurostat data, Hungary narrowed its disability employment gap from 32.4% in 2022 to 29.6 in 2023.[9]

Disability employment gap by level of activity limitation and sex (source EU-SILC)[10]



Source of data: Eurostat (online data code: tepsr_sp200)
Last update: 05/06/2024 23:00

eurostat

This graph has been created automatically by ESTAT/EC software according to external user specifications for which ESTAT/EC is not responsible.
General disclaimer of the EC website: https://ec.europa.eu/info/legal-notice_en.html

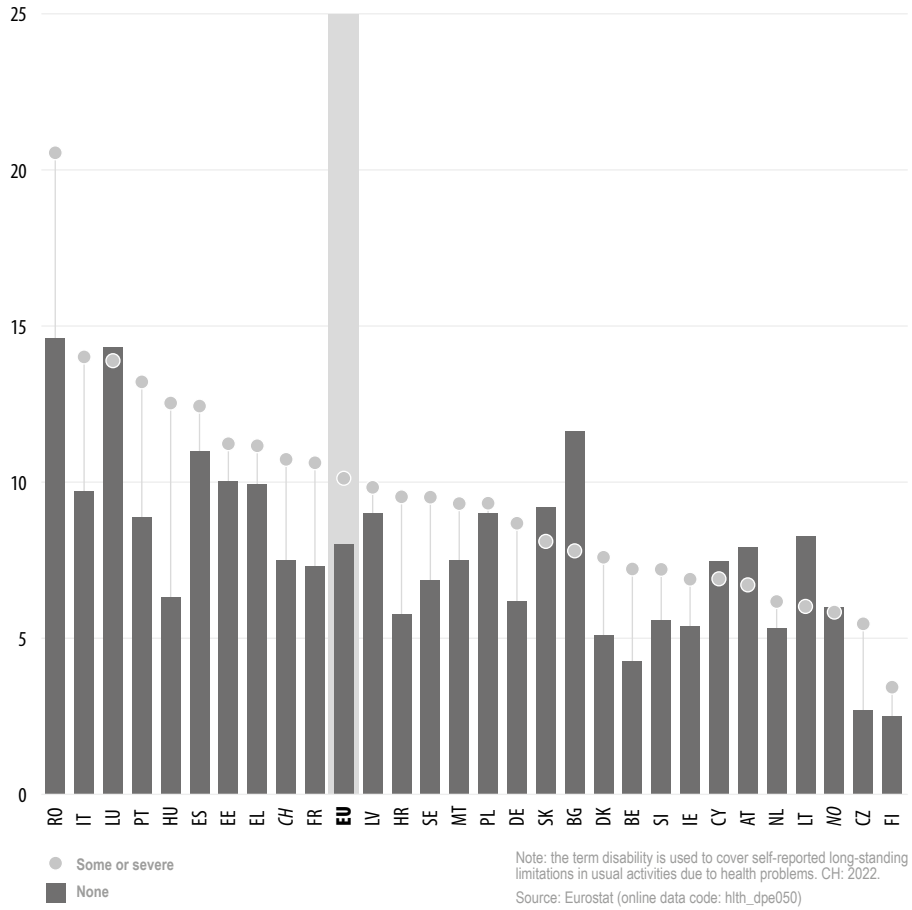
9 Ibid.
10 Source of data: Eurostat, no date a.

2.3. The Risk of Poverty

Generally speaking, disabled persons face a much bigger risk of poverty or worse financial standards then the non-disabled.[11] In addition to the above-mentioned point, the risk of poverty is also a crucial statistics, which can clearly demonstrate different positions of the disabled and non-disabled persons on the EU labour market. In 2023, a total of 10.10% of employed persons[12] with disabilities were found to be at risk of poverty. On the contrary, "only" 8.00% of employed persons without disabilities faced the same risk. There were no more than 6 EU member states[13] where the share of disabled people at risk of poverty was lower than among those without disabilities. In Hungary, the difference between the number of employed persons with some or severe disabilities at risk of poverty (12.5%) and employed persons without any possible disabilities at risk of poverty (6.3%) was one of the most significant in the EU, as it reached 6.2%.[14]

11 Braithwaite and Mont, 2009, pp. 219–232.
12 Aged 18 or over.
13 These were Bulgaria, Cyprus, Lithuania, Luxembourg, Austria, and Slovakia.
14 Eurostat, 2024c.

Employed workers aged 18 or over at risk of poverty, by level of disability in 2023[15]



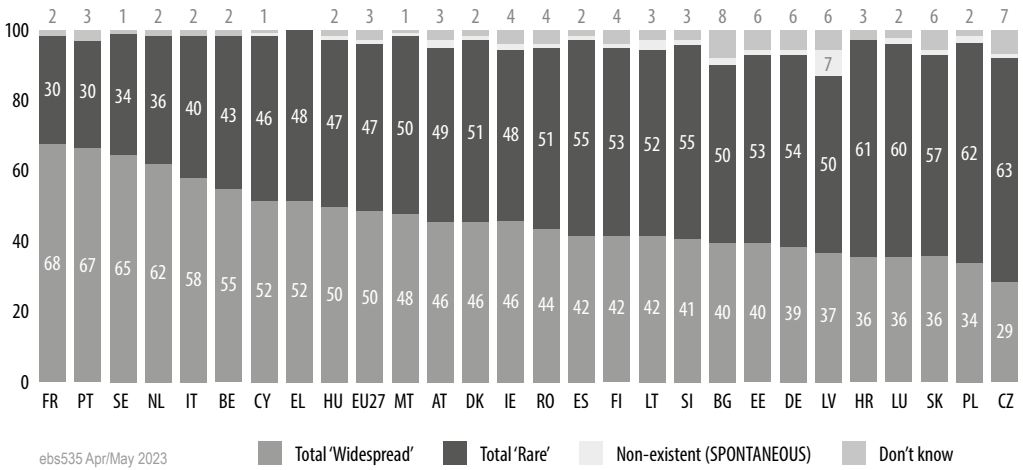
2.4. Discrimination in the European Union

With respect to discrimination against persons with disabilities, an EU survey (from 2023) pointed out that 49% of EU citizens considered this form of discriminatory behaviour extremely widespread in their country. Hungary was very close to the EU average in this respect, as 50% of its population believed that this form of discrimination was very common and widespread there. In the Czech Republic discrimination on the grounds of disability was perceived to be very rare by 63% of the respondents,

15 Source of data: Eurostat, no date b.

and only 29% considered it very widespread, which secured the Czech Republic the first place in this ranking.[16]

Discrimination in the European Union in 2023, the proportion of respondents who think discrimination on the basis of disability is widespread[17]



3. Basic Sources of Applicable EU Law

The European Union is continuously trying to improve the social and economic situation of the disabled. Its fight against various forms of discrimination, including the discrimination of persons with disabilities, is also a key issue within the EU legislation. A number of sources of EU law serve to meet this aim, that is, to promote the status of the disabled persons. Thus, it is inevitable to first introduce an overview of the most important legal framework of applicable EU law relevant for the protection of the disabled persons within the EU member states.

What's more, the role of the decisive EU case law is irreplaceable, especially with respect to the application and interpretation of the appropriate EU legislation. The protection of the disabled regulated in the basic sources of EU law can only be fully understood after taking the respective case law of the CJEU into account. That is why it obviously cannot be neglected within the following overview either.

16 Eurostat, 2024d.
17 European Union, 2023.

3.1. General Principles of Law: The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union itself enshrines the basic rules from which the rest of the legislation is subsequently derived. Article 1 of the Charter emphasises the fact that human dignity shall be completely inviolable and must be respected and protected.[18] In direct connection herewith, the Charter also stipulates that discrimination based on any grounds (such as disability) shall be prohibited.[19] As a result, the EU adopts various policies that make protection against discrimination more effective and help achieve equality between disabled and non-disabled persons. Simultaneously, in accordance with Article 26 of the Charter, one of the main aims hereof is to prevent the separation of the disabled persons from the rest of the society. Their integration into social and labour matters and the enabling of their active participation within the rest of the society shall thus be ensured.

The Charter's approach to the rights of persons with disabilities reflects the above-mentioned development in the understanding of disability from an individual medical model to a social-contextual concept of disability. The provisions of the Charter must be interpreted in the light of the CRPD. Therefore, the disability shall be understood as the result of interaction between persons with disabilities and barriers that prevent them from accessing and participating in their environment.[20] Disability is therefore no longer understood solely as a medical condition of the individual.

Furthermore, it should not be overlooked that Article 26 of the Charter goes beyond the mere concept of non-discrimination against persons with disabilities by establishing positive obligations for their integration, involvement, and participation in the surrounding environment. This means, among other things, that persons with disabilities should be entitled to measures designed to ensure their independence, social and professional integration, and participation in the life of society. The framework of the Charter implicitly supports the implementation of any reasonable accommodation to help persons with disabilities achieve these goals. However, it does not explicitly define this obligation. The provisions of the Charter can therefore be understood more as a basis for subsequent secondary legislation, which shall further implement and elaborate on these concepts, such as the specific requirements for reasonable accommodation for persons with disabilities stipulated under Article 5 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC).

3.2. Primary Law: The Treaty on the Functioning of the European Union

Similarly to the previous case, primary EU law also emphasises the prohibition of any form of discrimination. Discrimination shall be prevented and forbidden on any possible grounds, specifically on the basis of gender, race or ethnic origin, belief, age

18 This, of course, also includes the dignity of the disabled persons.
19 With regard to Article 21 of the Charter.
20 This model reflects, among other things, the EU's acceptance of and accession to the CRPD.

or sexual orientation, or disability. Primarily, within Article 10 of the Treaty on the Functioning of the European Union, the EU once again declares its readiness to fight against any form of disabled persons' discrimination. To meet the above-mentioned expectations, the Council shall (after receiving the required approval of the European Parliament) unanimously adopt sufficiently effective measures to combat this sort of discrimination.[21]

This Treaty also establishes the EU's authority to conclude multilateral agreements, such as the CRPD. By acceding to international treaties of this type, the EU can secure a multi-level system of protection for the rights of persons with disabilities, which can in many cases much better serve to protect interests of these persons and improve their position in the society. In addition to the above-mentioned influence of the CRPD on the EU case law, the role of the Committee on the Rights of Persons with Disabilities[22] is definitely worth mentioning in this regard. Among other things, it oversees the implementation of the CRPD, in particular signatory states, provides individual signatories with specific recommendations on how they could improve and streamline the implementation of the CRPD, or calls on them to involve local organisations of persons with disabilities in the adaptation process. In general, the provisions of the Treaty should, therefore, guarantee that the EU law in the field of disability is interpreted in accordance with its international obligations.

3.3. Selected Secondary Law Resources

It is obvious that all the needs of the disabled persons are usually interconnected. It shall be hard or even impossible for a disabled to lead a comfortable life without being able to gain adequate access to social protection, healthcare and housing. Without the above-mentioned, the disabled person's access to the local labour market might be limited to a certain extent. It may also be inevitable to guarantee a specific access to transportation, as this is also one of the key aspects, which can undoubtedly elevate the disabled persons' working and social life. And finally, achieving the same level of social and working life for the disabled and the non-disabled persons may, in general, not be possible without promoting the level of the disabled persons' access to education, in order to enable them participate in the labour market to the fullest possible extent. To achieve such goals, the EU frequently uses various secondary law resources. Some of the most important hereof are, therefore, briefly characterised below.

3.3.1. Access to Employment

In relation to the disabled persons, the EU legislation pays specific attention to the so-called "*reasonable accommodation for disabled persons*." These are measures intended to increase the involvement of disabled people in the field of occupation and

21 Article 19 of the Treaty on the Functioning of the European Union.

22 For further details, please see UN. Committee on the Rights of Persons with Disabilities, no date.

employment. Reasonable accommodation shall thus in principle mainly be provided and adopted by the employers. Directive 2000/78/EC contains the basic regulation of combating discrimination on various grounds (the concept of disability and Reasonable accommodation included). In this regard, the principle of equal treatment towards persons with disabilities with respect to their participation on the labour market is one of the key points stressed in the Directive. The purpose proclaimed hereby is the wish to achieve a much higher proportion of the disabled persons, who are actively participating in the labour market.

Under Article 5 of the respective Directive, "*reasonable accommodation for disabled persons*" shall be basically defined as all of the measures adopted, which are to enable a disabled person to work, unless such measures would impose a disproportionate burden on the employer.[23] Such burden shall, however, not be considered disproportionate if sufficiently remedied by any suitable measures existing in the framework of the relevant national legislation. The contents of the reasonable accommodation preventing the disabled persons from their exclusion from the relevant labour market is, therefore, similar to the one included in the CRPD. However, unlike the Convention, the Directive does not explicitly state that failure to take these appropriate measures constitutes discrimination.[24] In this regard it is also necessary to emphasise that, for example, in the CJEU judgment in the HR Rail case, Advocate General Rantos explicitly argued that the above-mentioned Directive shall be interpreted as prohibiting discrimination in the form of refusal to provide reasonable accommodation. In this judgement, the CJEU case law clearly supplemented the ambiguous EU legislation and attempted to bring it (in accordance with the above principles) into line with the CRPD. As a result, as Article 2 of the CRPD clearly classifies the refusal of reasonable accommodation as discrimination, the CJEU case law also clearly proceeds from this assumption.

Examples of suitable Reasonable Accommodation from practical application experience (acquired in the Czech Republic) may include: providing a personal assistant for the disabled person at his or her workplace; flexible forms of employment; presence of a specially trained dog at the workplace; more frequent or longer breaks at work for the disabled persons; possibility of remote working; removing a disabled employee from direct contact with the clients; purchasing special software for reading documents; removing a disabled employee (a person with hearing impairment) from the obligation to make phone calls; reassigning an employee to a workplace that is

23 Article 5 of the Directive 2000/78/EC stresses that: '*[i]n order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned*.'.

24 Waddington and Broderick, 2018.

closer to his or her home; providing a day of sick leave for maintenance of a compensatory devices.

The breach of the equal treatment and anti-discrimination principles shall thus not occur only under the circumstance that the adopted reasonable accommodation (i.e. measures ensuring the disabled persons' access to employment, counselling, vocational training, and similar activities) constituted a disproportionate burden on the employer. This is in particular the case of extensive financial costs, which would have to be spent on the adoption of such reasonable accommodation in proportion to the benefit that it brings to the disabled persons.[25] In addition, excessive organisational and technical complications laid on the employer may also constitute a disproportionate burden with respect to the above-mentioned definition. It cannot be ignored that in such a case, the employers are the ones to bear the burden of producing evidence to establish that a disproportionate burden exists. The assessment hereof must be objective and based on relevant factors. Factors that may be taken into account are financial and other costs, the scale and financial resources of the employer, or the possibility of obtaining public funding or assistance in the process of gaining reasonable accommodation, as outlined in Recital 21 of Directive 2000/78/EC.[26]

3.3.2. Further Forms of Protection against Discrimination

In the context of protection against various forms discrimination, the European Union continues its efforts and is trying to further and better encourage the position of the persons with disabilities. For example, the work on the adoption of the so-called "*Anti-discrimination directive*" is currently proceeding. This new Directive should prohibit discrimination even outside the field of work and employment (specifically in the fields of healthcare, education, housing, goods, and services). This shall also explicitly cover disabled people, who should thus gain a much broader field of protection.[27]

It is important to highlight that already the proposal of this Directive explicitly refers not only to the above-mentioned concept of reasonable accommodation but also to the actual need to reach proper level of accessibility. It is evident that disabled people often face obstacles when trying to reach the same level of education, healthcare, etc. as the rest of the population. As a result, it is proposed that people with disabilities should be guaranteed effective access to social protection, healthcare, goods and services, and housing.[28] Not surprisingly, only provided that guarantying such access does not impose a disproportionate burden or require a fundamental change to the product or service.

25 Jouza, 2020.

26 Waddington and Broderick, 2018; Lawson, 2009.

27 Council of the European Union, 2022.

28 Article 4 of the draft Anti-discrimination directive stipulates: '*[p]ersons with disabilities shall be given effective access to social protection, healthcare and access to goods and services, including housing, that are available to the public in advance. This obligation is limited in that it does not need to be fulfilled if it would impose a disproportionate burden or require substantial changes to the product or service*.'.

3.3.3. Travel Standards, European Disability Card, and European Parking Card for Persons with Disabilities

It has been the subject of various researches that people with disabilities often tend to travel much less frequently; they may use different ways and forms of traveling and their travel time is frequently longer than that of non-disabled persons.[29] These aspects may, thus, significantly influence their ability to promote their social and working relationships, access healthcare etc. As a result, the European Union tries to bring new legislation into life that would help solve these complex issues within the member states.

The European Disability Card is a document that shall enable disabled persons to enjoy the right of free movement across the EU member states to the fullest; it also serves as a proof of the disability status of the respective person in every single member state. As such, the European Disability Card grants its holder access to all the relevant preferential treatments resulting from their disability status across the member states. The basic regulation and principles hereof are provided within the Directive (EU) 2024/2841 of the European Parliament and of the Council of 23 October 2024 establishing the European Disability Card and the European Parking Card for persons with disabilities (Directive on the European Disability Card and the European Parking Card). The national disability cards (which are subject to the respective national regulations and may differ state from state) shall, however, still be awarded, as the European Disability Card is only meant to complement these. The Card shall be available in both physical and digital format.

The European Parking Card is another form of enriching the disabled persons' lives covered by the very same Directive. Generally speaking, the purpose of the European Parking Card is to facilitate the use of parking facilities particularly reserved for disabled persons all over the EU. Both the European Disability Card and the European Parking Card are intended to facilitate the effective exercise of the right to free movement by all persons with disabilities. They are to have equal access to any preferential treatment connected hereto, even if the special treatment is traditionally provided out of charge in the relevant member state. In particular, the protection is intended to apply to persons with disabilities who travel to or visit another member state in order to perform their work or training.

The relevant Directive on the European Disability Card and the European Parking Card was first published in 2023.[30] All of the rules stipulated herein are to be transposed by all the member states by no later than 5 June 2026. By issuing both of these cards, the EU intends to fulfil one of its goals set out within the Strategy for the Rights of Persons with Disabilities 2021–2030[31] (to expand the possibility of recognising the disability status when moving across the EU member states, and thus help the disabled persons to promote their labour mobility or provision of services).

29 Mindell et al., 2023, p. 84.
30 Council of the European Union, 2024.
31 Please, see below.

Of course, it is not only the above-described Directive that shall be considered when talking about the rights of the disabled persons while travelling. A set of EU Regulations cover every specific sort of public transportation (regardless of whether traveling by air, land or water) with respect to the particular level of protection, which the disabled persons shall be guaranteed therein.[32]

3.4. Core Case Law of the CJEU

3.4.1. Chacón Navas and the Definition of Disability

Ms. Chacón Navas was an employee at a Spanish catering company. She was unable to work for a relatively long time, thanks to her sickness (not disability itself). Based on this fact and the Spanish legislation, her employment relationship was terminated by the employer. Subsequently, she sought protection from the Spanish courts, claiming that the termination of her employment relationship was invalid due to the fact that it represented unequal treatment and discrimination. According to her interpretation of the case, this discrimination was particularly based on her long-term incapacity for work.

The essence of the first question laid down in front of the CJEU was, whether the framework of Directive 2000/78 also provides protection to a person who was unequally treated on the basis of his or her sickness (not disability). As part of the answer to this preliminary question, the CJEU obviously did have to define the term disability. As a result, it emphasised that disability '*must be understood as referring to a limitation which results in particular from physical, mental, or psychological impairments and which hinders the participation of the person concerned in professional life*.'

The term disability has actually been defined by the CJEU similarly to the definition provided within Article 1 of the UN Convention on the Rights of Persons with Disabilities. Furthermore, the CJEU concluded that it is not suitable to judicially expand the scope of the discriminatory grounds exhaustively listed in Directive 2000/78. Therefore, the concepts of disability and sickness shall not be confused. According to the CJEU, "mere" sickness cannot be considered as a discriminatory ground on the basis of Directive 2000/78, against which its protection would be offered and applied. It is thus essential to identify, whether the health incapacity can, under Directive 2000/78, be regarded as "mere" sickness or even disability. Only in the latter case, the disabled person shall be directly protected against his or her discrimination.

32 In particular, these are the Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, the Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, the Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations.

3.4.2. Coleman and the Prohibition of Direct Discrimination, Prohibition of Harassment

Ms Coleman worked for her employer as an assistant. She gave birth to a son who suffered from episodes of short-term apnoea and congenital laryngomalacia and bronchomalacia. Her son's medical condition required special care, and the majority of the care he needed was provided by Ms Coleman. Ms Coleman subsequently voluntarily agreed to the termination of her employment relationship. However, she later claimed to be the victim of unfair constructive dismissal and claimed to have been treated less favourably than other employees on account of the fact that she was the main care provider to her disabled child. She claimed that such treatment forced her to terminate her employment relationship with her employer. The preliminary question was, therefore, whether the employee could actually invoke the principle of non-discrimination against her former employer, to which she believed she had been subject, in connection with the disability suffered by her son.

The CJEU has already defined the concept of disability in the Chacón Navas judgment.[33] In general, it can be summarised that the prohibition of discrimination in the field of dismissal prevents the dismissal of an employee on the grounds of his or her disability which would not be justified by any objective facts (such as a breach of the employee's duties, or lack of his or her qualifications etc.). If an employee has been subject to unequal treatment on the grounds of disability, this may occur even in case the employee is not himself or herself disabled. Provided the disability constitutes the actual reason for the less favourable treatment of the employee, the employee shall be deemed discriminated against on grounds of disability in accordance with Directive 2000/78.

The same applies to harassment in accordance with Article 2(3) of the above stipulated Directive. Thus, if it is proven that the harassment of an employee, is related to the disability of the employee's child, such conduct is considered to contradict the prohibition of harassment enshrined in the Directive. However, the concept of harassment may vary depending on the particular national legislations and practices of the member states.

3.4.3. HK Danmark and the Obligation to Take Measures to Ensure Reasonable Accommodation

Ms. Ring worked for a social housing company. She was repeatedly absent from work because she suffered from chronic back pain in the lumbar region, which was incurable. Beyond that, it was not possible to make any predictions as to whether she would ever be able to continue working full-time. The employee was subsequently dismissed. Following this dismissal, Ms. Ring took up a new part-time job as a receptionist. Her workplace was equipped with a height-adjustable desk for her.

Ms. Werge was employed by a different company as a secretary. She suffered from hyperflexion of her neck as a result of a traffic accident. Therefore, she was on sick leave for approximately three weeks. After some time, Ms. Werge reported

33 Please, for further details see Article 3.4.1 above.

continuation of her sick leave to her employer, stating that she was still in severe pain and that she would see a specialist on the same day. In the medical report, the doctor stated that he was unable to comment on the probable duration of the incapacity for work. The employee was subsequently dismissed. Subsequent investigation set the level of her reduced capacity for work at 50%, which was later even revised to 65%.

HK Danmark was the trade union acting in the name and on behalf of both of the above stipulated employees. It brought an action for damages against both of their employers under the anti-discrimination law. HK Danmark claimed that the employees were disabled and thus their employer was required to provide them with reduced working hours under Article 5 of Directive 2000/78. As neither of the employers provided them with such reduced hours, they allegedly breached their duty to take measures to ensure reasonable accommodation.

It follows from the relevant UN Convention that the disability must be of a long-term nature. Furthermore, the CJEU stressed that Directive 2000/78 does not exclude impairments caused by illness. The CJEU thus concluded that

> '[i]f a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of "disability" within the meaning of Directive 2000/78.'

It can therefore be summarised that both a curable or incurable illness may fall within the concept of disability provided that it causes the above stipulated limitation and if such a limitation is of a long-term nature. The fact that the employee concerned can carry out his or her work to a limited extent does not constitute an obstacle to recognising the illness as disability.[34]

Reduction in working hours may be recognised as one of the accommodation measures referred to in Article 5 of Directive 2000/78. However, the assessment of the respective case always lies on the national court and it is especially inevitable to assess, whether such reduction represents a disproportionate burden on the employer or not.

Based on further CJEU case law, it can be summarised that these accommodation measures can be divided into three main categories: material measures, organisational measures, and personal assistance. Material measures include providing information to persons with disabilities in accessible formats (e.g., Braille), allowing employees to use assistive devices (hearing aids, medical technical equipment), or adapting workplace premises and equipment to their needs and health limitations. Furthermore, organisational measures may consist, for example, of reducing working hours or allowing part-time work, redistributing tasks, or assigning particular tasks

34 See Ferri and Favalli, 2016, p. 5; Waddington, 2013, pp. 169–200.

to persons with disabilities if they are unable to perform their original function due to their disability. In summary, these measures can be described as enabling more flexible working conditions. Personal assistance measures include the provision of support by qualified third parties.

The CJEU has clarified that the obligation to make reasonable accommodations does not extend to requiring employers to create entirely new positions for persons with disabilities. Employers are only required to reassign employees to existing vacant positions that already exist with the employer. Furthermore, it cannot be ignored that an employer is not obliged to transfer a person with disabilities to another position if that employee is not competent, capable, and qualified to perform the basic duties of that new position.

When assessing whether an employee with a disability is 'competent, capable, and ready to perform the essential functions of the job', it is necessary to consider what that person is capable of achieving if reasonable accommodations are provided in that job. This means that employers must conduct an individual investigation to determine whether the employee is capable of performing the job tasks. They must also consider whether these employees are capable of performing the job after reasonable accommodations have been made. Only if no such position exists with the employer for such a person with disabilities may that person be dismissed on the grounds of inability to perform the job. National legislation that absolutely prohibits the employment of workers who do not meet precisely defined physical requirements is also inadmissible. Such restrictions are only permitted in national legislation if these physical fitness requirements for employees do not constitute 'genuine and determining occupational requirements.'[35]

There is no doubt that Directive 2000/78 prohibits any discrimination and harassment not only against persons with disabilities, but also against persons without disabilities who are in fact connected with such persons in some way (which, among other things, emerged from the CJEU judgment in the Coleman case). This protection typically applies to cases where an employer discriminates against an employee who cares for a disabled child. However, the obligation of reasonable accommodation under Article 5 of Directive 2000/78 applies only to persons with disabilities. The protection of persons without any disabilities is not provided for here. According to the Directive, they do not formally have the right to reasonable accommodations even on the basis of their relationship with a person with a disability. Although the CJEU has not explicitly confirmed that discrimination against these "carers" is prohibited in cases of disability, this seems likely, as it would not make much sense if the CJEU did not intend to guarantee these persons the same level of protection as persons with disabilities.[36]

35 See O'Cinneide, 2012, p. 42; Waddington, 2007.
36 See Benedi Lahuerta, 2018; Clifford, 2011, p. 11.

3.4.4. Kaltoft[37] *and the General Principle of Non-discrimination on the Grounds of Obesity*
Mr. Kaltoft was employed as a caregiver for preschool children. Although, he did continuously try to lose weight, and the employer provided him with financial contribution as part of his health policy, he was obese throughout the duration of his employment. His employment relationship was subsequently terminated by the employer, allegedly due to the decreasing number of children being taken care of. However, the employee in question expressed his opinion that the actual reason was his obesity.

The CJEU first stated that no provision of the Treaty on the Functioning of the European Union, nor the secondary EU law contains a direct prohibition of discrimination based on obesity. As already mentioned above, according to the CJEU case law, it is not feasible to extend the scope of Directive 2000/78 to cases other than those exhaustively defined in Article 1 hereof.[38] Consequently, obesity (or sickness) itself cannot be considered a prohibited discriminatory ground under the regime of Directive 2000/78.

However, the question remained, whether the employee's obesity could possibly constitute his disability within the meaning and scope of the above-mentioned Directive. In this matter, the CJEU summarised that the term disability must be understood as including not only the failure in performing an occupational activity, but also limitation of the performance hereof. Otherwise, the objective of Directive 2000/78 would be breached, as its aim is mainly to promote the access of the persons with disabilities to the labour market. At the same time, it is not decisive by whom the disability has been caused. Upon meeting the definition characteristics of the term disability, even obesity shall be covered by Directive 2000/78. This shall be the case especially provided that the obesity would prevent a person's full involvement in social and occupational life. As a result, it shall be emphasised that it is always necessary to take any possible physical, mental or psychological impairment into account, when deciding whether disability is involved.

3.4.5. Ruiz Conejero[39] *and Another Termination of Employment on the Grounds of Obesity*
The previous case was followed up by the case of Mr. Conejero. The employee in question, Mr. Ruiz Conejero, also suffered from obesity. Subsequently, it was found out that (in terms of the Spanish national law) Mr. Ruiz Conejero was considered disabled on the grounds of his obesity as well. As the obesity was connected with a long-term absence from his workplace, his employment relationship was terminated on these grounds. Such termination was, in general, plausible in accordance with the applicable provision of the Spanish Labour Code. The employee, however, pointed to the fact that there was a direct connection between his absence and his

37 Judgment of the Court (Fourth Chamber), 18 December 2014, *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)*, Case C-354/13.
38 For instance, with respect to the Chacón Navas judgment.
39 Judgment of the Court (Third Chamber) of 18 January 2018, *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal*, Case C-270/16.

"disability." Therefore, he proposed that his termination should be claimed invalid and discriminatory.

Mr. Ruiz Conejero insisted on the fact that he was dismissed due to his excused absence from work, which was closely related to his disability. Therefore, the CJEU concluded that dismissal of Mr. Ruiz Conejero could have constituted discrimination on the grounds of his disability. It also emphasised that unless the Spanish national legislation pursues a legitimate goal of combating absenteeism and does not exceed necessary limits to achieve this goal, such termination shall constitute a discriminatory breach. However, a more detailed assessment of the relevant circumstances of the case in question was subsequently left to the competent Spanish courts by the CJEU.

It can thus be summarised that if obesity (or sickness in general) results in long-term limitations preventing the full and effective involvement of the affected person into his or her occupational or social life, such a sickness is very likely to fall under the concept of disability foreseen by Directive 2000/78. On the contrary, disability recognised under the terms of national law does not necessarily have to meet the definition of the disability under the EU Directive 2000/78.

Beyond all that has already been mentioned, it is also necessary to emphasise that the limitations preventing the full and effective involvement of the affected person into his or her occupational or social life must always be "long-term" in order to meet the definition of disability. The CJEU further ruled (for instance in the related Daouidi case[40]) that a limitation can be considered long-term if, at the time of the potentially discriminatory act, it is not possible to clearly determine the short-term prognosis or if it is likely that such a limitation will last for a considerable period of time. The assessment hereof must be objective and based on up-to-date medical and scientific knowledge and data, including documents and certificates related to the person's personal conditions. The CJEU has not specified any particular time limit, which would always mean that the period in question already is long-term. It is also important that the assessment carried out by the CJEU focuses much more on the prognosis of the long-term nature of the limitations than on determining the actual length of the limitation period. Whether the limitations were actually long-term in total or not may be considered as less important than whether they appear to be long-term at the time of the potentially discriminatory behaviour.[41]

3.4.6. Tartu Vangla[42] *and the Right to Access the Labour Market for the Disabled*

A prison guard was in charge of monitoring the persons under electronic surveillance, evaluation and transmission of information, especially in case of an alarm signal, and detection of violations of the internal rules of the prison. Nevertheless, this employee was dismissed in accordance with the relevant provisions of Estonian

40 Case C-395/15 *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, para. 56.

41 See Waddington and Broderick, 2018, p. 61.

42 Judgment of the Court (Second Chamber) of 15 July 2021, *XX v Tartu Vangla*, Case C-795/19.

law, as his auditory acuity (hearing perception) did not reach the minimum values set out by the relevant national regulation. Due to the proclaimed need to ensure safety of persons and public order, the Estonian regulation also prohibited the usage of any possible hearing aids to enable the employee meeting such requirements.

The Estonian national regulation, undoubtedly, pursued legitimate objectives, namely to protect the safety of persons and public order. At the same time, however, any employer shall be obliged to adopt appropriate measures to enable a disabled person an access to the labour market, provided that the particular case requires it and such measures do not entail a disproportionate burden on the employer.[43] In the above-mentioned case, persons with a lower level of auditory acuity (than required by the relevant national regulation) could not be accepted or employed as members of the prison guards. They were, therefore, treated less favourably than other persons in a comparable situation (without being given the possibility to use hearing aids to compensate the disability). Such diversification cannot be justified on the basis of Directive 2000/78, as it directly excludes any possible measures to equalise the position of the disabled persons on the labour market in question. Neither does it enable to determine, whether it would be possible to fulfil the set conditions hereby. Any such national legislation that would exclude the persons with various disabilities from the respective labour market shall thus not be acceptable.

4. Non-binding Sources of EU Law

In addition to primary and secondary EU legislation (that primarily focuses itself on the problems of discrimination on the basis of disability and better integration of the disabled people into working life standards), and which is further enriched by the case law of the CJEU, it is also inevitable to mention several other non-binding sources of EU law. Although these resources are not legally binding for the member states, they satisfyingly illustrate the specific interests of the EU in achieving better and inclusive working and social environment for the disabled persons.

4.1. The European Pillar of Social Rights and the European Pillar of Social Rights Action Plan

The European Pillar of Social Rights was adopted by the European Parliament, Council, and the Commission in 2017. It is a scheme that sets out 20 key EU principles that shall ensure better rights for EU citizens and help achieve a fair and inclusive environment within the EU member states. To be specific, principle No. 17 of the European Pillar of Social Rights, named '*the inclusion of people with disabilities*', emphasises that persons with disabilities have the right to income support. Its aim shall be to ensure a dignified life for them, along with an appropriate level of independence. Services allowing disabled persons to participate in the labour market, working environment adapted

43 In accordance with Article 5 of the Directive 2000/78.

to their specific needs and their inclusion into the society have to be provided as well. Fulfilment of this principle shall then be ensured by the joint cooperation between the relevant EU institutions, national, regional and local authorities, as well as social partners and civil society.

The European Pillar of Social Rights Action Plan follows up on the previously mentioned European Pillar of Social Rights principles and transforms these principles into concrete applicable measures, whereas its main goals shall be achieved by 2030. As a result of application hereof, working standards of the EU citizens should be sufficient for the future of work and labour market. Equal treatment for the disabled persons shall also thus be achieved. The impact of the application hereof should, therefore, bring a sufficient removal of unreasonable barriers, which currently prevent the disabled people from being able to fully participate in working and social life in the EU. In particular, it concerns achieving progress within the approach of the disabled persons to education, training, employment, social protection, housing and health issues.

4.2. The Strategy for the Rights of Persons with Disabilities 2021-2030 and the European Disability Strategy (2010-2020)

The EU is one of the parties of the UN Convention. Based on and reflecting this Convention, together with the Charter, the EU first presented its Disability Strategy for the decade of 2010–2020, and afterwards came with an updated Disability Strategy for the period of 2021–2030. Both of these Disability Strategies were supposed to be fulfilled via the cooperation of respective EU institutions and particular member states.

The former was established on eight key principles with the aim of empowering the disabled persons and providing them with equal opportunities. It emphasised, for instance, the access of the disabled persons to the labour market, the necessity of available education for disabled pupils, tackling the risk of poverty and social exclusion or the importance of equal access of the disabled to health care providers. Generally speaking, the Disability Strategy for the decade of 2010-2020 paved the way for numerous improvements within the situation of the persons with disabilities.

The latter recognises various barriers that prevail and are currently faced by the persons with disabilities. These include independent living and achieving a certain quality of life, accessibility to legal protection and enjoying the EU rights freely, non-discriminatory access to justice, social protection, healthcare, education, housing, and other goods and services. Their fair access to art, culture, leisure activities, sport, and tourism, and preventing violence against the disabled persons shall not be omitted either. The EU also proclaims its intentions to lead by example, when it comes to employment of the persons with various disabilities, or accessibility of the EU institutions to the disabled persons and so on.

5. Selected Central and Eastern European CJEU decisions

It is not unusual for the CJEU to review the legislation of Central European member states with regard to the specific position of the disabled. Naturally, the above-mentioned basic approaches and findings of the EU institutions, the CJEU included, remain unchanged in such cases. However, it is very interesting to focus on how, in the environment and conditions familiar to us, particular cases concerning the protection of the disabled have been resolved. Although, it is obviously not possible to include all the relevant Central European disability case law, a representative sample hereof may be covered and commented on below.

5.1. Enhanced Protection in the Event of Dismissal of Employees with Disabilities

Ms. Milkova worked in Bulgaria as an employee (civil servant) under the Civil Service Act. The employee was dismissed due to the abolition of the post she occupied. However, she did not agree herewith, as she suffered from a mental illness leading to a 50% reduction of her working capacity. In case of a disabled person, the Bulgarian legislation required prior consent of the labour inspectorate for the employer to dismiss such an employee. However, the protection was only provided to employees in an employment relationship, not the civil servants. Therefore, prior labour inspectorate consent was not required by Ms. Milkova's employer and was not essential for the termination of her civil service contract. Thus Ms. Milkova considered such legislation to be discriminatory.

In the above-mentioned case, it was first necessary to assess whether Ms. Milkova's mental illness fell within the concept of disability as it is understood by Directive 2000/78. Since she suffered a long-term physical, mental, or psychological impairment which, in interaction with various obstacles, was likely to hinder Ms. Milkova's full and effective participation in professional life, Ms. Milkova met the definition[44] of disability as understood by the CJEU and the CJEU subsequently assessed the employees' health impairment as disability.

In general, it is important that the EU legislation allows any member state to adopt national legislation, which would provide specific *ex ante* protection to the disabled employees in the event of dismissal. The protection can only be provided to the employees working in an employment relationship. It does not have to be granted to the employees performing civil service. Nevertheless, this only is possible if the specific measure does not breach the principle of equal treatment, which must be verified by the national court.

Although EU legislation allows any member state to adopt such national legislation in general, the CJEU considered the respective Bulgarian law as unsatisfactory. The CJEU stated that the purpose of the Bulgarian protection against dismissal was that the labour inspectorate assessed the health consequences of such dismissal.

44 For details, please, see article 3.4.1. above.

The purpose was therefore not to protect the employee depending on the type of legal relationship between the employer and the employee, but to protect him or her on account of his or her disability. The distinction such legislation introduced between the disabled employees and the disabled civil servants appeared to be disproportionate and thus breached the principle of equal treatment.

5.2. Exclusion from Participation in Criminal Proceedings

The employee had a permanently reduced capacity to work due to loss of vision. She worked for the Bulgarian organisation of the blind and in the structures of the European Union of the blind. In 2014, she was recruited as a juror at the Sofia City Court. On 24 September 2015, she submitted a complaint with the Commission for Protection against Discrimination, alleging that she had been subject to unfavourable treatment on the grounds of disability. The judge at the Sofia City Court had not allowed her to participate in any criminal proceedings and the Sofia City Court had not transferred her to another chamber in order to exercise her right to work as a juror. The Commission subsequently concluded that the employee had been discriminated against. However, the judicial authorities from the Sofia City Court brought an action against this decision. The Bulgarian Supreme Administrative Court, as a result, referred a preliminary question to the CJEU.

It primarily emerged from the available information that the function of a juror constituted paid, professional activity for the employee. Therefore, the conditions of access to this employment within the meaning of Directive 2000/78 had to be assessed with respect to the disabled employee in question. Furthermore, it was found out that the particular employee should be regarded as a disabled person within the meaning of the Directive, as she fulfilled all the conditions of the CJEU case law definition.[45]

Given the nature of the post of a juror in criminal proceedings and the conditions for its performance, which may in certain cases involve examination and assessment of visual evidence, sight can be considered a genuine and determining occupational requirement. The representatives of the local Sofia City Court invoked the need to fully respect the principles of criminal procedure enshrined in the Criminal Procedure Code, including the principle of direct assessment of evidence. They argued that the judge must ensure all the members of the panel treat the evidence in the file in the same way and that they immediately evaluate the behaviour of the parties to the proceedings, which is not possible in case of a blind person.

Consequently, it was necessary to verify whether employee's complete exclusion from the post of a juror in criminal proceedings did not exceed the necessary limits of Directive 2000/78. In this regard, the CJEU clarified that the concept of '*reasonable accommodation for disabled persons*'[46] must be understood broadly. It includes the removal of various obstacles which hinder the full and effective participation of the disabled persons in their professional life, such as adapting work spaces and

45 For the details, please, see Article 3.4.1. above.
46 See the Tartu Vangla judgment in Article 3.4.6. above and Article 5 of Directive 2000/78.

equipment, working time arrangements for the disabled persons, the division of tasks, or provision of extra educational or training measures to the disabled person.[47]

However, in this case, the employee was completely excluded from participating in criminal proceedings, without verifying whether she could have been offered any material, personal or organisational assistance. The employee was thus absolutely excluded from participating in cases heard by the criminal chamber to which she was assigned, without any assessment of her individual capacity to perform her function or without any further examination of whether any difficulties could be overcome. Subject to verification by the national court, the CJEU therefore considered that the measure in question went beyond necessary limitation of the disabled.

According to the view expressed by the CJEU, Directive 2000/78 (read in the light of the Charter of Fundamental Rights of the European Union and the UN Convention), together must be interpreted as legislation precluding a blind disabled person from being completely denied the opportunity to act as a juror in the criminal proceedings.

5.3. Provision of Wage Supplement to Disabled Employees

A Polish employee was employed as a psychologist in a hospital and recognised as having a moderate permanent disability, which she informed her employer hereof. The hospital director subsequently decided to grant a monthly salary supplement of approximately EUR 60 to the disabled employees. This supplement was only acknowledged to those disabled employees who submitted a certificate of their disability to the director after this decision. On the basis hereof, the salary supplement was therefore granted to 13 employees who did duly submit their certificates to the employer after the decision of the hospital director had come into effect. On the other hand, 16 employees who had submitted their disability certificates to their employer before the decision did not receive the supplement at all. The employee did not receive the supplement either and, therefore, claimed she had been discriminated against, in particular regarding the conditions of her remuneration.

In the abovementioned context, the national court asked whether indirect discrimination within the meaning of Article 2 of Directive 2000/78 could also occur in case the employer discriminates within the group of disabled employees. All of the employees had the same protected characteristic – all suffering from disability. However, the employer treated such disabled employees in a different matter, without treating the affected disabled employees less favourably than non-disabled employees at the same time.

Although it is ultimately a matter for the national court to decide, the CJEU is intended to provide the national court with useful answers and guidance to enable it to properly decide. Directive 2000/78 generally aims to combat all forms of discrimination in occupation on the grounds of disability. It is true that cases of discrimination on the grounds of disability within the meaning of the Directive are generally cases

47 See recital 20 of the Directive 2000/78.

where the disabled are treated less favourably or are put at a specific disadvantage compared to the non-disabled persons. Nevertheless, the protection afforded by the Directive would be disproportionately reduced if a group of disabled persons were no longer subject to the prohibition of discrimination, provided such discrimination "only" occurs within the group of disabled persons. The principle of equal treatment enshrined in Directive 2000/78 is intended to protect a disabled employee against any discrimination on grounds of disability, and must be respected not only against non-disabled employees, but also against other employees with a disability.

The employer's attitude to granting the wage supplement in question may, according to the CJEU, lead to direct discrimination of a group of employees. Several employees had previously formally declared their disability by submitting a certificate of disability to their employer. As a result, the employer knew about their disability and these above-mentioned employees were definitively prevented from fulfilling the employer's time condition. Direct discrimination in this case could only be justified on one of the grounds listed in Article 1 of Directive 2000/78. However, one of these obviously is discrimination on the grounds of disability.

Although seemingly neutral, an employer's practice of paying a wage supplement only to selected disabled employees and not to all disabled employees may, therefore, in this case also constitute indirect discrimination on the grounds of disability. It is unacceptable if it results in a specific disadvantage for disabled employees depending on the nature of their disability – in particular, its manifest nature or the fact that this disability requires reasonable accommodation of working conditions, unless it is objectively justified by a legitimate aim and the means of achieving that aim are proportionate and necessary. The concept of indirect discrimination generally consists in seemingly neutral provisions, criteria, or practices that disadvantage persons with disabilities in comparison with other persons. For example, the CJEU has recognised that employees with disabilities are more exposed to certain risks, such as absences due to illness. If an employer has an internal policy that seemingly neutrally penalises employees with high rates of absence from work, this potentially discriminatory measure affects employees with disabilities. Similarly, selection criteria such as productivity ratings or low ability to perform multiple tasks at once may also constitute indirect discrimination. The decisive criterion is whether these measures disproportionately affect employees with disabilities without being objectively justified. When assessing national courts, particular attention should be paid to whether internal arrangements ensure a reasonable balance between the interests of employers and employees with disabilities, whether the adverse effects on the persons concerned are proportionate to the specific circumstances, and whether the employer's chosen internal arrangements are appropriate and necessary to achieve legitimate objectives.[48]

In addition, there is absolutely no doubt that Directive 2000/78 prohibits any discrimination and harassment not only against persons with disabilities, but also

48 See Benedi Lahuerta, 2016, pp. 1–15; Schiek, 2016.

against persons without disabilities who are in fact connected with such persons in some way (which, among other things, emerged from the CJEU judgment in the Coleman case). This protection typically applies to cases where an employer discriminates against an employee who cares for a disabled child. However, the obligation of reasonable accommodation under Article 5 of Directive 2000/78 applies only to persons with disabilities. The protection of persons without any disabilities is not provided for here. According to the Directive, they do not formally have the right to reasonable accommodations even on the basis of their relationship with a person with a disability. Although the CJEU has not explicitly confirmed that discrimination against these "carers" is prohibited in cases of disability, this seems likely, as it would not make much sense if the CJEU did not intend to guarantee these persons the same level of protection as persons with disabilities.[49]

6. Conclusion

The EU legislation and case law clearly shows the EU efforts to improve the disabled persons everyday lives. The basic principle hereof is to achieve the same level in their occupational and social involvements as in the case of the non-disabled persons. It is apparent, that the EU tries to find a variety of different ways to reach it. Not only the above-mentioned Reasonable accommodation measures, but also the efforts to promote other aspects of the disabled persons lives (such as better accessibility to education, health service, housing, social care, or transportation) shall be taken into account, as all of these aspects tend to form a complex of obstacles for the disabled persons preventing their full participation in work and society.

As for the relationship between the CRPD and the EU law, they are essentially built on the same foundation and are very similar in many ways. For example, the definition of the term "disability" itself is essentially the same in the CRPD and EU case law. This is certainly a positive sign, as too significant deviations would mean a large amount of legal uncertainty and a threat to meeting the intended purpose for the subjects of both the CRPD and EU law.[50]

It is clear, however, that some key aspects slightly differ under the CRPD and under relevant EU law. For example, the Convention considers accessibility of the disabled persons to equal conditions to be rather an unconditional obligation, which should be gradually fulfilled and promoted by the member states. Whereas under the EU law, accessibility rules must be observed only in case they do not represent a disproportionate burden on employers or service and goods' providers. It can, therefore, be very interesting to see how the CJEU would deal with such a difference if it was to decide a case on this topic.[51]

49 See Benedi Lahuerta, 2018; Clifford, 2011, p. 11.
50 See Quinn and Degener, 2002; Kayess and French, 2008, p. 8.
51 Scheu and Durajova, 2021.

Based on the EU case law, it seems obvious that not every sickness might be considered as disability. What's more, not even the national definition of disability may be relevant, but the court shall assess, whether the CJEU case law definition is/is not fulfilled. Only then, it is possible to guarantee the protection the EU law provides for the disabled persons (especially under Directive 2000/78/EC). It is necessary to stress that the aspect of curability is absolutely irrelevant in this respect, as not only incurable, but also curable sickness can result in disability under the CJEU definition. What's more, even obesity (regardless of whether caused by the disabled person or not) may constitute disability. Any subsequent unequal treatment arising from the health status of the disabled person is prohibited. In addition, discrimination may occur even in case the employee faces unequal treatment under the condition that he or she is the person providing the major care for a disabled relative (e.g. a mother caring for her disabled son).

The Central and Eastern European case law shows us that although seemingly neutral, the employers practice leading to discrimination of the disabled persons shall always be found prohibited. Employers and national legislations are allowed to adopt any possible measures, provided that these do not result in different unequal treatment with the disabled persons. The measures may even include particular *ex ante* protection granted to the disabled employees after termination of their employment relationship. On the other hand, any law or regulation shall be adopted in a way, that ensures reasonable accommodation for the disabled. For example, a requirement set on a juror, who shall be able to immediately and directly assess evidence during the respective proceedings, may not exclude bind jurors from access to this occupation. The reasonable accommodation measures must in this case be understood very broadly and shall result in the removal of such obstacles, especially via adapting the used work spaces and equipment for the disabled persons.

Last, but not the least, it is inevitable to stress that the basic principle incorporated in every relevant EU source of law, is that the disabled persons shall be guaranteed such a protection so that they were able to achieve the same working and living standards as the non-disabled persons in the society. Even though, the EU has gone a very long way in achieving this, the statistics show that a lot is yet to be improved. For instance, in 2023, 8% of the employed persons without disabilities face the risk of poverty in the EU compared to the total amount of 10.10% of the employed disabled persons facing the same risk. Even though substantial progress may have been reached, Member State courts should not slacken in ensuring that their interpretations align with CJEU case law. Just as the CJEU still has the task of further developing its case law to reflect current developments, progress, and trends in the approach to persons with disabilities, it has sought to better support the needs of these highly vulnerable persons and not lag behind, for example, the UN's approach to this issue. The multi-level structure of law enforcement, including the CJEU, national courts, and even oversight by the Committee on the Rights of Persons with Disabilities (CRPD), offers great opportunities for achieving a high level of protection for persons

with disabilities. Of course, challenges remain in ensuring uniform protection of the rights of persons with disabilities across the EU.[52]

52 See also Ferri and Broderick, 2020; Priestley, 2001.

Bibliography

Benedi Lahuerta, S. (2016) 'Ethnic discrimination, discrimination by association and the Roma community: CHEZ', *Common Market Law Review*, 53(3), pp. 1–15; https://doi.org/10.54648/cola2016066.

Benedi Lahuerta, S. (2018) 'Directive 2000/43/EC on Racial Equality' in Edoardo Ales, E., Bell, M., Deinert, O., Robin-Olivier, S. (eds.) *International and European Labour Law: A commentary*. Nomos.

Braithwaite, J., Mont, D. (2009) 'Disability and poverty: A survey of World Bank Poverty Assessments and implications', *Alter*, 3(3), pp. 219–232; https://doi.org/10.1016/j.alter.2008.10.002.

Clifford, J. (2011) 'The UN Convention and its Impact on European Equality Law', *Equal Rights Review*, 6, pp. 11–25.

Council of the European Union (2022) *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report* [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13070_2022_INIT&from=EN (Accessed: 23 September 2024).

Council of the European Union (2024) *European disability card and European parking card for persons with disabilities: Council adopts new directives* [Online]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2024/10/14/european-disability-card-and-european-parking-card-for-persons-with-disabilities-council-adopts-new-directives/ (Accessed: 10 March 2026).

European Union (2023) *Special Eurobarometer 535 – Discrimination in the European Union. Report, 2023* [Online]. Available at: https://europa.eu/eurobarometer/surveys/detail/2972 (Accessed: 23 September 2024).

Eurostat (2024a) *Disability employment gap* [Online]. Available at: https://ec.europa.eu/eurostat/databrowser/view/tepsr_sp200/default/bar?lang=en (Accessed: 7 September 2024).

Eurostat (2024b) *Disability employment gap by level of activity limitation and sex* [Online]. Available at: https://ec.europa.eu/eurostat/web/products-datasets/-/tepsr_sp200 (Accessed: 27 August 2024).

Eurostat (2024c) *Key figures on European living conditions, 2024 edition* [Online]. Available at: https://ec.europa.eu/eurostat/documents/15216629/20161003/KS-01-24-001-EN-N.pdf/d0998edb-fc06-d7d4-8e78-d34ba2ed5608?version=1.0&t=1728563187288 (Accessed: 7 September 2024).

Eurostat (2024d) *Key figures on European living conditions, 2024 edition* [Online]. Available at: https://europa.eu/eurobarometer/surveys/detail/2972 (Accessed: 23 September 2024).

Eurostat (2024e) *Level of disability (activity limitation) by sex, age and citizenship* [Online]. Available at: https://ec.europa.eu/eurostat/databrowser/view/hlth_silc_28/default/table?lang=en (Accessed: 27 August 2024).

Eurostat (no date a) *Disability employment gap by level of activity limitation and sex*; https://doi.org/10.2908/tepsr_sp200.

Eurostat (no date b) *In-work at-risk-of-poverty rate by level of disability (activity limitation), sex and age*; https://doi.org/10.2908/hlth_dpe050.

Eurostat (no date c) *Level of disability (activity limitation) by sex, age and citizenship*; https://doi.org/10.2908/hlth_silc_28.

Ferri, D., Broderick, A. (eds.) (2020) *Research Handbook on EU Disability Law*. Edward Elgar Publishers.

Ferri, D., Favalli, S. (2016) 'Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?', *European Journal of Health Law*, 23(1), pp. 5–35; https://doi.org/10.1163/15718093-12341392.

Jouza, L. (2020) *Diskriminace v zaměstnání – jak na ni pohlížejí pracovněprávní předpisy* [Online]. Available at: https://advokatnidenik.cz/2020/02/12/diskriminace-v-zamestnani-jak-na-ni-pohlizeji-pracovnepravni-predpisy/ (Accessed: 23 September 2024).

Kayess, R., French, P. (2008) 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', *Human Rights Law Review*, 8(1), pp. 1–34; https://doi.org/10.1093/hrlr/ngm044.

Lawson, A. (2009) 'Reasonable Accommodation and the European Convention on Human Rights' in Arnardóttir, O.M. and Quinn, G. (eds.) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*. Martinus Nijhoff Publishers.

Mindell, J.S. et al. (2023) 'Chapter Two - Disability and travel' in Mindell, J. S., Watkins, S.J. *Advances in Transport Policy and Planning, Volume 13.* The Reviews. Academic Press, pp. 47–87; https://doi.org/10.1016/bs.atpp.2023.11.009.

O'Cinneide, C. (2012) *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*. European Commission, Directorate-General for Justice.

Priestley, M. (ed.) (2001) *Disability and the Life Course: Global Perspectives*. Cambridge: Cambridge University Press.

Quinn, G., Degener, T. (2002) *Human Rights and Disability: The current use and future potential of United Nations human rights instruments*. New York: United Nations.

Scheu, H. C., Durajova, Z. (eds.) (2021) *Lidé s postižením jako nová menšina – právní výzvy a souvislosti* [Online]. Available at: https://www.ochrance.cz/dokument/lide_s_postizenim_jako_nova_mensina_pravni_vyzvy_a_souvislosti/lide_s_postizenim_jako_nova_mensina.pdf (Accessed: 10 December 2024).

Schiek, D. (2016) 'Intersectionality and the Notion of Disability in EU Discrimination Law', *Common Market Law Review*, 53(1), pp. 1–27.

UN. Committee on the Rights of Persons with Disabilities (no date) [Online]. Available at: https://www.ohchr.org/en/treaty-bodies/crpd (Accessed: 23 September 2024).

Waddington, L. (2007) 'Reasonable Accommodation' in Schiek, D., Waddington, L., Bell, M. (eds.) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*. Oxford: Hart Publishing.

Waddington, L. (2013) 'Equal to the Task? Re-examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities' in Waddington, L., Quinn, G., Flynn, E. (eds.) *European Yearbook of Disability Law, vol. 4*. Antwerp: Intersentia, pp. 169–200.

Waddington, L., Broderick, A. (2018) *Combatting disability discrimination and realising equality – A comparison of the UN Convention on the Rights of Persons with Disabilities and EU equality and non-discrimination law*. Luxembourg: Publications Office of the European Union.

Part V
Ethnic, National and Religious Minorities

Chapter 13

The International Protection of Ethnic, National and Religious Minorities: The United Nations Framework

Katarzyna Zombory

'Some minority groups share another experience: that of separation or exclusion. While it is true that at times a group may deliberately choose to remain apart in order to protect its own way of life, it is more often true that minorities are confronted by barriers that keep them apart from the rest of society. While in such a context the minority group tends to become closed within itself, the majority group may foster a feeling of rejection towards this group as a whole or towards its individual members. When this happens, the latter are no longer in a position actively and creatively to contribute to building a peace based on the acceptance of legitimate differences.'

Pope John Paul II
Message for the celebration of the XXII World Day of Peace: 'To Build Peace, Respect Minorities'[1]

ABSTRACT

The protection of national minorities has been a highly sensitive issue in international law, evolving from the interwar regime for minority protection under the League of Nations to the contemporary legal framework under the auspices of the United Nations (UN). This paper examines the historical development and current state of minority protection at the universal level, emphasising the transition from the collective protection during the interwar period to the individual rights-based approach underlying the international human rights law. Although the UN has primarily relied on the principle of non-discrimination and equality for ensuring the rights of persons belonging to national minorities, the adoption of the 1966 International Covenant on Civil and Political Rights (ICCPR) explicitly recognised the cultural, linguistic and religious rights of minorities, and has become the most important binding universal standard on minority protection. The paper also explores the role of the Human Rights Committee (HRC) in shaping minority rights through its case law, which nevertheless focuses more on indigenous rights than minority rights, and has not addressed many cases from Central and Eastern Europe. With the intensive development of the European framework

1 John Paul II, 1989.

Katarzyna Zombory (2026) 'The International Protection of Ethnic, National and Religious Minorities: The United Nations Framework' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 559–600. https://doi.org/10.71009/2026.nj.hrpovg_13

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for minority protection in 1990s, national minorities achieved a higher level of recognition and more effective protection at the European level compared to the UN human rights system, nevertheless the standard-setting activity of the UN cannot be overestimated.

KEYWORDS
national minorities, minority rights, cultural rights, Human Rights Committee, Article 27 of the ICCPR

1. Introduction

The protection of the rights of national minorities is an inherent element of the contemporary discourse on human rights, civil society and cultural diversity.[2] Nonetheless, national minorities have long remained at the peripheries of international law, their protection being a highly sensitive topic both in international relations, and within the domestic political context as well. Being communities with a different national, cultural, linguistic, or religious identity from that of the majority population, national minorities have historically faced assimilation pressures, and cultural erasure, either within an induced and intended scheme, or through a voluntary adaptive process. The vulnerable situation of persons belonging to national minorities results from discriminative attitudes they might experience from the majority population and the host state itself, in areas such as employment, education, or political participation. Discriminatory practices hinder the minorities' full empowerment on the one hand, and the preservation of their distinct cultural identity on the other. The gradual loss of fundamental aspects of their minority identity, such as language, religion or cultural practices, poses a threat to their existence and cultural survival. All these factors induce the need of special legal protection for persons belonging to national minorities, to ensure that they can fully exercise their human rights, while at the same time safeguarding what makes them vulnerable, that is their distinct cultural identity and heritage.

This paper presents the main legal instruments adopted under the auspices of the United Nations (UN) to safeguard cultural identity and cultural existence of national minorities. Historically, the legal regime for protecting minority rights have first emerged within the universal system of human rights protection. Although the term "national minority" is more commonly used in the regional European instruments on minority rights[3] than in the UN documents, the author nevertheless refers to the protection of *national minorities*, as the term is deeply anchored in the legal culture of Central and Eastern Europe to describe persons with a national, linguistic, and

2 Recommended reading on the protection of national minorities in international law, among others: Thornberry, 1991; Kovács, 2000; Weller, 2007; Sándor-Szalay, 2022; Zombory, 2023b.
3 Examples include the Framework Convention for the Protection of National Minorities, adopted under the auspices of the Council of Europe on 1 February 1995 in Strasbourg, ETS. No 157, or the soft-law instruments issued by the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe.

cultural background different from that of the majority population in the country where they live permanently.

The first part of the paper focuses on the notion of national minority and minority rights to provide the reader with a conceptual foundation. The second part outlines the historical development of the legal framework for protecting minorities in international law, which began with the League of Nations' treaty system of minority protection and evolved further after World War II, from protecting national minorities as groups towards the protection of individual rights of persons belonging to minorities. The fourth section addresses the current legal framework for safeguarding minority rights within the UN human rights system, while the fifth part analyses the case-law of the Human Rights Committee in cases brought by members of national minorities. In the final part of the paper, the author presents a case study of South Tyrol, highlighting it as a positive example of how addressing a sensitive minority issue at the UN forum has resulted in the development of an effective bilateral framework for minority protection.

2. Protecting Whom and What? – The Concept of "Minority" and "Minority Rights"

The concept of national minority has not been clearly defined in international law. Attempts to agree on a universally accepted legal definition of "national minority" have not been successful, however, over the years, various definitions have emerged in scholarly literature, highlighting diverse aspects related to the existence of national minorities.[4]

The issue of defining national minorities was for a long time on the agenda of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, established in 1947 (since 1999: the Sub-Commission on the Promotion and Protection of Human Rights). In 1979, the Sub-Commission's Special Rapporteur Francesco Capotorti presented a study, which contained one of the most recognised and widely accepted definitions of "minority":

> 'a group numerically inferior to the rest of the population of a state, in a non-dominant position, and whose members –being nationals of the State– possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language.'[5]

4 For more on the concept and definition of national minorities, see e.g.: Heinze, 2006; Pentassuglia, 2000.
5 Capotorti, 1979, para. 568.

Capotorti's definition is an echo of the jurisprudence of the Permanent Court of International Justice (PCIJ), which, on behalf of the League of Nations, supervised the implementation of international obligations connected to minority protection in the interwar period. The PCIJ's position on the recognition of a national minority, according to which both objective and subjective criteria should be taken into account while determining the existence of a minority group, had a significant impact on the development of the concept of national minorities.[6] Objective criteria include the size of the minority in relation to majority population, as well as distinct ethnic, linguistic and religious characteristics of its members; while the subjective criteria refer to the sense of solidarity, sense of belonging to minority, and the desire to preserve the minority culture.

Given that there is no universally applicable definition of a national minority, international instruments on minority rights often indicate different types of social groups, such as ethnic, linguistic or religious minorities, which enjoy protection because of their special cultural characteristics.[7] The 1992 UN Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,[8] while being entirely dedicated to the protection of minorities, does not include a legal definition, instead lists four different types of minorities which enjoy international protection. The Commentary to the 1992 Declaration suggests that the term "national minority" is the most far-reaching among all of them, and enjoys the strongest protection. Persons belonging to a *national minority* have stronger rights compared to either ethnic, or religious, or linguistic minorities, that is the rights relating not only to their culture but to the preservation and development of their national identity as well.[9] However, under the UN instruments, minority groups other than national minorities, even if not officially recognised as such, can still enjoy protection as ethnic, religious or linguistic minorities, as almost every national minority, however defined, is also an ethnic or linguistic minority.[10]

An important element of the debate on minority protection is whether members of a national minority should be *citizens or permanent residents* of the state on the territory of which they live to be entitled for international protection. The continuity

6 See e.g. PCIJ, 1930.

7 See e.g. art. 27 of the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, UN Treaty Series No. 14668.

8 *Declaration* on the Rights of Persons *Belonging to National or Ethnic*, Religious and Linguistic Minorities of 18 December 1992, UN GA Resolution 47/135, UN Doc E/CN.4/1992/48.

9 UN Working Group on Minorities, 2005, para. 6.

10 Ibid., paras. 6–8. Unlike the UN instruments, regional documents on minority rights in Europe, adopted under the auspices of the Council of Europe and the Organization for Security and Cooperation in Europe, use only the concept of "national minorities", without referring to "ethnic, religious or linguistic minorities". Therefore, when applying those instruments, it is necessary to define "national minority", but a similar problem does not arise for the United Nations documents on minority rights (art. 27 of the ICCPR, 1992 Declaration): even if a group is held not to constitute a national minority, it can still enjoy legal protection as an ethnic, religious or linguistic minority.

of settlement is related to the issue of the so-called *"new" minorities* (e.g. migrant workers), who, unlike historically settled national minorities, do not have permanent historical ties with the host state. The question of whether to protect immigrant populations as national minorities is a bone of contention both among scholars and in international politics. The UN Human Rights Committee (HRC) considers that the obligation to respect cultural rights of minorities applies to all residents of the state, who need not to be nationals or citizens, or even permanent residents to enjoy their minority rights. According to the HRC, migrant workers belonging to ethnic, religious or linguistic minorities or visitors to a country should enjoy equal protection as members of communities traditionally settled.[11] However, such a broad understanding of minority standards is not in line with the concepts developed over the years in academic literature, which emphasise the role of historical settlement among the requirements to be recognised as national minority.

Within the UN framework of minority protection, persons belonging to *indigenous peoples* also benefit from the protection afforded to national minorities.[12] It is assumed that persons belonging to indigenous peoples are fully entitled to claim the rights guaranteed in the instruments on national minorities.[13] As Marinkás points out, the rights of indigenous peoples have only come to the attention of the international community in the last four decades, but during that time they have achieved more than national minorities have in the more than six decades since 1945.[14] Bándi highlights a significant difference between the protection of the cultural rights of national minorities and those of the indigenous peoples. The so-called "Western countries", who continue to dominate the development of international law, including human rights law, have different attitudes towards granting protection to national minorities than towards protecting indigenous peoples, where the difference in approach can be explained with the number of affected persons, and the nature of their legal claims. Indigenous peoples, less significant in number than members of national minorities, and without state-building aspirations, are less challenging to grant rights to, unlike minorities who often seek self-determination and territorial autonomy, and are therefore considered as a potential threat to the integrity of the state. While the normative content of minority and indigenous rights shows similarities in terms of self-governance, cultural, and participatory rights, the barriers to harmonising these rights stem from political concerns rather than legal reasons.[15]

11 UN Human Rights Committee, 1994, para. 5.2.
12 UN Working Group on Minorities, 2005, para. 17. Indigenous peoples are considered to be descendants of the communities that inhabited a given country at the time of its conquest or colonisation, and who retain some or all of their own social, cultural, and political institutions, see Eide, 2006, p. 43. For elaborated accounts on the protection of indigenous peoples, see e.g. Hanson and Weller, 2018; Marinkás, 2016; Marinkás, 2018; Raisz, 2008; Zombory, 2023a.
13 UN Working Group on Minorities 2005, para. 17.
14 Marinkás, 2018, pp. 25–26.
15 Bándi, 2020, pp. 37–39.

The protection of national minorities is inextricably linked to the concept of safeguarding cultural identity. The need to ensure the protection of a distinct culture is at the heart of the international protection of all minority rights. The elements that make up cultural identity, such as language, religion, traditions and cultural heritage, are the basis for distinguishing national minorities as such.[16] The general term *minority rights* is often used to describe all those guarantees that are aimed at protecting various aspects of cultural identity. They might encompass, among others, the right to use the minority language in private and in the public sphere, including the right to learn a minority language and receive education in that language (linguistic rights), the right of the members of the minority group to establish their own educational institutions, the right to practice their own religion, the right to enjoy their own culture and participate in the cultural life of their community, freely and without interference or any form of discrimination.[17] In the international catalogue of human rights, the guarantees that aim to protect cultural identity, not only that of persons belonging to national minorities, are referred to as *cultural rights*. Cultural rights belong to the universal catalogue of human rights since the adoption of the Universal Declaration of Human Rights in 1948,[18] and are classified within the second generation of human rights.[19]

The development of the international framework for minority protection has, since the beginning, been accompanied by the debate over whether national minorities should be protected as a group, or whether the protection should be granted to individual members of the minority; a debate that ultimately pins down to the question whether minority rights are collective or individual in nature. Unlike during the interwar period, when specific minority groups were granted protection under international treaties, the contemporary international framework for minority protection recognises minority rights as individual rights, that is, rights which can be exercised

16 See art. 5 of the Framework Convention for the Protection of National Minorities, adopted under the auspices of the Council of Europe on 1 February 1995 in Strasbourg, ETS. No 157, which identifies religion, language, traditions and cultural heritage as the essential elements of the identity of national minorities.

17 See e.g. art. 2 of the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; art. 27 of the ICCPR; art. 30 of the 1989 Convention on Children's Rights. The cultural life of the national minority should be understood broadly, to include language, faith, science, art, philosophy, law, customs, see e.g. Reidel, 2011, p. 414.

18 See Article 27 of the Universal Declaration of Human Rights, adopted by the UN General Assembly in Paris on 10 December 1948.

19 First-generation rights include rights the observance of which presupposes non-interference by the state in individual rights and freedoms. Political and civil rights fall into this category. Economic, social and cultural rights are second-generation, and their protection requires positive action by states. The third generation includes the so-called solidarity rights, the implementation of which requires the cooperation of the state and individuals. These are collective guarantees relating to aspects of community life, such as the right to peace, the right to development, the right to live in a clean environment and the right to the protection of cultural heritage. For more on the doctrinal categorisation of human rights, see Vasak, 1977, p. 29; Kardos, 2002, p. 29. On the classification of human rights in the literature on the subject, see e.g. Rosas and Scheinin, 1999, pp. 49–63.

individually, even though the cultural identity of persons belonging to a minority can only be understood within their community, and with its other members.[20] By protecting the rights of individual members of the minority, the collective identity of the entire group is also safeguarded, therefore, the protection of minority rights as collective rights takes place indirectly.[21] Minority rights are considered to be a compromise between individual and collective rights, which means that despite their individual nature, they should be exercised collectively.[22]

3. A Historical Overview of Protecting Minority Rights

3.1. The League of Nation's System of Minority Protection

The beginning of the protection of national minorities dates to the first half of the 20th century along with the creation of the League of Nation's system of minority protection.[23] Due to major territorial and geopolitical changes in Central and Eastern Europe following the peace agreements concluded after the First World War, it became essential to create a system for the effective legal protection of national minorities, both in the newly formed states and in the defeated states. The most notable territorial shifts resulted from the collapse of the multi-ethnic Austro-Hungarian monarchy and the Ottoman Empire. The borders of the countries created as a result of the collapse of both empires principally did not coincide with the borders set by the nationality structure of peoples inhabiting them. The U.S. President Woodrow Wilson, in his famous address to a Joint Session of Congress on the Conditions of Peace, containing a peace programme for post-war Europe (also known as 'The Fourteen Points'), drew attention to the importance of the national question for ensuring peace and security in Europe that should be taken into account during the peace negotiations after the First World War.[24] President Wilson urged for, among others, a readjustment of the

20 Sándor-Szalay, 2022, p. 164.
21 Ibid.
22 On considerations concerning the collective and individual dimension of minority rights, see also Heinze, 2006, pp. 85–86; Hannum, 2007, pp. 69–70.
23 In previous periods, the protection of minorities functioned in relation to the protection of religious minorities. The protection of religious minorities was provided for in the Westphalian Peace Treaty, concluded in 1648 in connection with the end of the Thirty Years' War. This treaty provided for equal rights for Lutheran, Catholic and Calvinist faiths in the territory of the German Reich and freedom to practice religion in relation to these three religious communities. Provisions concerning the protection of religious minorities were also included in the Peace of Oliwa, signed between Poland and Sweden in 1660. The protection of religious minorities was also provided for in the Treaty of Paris of 1763, which extended the protection to the French Catholic minority in British-controlled Canada. The treaty concluded in 1774 in Küçük Kaynarca between Russia and Turkey included provisions concerning the protection of the rights of the Orthodox minority on the Turkish territory. See Lerner, 2003, p. 25; Győri Szabó, 2006, pp. 82–83; Hannum, 2007, pp. 51–52. According to Muszyński, the roots of the protection of national minorities date back to the 4th-6th centuries in Asia Minor. Muszyński, 2022, p. 221.
24 Wilson, 1918.

frontiers of Italy along clearly recognisable lines of nationality (point IX), assuring the opportunity to autonomous development for the peoples of Austria-Hungary (point X), the establishment of relations among Balkan States along historically established lines of allegiance and nationality (point XI), and the creation of an independent Polish State which should include the territories inhabited by indisputably Polish populations, whose political and economic independence and territorial integrity should be guaranteed by international covenant (point XIII). Failure to fully address these demands adequately during peace negotiations after the First World War led to ethnic tensions in Central and Eastern Europe, as well as in the Balkans, some of which are still ongoing with varying intensity (e.g. the issue of the Hungarian minority in Romania and Slovakia, the ethnic tensions in the Balkan States).

During the Paris Conference, held from January 1919 to January 1920, the purpose of which was to draft a peace treaty ending the First World War, the issue of the protection of minority rights was treated as a matter requiring legal regulation. Its purpose was not only to guarantee the respect and protection for the national minorities themselves, but also in a broader sense to prevent separatist aspirations and protect stability in Europe. An overarching aim of creating protection regime after the First World War was to 'consolidate peace and understanding among nations'.[25] The architects of the League of Nation's system of minority protection hoped that 'the defeated countries would reconcile themselves more readily to the loss of territory they had suffered if the minority groups detached from them were well-treated and allowed to retain their culture and national characteristics'.[26] It was also anticipated that minorities that were satisfied with their lot would become loyal citizens of the states to which they had been transferred.

The Commission of New States, established in January 1919, was responsible for developing uniform rules on minority protection and tasked to draft the minority treaties. The work of the Commission laid the foundations for the creation of the League of Nation's system of minority protection, which should be understood as a system of legal regulations and a mechanism for the protection and investigation of violations of the rights of national minorities in countries covered by treaty obligations. The League of Nation's system was multi-layered, and consisted of (I) peace treaties signed with defeated states, (II) separate treaties on the protection of minorities signed with newly formed countries, annexed to the appropriate peace treaty, (III) declarations on respect for the rights of minorities made by countries later joining the League of Nations, as well as (IV) bilateral agreements regulating the situation of specific national minorities.[27] The Treaty of Versailles itself did not contain provisions on the protection of national minorities.[28]

25 UN Economic and Social Council, 1950, p. 42.
26 Ibid.
27 Muszyński, 2022, pp. 222–225; Sándor-Szalay, 2022.
28 Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles on 28 June 1919.

The first group of treaties – peace treaties with the defeated states – were signed with four countries: with Austria (10 September 1919 in Saint-Germain-en-Laye), with Bulgaria (27 November 1919 in Neuilly-sur-Seine), with Hungary (4 June 1920 in Trianon) and with Turkey (24 July 1923 in Lausanne).[29] They contained similar obligations related to the protection of minority rights, such as the obligations to ensure religious freedoms, equality before the law, language rights, the implementation of which was subject to the control of the League of Nations.[30] Unlike other peace treaties, the treaty concluded with Turkey did not refer to the concept of ethnic or national minorities, but made a distinction between the Muslim population and non-Muslim minorities.[31] As a consequence of the application of the religious criterion, without regard to nationality, protection was not extended to Muslim population groups of non-Turkish origin, such as the Kurds.

The second group of treaties that made up the League of Nation's system of minority protection were minority treaties signed with the newly created countries after the collapse of the Austro-Hungarian monarchy and the Ottoman Empire. The first such treaty was concluded with Poland on 28 June 1919 in Versailles.[32] This so-called 'Little Treaty of Versailles' became a model for drafting altogether thirteen minority treaties during the Paris Peace Conference. Its adoption was a condition for recognising the new Polish State, imposed by the international community.[33] Other minority treaties included the treaty with Czechoslovakia (10 September 1919 in Saint Germain-en-Laye), the Kingdom of Serbs, Croats and Slovenes (10 September 1919 in St. Germain-en-Laye), Romania (9 December 1919 in Paris) and Greece (10 August 1920 in Sévres).[34] With regard to the protection of minority rights, these treaties provided for a similar scope of guarantees, ensuring the principle of non-discrimination,

29 Treaty between the Principal Allied and Associated Powers and Austria, signed at Saint-Germain-en-Laye, September 10, 1919; Treaty between the Principal Allied and Associated Powers and Bulgaria and its Protocol, signed at Neuilly-sur-Seine on 27 November 1919; Treaty of Peace between the Allied and Associated Powers and Hungary concluded in Trianon on 4 June 1920; Treaty of Peace with Turkey signed at Lausanne on 24 July 1923.

30 See e.g. provisions on the protection of minorities were in the Treaty with Bulgaria (Chapter IV, arts. 49 to 57), provisions on the protection of minorities in the Treaty with Hungary (Chapter VI, arts. 54 to 60), provisions on the protection of minorities were in the Treaty with Austria (Chapter V, arts. 62 to 69).

31 The Treaty uses the term 'Turkish nationals belonging to non-Muslim minorities', cf. arts. 39–41 of the Treaty of Lausanne. The first peace treaty concluded with Turkey on 10 August 1920 in Sèvres did not enter into force. After the Greco-Turkish War of 1919–1922 and the revolution of Kemal Atatürk, a new peace treaty was signed in 1923 in Lausanne.

32 Minorities Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles on 28 June 1919.

33 Muszyński, 2022, p. 227.

34 Peace Treaty concluded between the Allied and Associated Powers and Czechoslovakia concluded in Saint Germain-en-Laye on 10 September 1919; Peace Treaty concluded between the Allied and Associated Powers and the Kingdom of Serbs, Croats and Slovenes concluded in Saint Germain-en-Laye on 10 September 1919; Treaty between the Principal Allied and Associated Powers and Romania, concluded in Paris on 9 December 1919; Treaty concluded between the Allied and Associated Powers and Greece in Sévres on August 10, 1920.

freedom of religion, equality before the law, freedom to use the minority language in the private sphere, limited rights to use the language in the public sphere, the right to establish and maintain religious and educational institutions and primary education in the minority language. Some of the minority treaties laid down guarantees relating to specific ethnic or national groups, such as the Jewish minority (the treaties concluded with Poland, Lithuania and Greece), the Szeklers and Saxon minorities (religious and educational autonomy in the treaty concluded with Romania) or to specific regions, e.g. Transcarpathian Ruthenia (legislative autonomy in linguistic, educational, religious matters and local administration in the treaty concluded with Czechoslovakia).

In addition to peace treaties containing clauses on the protection of minorities and minority treaties, the interwar system of minority protection also consisted of declarations made when joining the League of Nations. Such declarations were made by: Finland (27 June 1921), Albania (2 October 1921), Lithuania (12 May 1922), Latvia (7 July 1923) and Estonia (17 September 1923). The content of the commitments assumed by individual states was prepared in consultation with the Council of the League of Nations. The declarations were not uniform and differed from the clauses in peace and minority treaties.

The League of Nation's system of minority protection was supplemented by bilateral agreements concerning the situation of particular national minorities, e.g. the Greek-Bulgarian agreement of 1919, the Yugoslavian-Romanian agreement of 1920, the treaty between Poland and the Free City of Danzig of 1920, the Finnish-Swedish agreement of 1921 concerning the autonomy of the Åland Islands, the Polish-German convention on Upper Silesia of 1922 and the Polish-Czechoslovak convention of 1925.

The peace treaties and minority treaties contained similar provisions governing the proceedings in case of violations of minority rights.[35] They emphasised the international nature of the commitments made by states in the area of minority protection. Their content and scope could not be changed without the consent of the majority of the members of the Council of the League of Nations. Supervision over the implementation of obligations concerning the protection of national minorities was entrusted to the League of Nations. The Council of the League and the Permanent Court of International Justice were to be the guarantors of the durability and implementation of the newly created system of minority protection.[36] However, the League of Nations was established primarily as an organisation of a system of collective security, and the protection of human rights, including the rights of national minorities, was not the basic area of international cooperation in this system.[37] The Covenant of the League

35 See e.g. art. 12. of the Treaty with Poland in 1919, art. 12 .of the Treaty with Romania in 1919, art. 69. of the Treaty with Austria of 1919, art. 60. of the Treaty with Hungary of 1920, art. 44. of the Treaty with Turkey of 1923.
36 Thornberry, 1999, p. 44.
37 Győri Szabó, 2006, p. 83.

of Nations, like the Treaty of Versailles, made no direct reference to the protection of minority rights.[38]

The rules of procedure for filing complaints concerning violation of treaty obligations were set out in the resolutions of the Council of the League of Nations adopted in 1920, 1921, 1923 and 1925.[39] Legitimacy to file a complaint to the League of Nations belonged to states, not the national minorities themselves. The complex procedure for handling complaints included, among others, a pre-screening procedure in the League Secretariat, investigation before the Committee of the Council of the League of Nations, following which the matter was examined by the Council. If no agreement was reached before the Council of the League of Nations, the case could be referred to the Permanent Court of International Justice, before which only states could stand as parties.

As Muszyński points out, the interwar system of minority protection encompassed rights which could be classified as (I) direct positive rights (the right to maintain identity, the right to use the mother tongue), (II) indirect positive rights (the right to the protection of life, the right to the protection of freedom) and (III) special rights (individual and collective).[40] The League of Nation's system of minority protection was complex but lacked effectiveness. It shaped the rights of minorities in various countries in different ways, imposing obligations on different countries unevenly.[41] Germany has not been covered by the treaty obligations in the field of the protection of national minorities, despite its status as a defeated state. Such commitments were not accepted by the allied powers (France, Great Britain, Italy), either. The asymmetry in international relations in this respect led to the interference of the stronger countries in the internal affairs of the newly formed and defeated countries (with the exception of Germany). The way in which complaints filed by individual minorities were dealt with was not fully objective and impartial.[42] Insufficient regulation and underestimation of the importance of national issues after the First World War are indicated as one of the reasons for the outbreak of Second World War.[43] However, the very fact that the issue of protecting national minorities appeared on the international agenda, and the first attempts to establish a catalogue of rights for minorities, are considered positive developments.[44]

38 The Covenant of the League of Nations, adopted on 28 June 1919 in Paris, constituting an integral part of the Treaty of Peace between the Allied and Associated Powers and Germany, signed in Versailles on 28 June 1919.

39 Resolution of the Council of the League of Nations of October 25, 1920; Resolution of the Council of the League of Nations of June 27, 1921; Resolution of the Council of the League of Nations of September 5, 1923; Resolution of the Council of the League of Nations of 10 June 1925, cited in Galántai, 1993, pp. 172–176.

40 Muszyński, 2022, p. 228.

41 See e.g. Győri Szabó, 2006, p. 86; Muszyński, 2022, p. 229.

42 Muszyński, 2022, p. 229.

43 Jackson-Preece, 2006, p. 508; UN Economic and Social Council, 1950, p. 42.

44 Hannum, 2007, p. 54.

3.2. Protection of the Rights of National Minorities After 1945

The protection of the rights of national minorities developed after the Second World War at the universal level was to be carried out on different principles than those in the interwar period. In 1950, the UN Economic and Social Council reported about the emerging concept of a general and universal protection of human rights and fundamental freedoms. Consequently, it was no longer only the minorities in certain countries which received protection, but all human beings in all countries who received international protection. Within this system, some special provisions in favour of certain minorities were still conceivable, but the minority issue was approached according to a different philosophy from that which shaped the League of Nation's minority regime after the First World War.[45] The concept of the protection of collective rights, underlying the League of Nation's system of minority protection, was replaced by the protection of individual rights. Unlike the peace treaties after the First World War, the peace treaties concluded after the Second World War did not address the issue of the protection of national minorities.

After 1945, the protection of the rights of persons belonging to national minorities was to be ensured by a system of universal protection of fundamental human rights, founded upon the principle of equality and non-discrimination.[46] Therefore, there was no direct reference to the protection of national minorities in the UN Charter.[47] The rights of national minorities were also not explicitly indicated in the Universal Declaration of Human Rights of 1948 – it was then considered that referring to the rights of minorities would contradict the universal character of the Declaration. The first international treaty at the universal level that contained provisions explicitly related to the protection of the rights of national minorities was adopted within the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO). The Convention on Combating Discrimination in Education[48] of 1960, dedicated to promoting equality of educational opportunities, recognised the right of members of national minorities to carry on their own educational activities. A few years later, in 1966, another binding international instrument – the International Covenant on Civil and Political Rights – established the widest binding standards for minority protection at the universal level to date. In a single article, it provided persons belonging to minorities with the core rights necessary to preserve their national and cultural identity: the right to their own cultural life, religious freedom and the right to use their own language. The issue of minority protection returned to the UN agenda in the 1990s with the adoption *of the Declaration of the Rights of Persons Belonging* to *National* or *Ethnic*, *Religious* and *Linguistic Minorities in* 1992.

At the turn of the 20th and 21st centuries, the protection of national minorities at the universal level has primarily taken form of monitoring the implementation of

45 UN Economic and Social Council, 1950, p. 70.
46 Ibid.; Eide, 2007, p. 37.
47 Charter of the United Nations, adopted in San Francisco on 26 June 1945, XV UNCIO 335.
48 Convention on Combating Discrimination in Education, adopted in Paris on 14 December 1960, UNTS vol. 429, No. 6193.

states' obligations, without visible efforts to develop new international instruments. The key legal instruments adopted under the auspices of the UN establish special treaty bodies to monitor states' compliance with the international human rights obligations, primarily through the interpretation of treaty provisions and the examination of periodic reports of States Parties. Some of the treaty bodies are equipped with quasi-judicial powers enabling them to receive and consider individual communications (complaints) concerning violations of the provisions of the treaty.[49]

The Human Rights Committee, the treaty body established by the International Covenant on Civil and Political Rights (ICESCR), has the most extensive case-law and the greatest influence on the universal human rights system among all the UN treaty bodies, given that it was established under the 1966 Optional Protocol to the International Covenant on Civil and Political Rights.[50] Other treaty bodies have received the competence to examine individual complaints much later. The Committee on Economic, Social and Cultural Rights (CESCR) is competent to receive individual communications concerning alleged violations of the ICESCR, vis-à-vis states that have recognised its competence by ratifying the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.[51] The communication procedure before the CESCR is still of limited practical significance, given that relatively few states have ratified or acceded to the Optional Protocol so far. The Committee on the Rights of the Child has the competence to receive and consider individual communications based on the Optional Protocol to the Convention on the Rights of the Child in a communications procedure,[52] but its role in the protection of the rights of children belonging to national minorities via communication procedure is still limited.[53]

The UN human rights treaty system is complemented by several UN bodies with general competences in the field of monitoring human rights situation, such as the Human Rights Council, which carries out the Universal Periodic Review, a four-year cycle procedure to monitor the state of compliance with human rights obligations by all UN Member States.[54] The status of implementation of minority rights is also being monitored by UN bodies with the mandate connected specifically to the protection of national minorities. They include the UN Forum on Minority Issues UNFMI

49 Such as the Human Rights Committee (HRC, the treaty body established by the International Covenant on Civil and Political Rights), the Committee on Economic, Social and Cultural Rights (CESCR, the treaty body of the International Covenant on Economic, Social and Cultural Rights), or the Committee on the Rights of the Child (the treaty body established by the Convention on the Rights of the Child).

50 Optional Protocol to the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, UNTS vol. 999, No. 14668.

51 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted in New York, 10 December 2008, UNTS vol. 2922, No. 14531.

52 Optional Protocol to the Convention on the rights of the child on a communications procedure, adopted in New York on 19 December 2011, UNTS vol. 2983, No. 27531.

53 For more on the significance of the Optional Protocol to the Convention on the Rights of the child on communication procedure, see Benyusz, 2024.

54 The Human Rights Council was established by the General Assembly Resolution 60/251 of 15 March 2006, UN Doc A/RES/60/251.

(former UN Working Group on National Minorities) established in 2007, as well as the office of the Special Rapporteur on Minority Issues (former Independent Expert on Minority Issues), established in 2014.[55] The mandate of the Special Rapporteur is to, *inter alia*, promote the implementation of the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, conduct consultations with governments and examine existing international standards and national legislation concerning minorities, as well as to examine ways and means of overcoming existing obstacles to the full and effective realisation of the rights of persons belonging to minorities.[56]

4. The UN Framework for Protection of National Minorities

4.1. The Principle of Non-Discrimination

The prohibition of discrimination and the related principle of equality has underlain the entire universal regime of human rights protection since its creation under the auspices of the UN. The Charter of United Nations, adopted in 1945, embodied the principles of respect of human rights and of non-discrimination on the grounds of race, sex, language or religion.[57] These principles were later upheld in the Universal Declaration of Human Rights,[58] and further developed in main international human rights instruments, such as the 1966 International Covenant on Civil and Political Rights (Article 2 paragraph 1) and International Covenant on Economic, Social and Cultural Rights (Article 2 paragraph 2), in which States Parties undertook to ensure to all individuals within their territory human rights without distinction of any kind, including race, colour, sex, language, religion, national or social origin. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[59] provided even stronger protection against discrimination based on the grounds of ethnicity, as it prohibited

> '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'.[60]

55 The mandate of the Special Rapporteur on minority issues was established by the Commission on Human Rights in its resolution 2005/79 of 21 April 2005.
56 Ibid.
57 Charter of the United Nations, see art. 1 para. 3, art. 13 para. 1(b), art. 55(c), art. 76(c).
58 Art. 7 of the Universal Declaration of Human Rights.
59 International Convention on the Elimination of All Forms of Racial Discrimination, adopted in New York on 7 March 1966, UN Treaty Series vol. 660, No. 9464.
60 Art. 1 para. 1. of the International Convention on the Elimination of All Forms of Racial Discrimination.

At the same time, it was recognised that special measures might be necessary to ensure adequate development and protection of certain racial or ethnic groups, allowing them and their members to fully exercise their human rights and fundamental freedoms on an equal basis.[61] Such special measures of protection, referred to as *affirmative action*, are not considered racial discrimination, and are allowed as long as they do not lead to the maintenance of separate rights for different racial groups. This has been reiterated in the 1992 UN Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which underscores the states' obligation to implement special measures to ensure that persons belonging to minorities can fully and effectively exercise their human rights without any discrimination and in full equality before the law (Article 4 paragraph 1). Although states are generally obliged under international law to ensure that all members of society can exercise rights and freedoms on an equal basis, persons belonging to national minorities require particular attention, because of their special situation, meaning that they are often in a vulnerable position and have, in the past, often been subjected to discrimination.[62]

During the first decades of the development of the universal human rights framework, it was considered that the respect for the principle of equality and non-discrimination, which became the cornerstone of the international human rights regime, was already a significant benefit in minority protection, even without granting any special minority rights.[63] Therefore, the intensive efforts to codify international human rights law in the second half of the 20th century at the universal level did not focus on adopting an international treaty entirely dedicated to the protection of minority rights. Specific provisions on minority protection were included as a single article in general human rights treaties, such as the 1996 International Covenant on Civil and Political Rights and the 1989 Convention on the Rights of the Child.

4.2. Specific National Minority Provisions in Un Documents

Chronologically, the first special provisions regarding the rights of national minorities at the universal level were related to the protection of linguistic and educational rights. The 1960 UNESCO Convention on Combating Discrimination in Education, recognised the right of members of national minorities to conduct their own educational activities, including the establishment of schools and, the use or the teaching of their own language (Article 5 paragraph 1(c)). It set forth two important conditions. First, it stipulated that this right should not be exercised in a way that prevents members of national minorities from understanding the culture and language of the dominant population and from participating in its activities, or in a manner which prejudices national sovereignty. Second, it required that the standard of education

61 See art. 1 para. 4. of the International Convention on the Elimination of All Forms of Racial Discrimination.

62 UN Working Group on Minorities, 2005, para. 55.

63 See UN Economic and Social Council, 2005, p. 42; see also Szalai, 2018, pp. 523–524.

in minority institutions should not be lower than the general standard set by the competent authorities, and that the attendance at such schools should be optional.

The most notable foundation for specific regulations regarding the right of minorities to uphold and safeguard their cultural identity can be found in the 1966 International Covenant on Civil and Political Rights. Its Article 27 provides that

> 'in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

Article 27 of the ICCPR established cultural rights of persons belonging to national minorities, including linguistic rights and religious freedoms, necessary to ensure the survival and continuity of the development of their cultural, religious and social identity.[64] These guarantees are different from, and additional to, all the other rights that members of minorities are already entitled to under the ICCPR, just like all other individuals.[65] The personal scope of application of Article 27 of the ICCPR is broad, as the rights guaranteed therein are also granted to members of minorities who are not citizens of the States Party or its permanent residents. According to the HRC, the existence of an ethnic, religious or linguistic minority in a given state does not depend upon a decision by that States Party but requires to be established by objective criteria.[66]

The specific rights of national minorities to safeguard their cultural identity, language and religion, have also been enshrined in the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities. The Declaration is an important development of the universal standards for the minority protection included in Article 27 of the ICCPR, however, unlike the latter one, it does not have a binding legal force. The legal framework for minority protection under the 1992 Declaration is based on four principles: protection of the existence, non-exclusion, non-discrimination and non-assimilation of the national minorities.[67] Both, Article 27 of the ICCPR, as well as the (non-binding) provisions of the 1992 Declaration require from the state that it abstains from policies aiming at or resulting in the assimilation of minorities into the dominant culture; moreover, they oblige the state to protect members of minorities against activities by third parties which have an assimilatory effect.[68] Therefore, protective measures are necessary not only

64 UN Human Rights Committee, 1994, para. 9. The HRC considers that culture can manifest itself in many forms, which is why protection should also be extended to traditional activities and ways of life related to, for example, the use of natural resources and environment. See ibid., paras. 3.2, 7.
65 Ibid., paras. 1, 9.
66 Ibid., paras 5.1, 5.2.
67 UN Working Group on Minorities, 2005, para. 23.
68 UN Working Group on Minorities, 2005, para. 28.

against actions taken by the state party itself, but also against actions by individuals and entities within the States Party.[69]

The 1992 Declaration imposes on the states a positive obligation to protect the identity of national minorities. Article 1 paragraph 1 states that 'States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity'. Article 1 paragraph 2 adds that 'states shall adopt appropriate legislative and other measures to achieve those ends.' The protection of minority identity requires from the states four types of conduct: protection of the existence of the group, protection against exclusion, protection against discrimination, and protection against assimilation.[70] The 'existence of the group' should be understood as the physical presence of minorities, the continuity of their settlement in the area in which they are present, and constant access to material resources needed for survival. The protection of existence goes beyond the obligation to refrain from destroying or deliberately weakening minority groups, but it also requires respect for and protection of religious and cultural heritage important to their group identity, including institutions such as libraries and churches.[71] The protection of the group identity of minorities requires both tolerance and respect for their distinctiveness by the state and the rest of society. The state should refrain from activities that may lead to assimilation into the dominant culture, but should also ensure the protection of minorities against such actions by third parties.[72]

The educational and language policy of the state is crucial from the perspective of protecting minority identity. Depriving minorities of the opportunity to learn their own language and receive instruction in this language, or eliminating from their teaching the possibility of imparting knowledge about their own culture, history, tradition and language, amount to a breach of the obligation to protect the cultural identity of the minorities.[73] The protection of minority language rights under Article 1 of the 1992 Declaration includes the states' obligation to take positive action to protect the minority language and to provide the conditions for fostering linguistic identity. The minimum scope of obligations for states is the adoption of measures guaranteeing the protection of the right of members of minorities to use the minority language freely in the private sphere. Article 1 of the Declaration, however, does not imply an obligation on the state to take action to ensure the possibility of using the minority language in the public sphere, that is in contacts with state authorities.[74]

69 UN Human Rights Committee, 1994, para. 6.1.
70 See UN Working Group on Minorities, 2005, para. 23, according to which minority protection is based on four requirements: protection of the existence, non-exclusion, non-discrimination and non-assimilation of the groups concerned.
71 UN Working Group on Minorities, 2005, para. 24.
72 Ibid., para. 28.
73 Ibid.
74 de Varennes, 1997, pp. 12–13.

Article 2 paragraph 1 of the Declaration lays down explicitly the right of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. These provisions directly refer to Article 27 of the ICCPR. The wording used in the Declaration clearly indicates the existence of the right, while the ICCPR uses a negative construction ('persons belonging to such minorities shall not be denied the right'). Notwithstanding the drafting differences, the provisions of both documents require the state to take action beyond non-interference with the rights of members of minorities.[75] Article 2 paragraph 2 of the Declaration guarantees minorities the right to participate in cultural, religious, social, economic and public life, and it should be understood primarily in relation to the life of society as a whole.[76] Participation in the public life of society is essential for persons belonging to minorities and can be achieved for example, by setting up their own associations (Article 2 paragraph 4) and by establishing and maintaining free and peaceful contacts with other members of the minority, including contacts across frontiers (Article 2 paragraph 5). The right to participate requires the inclusion of members of minorities in decision-making processes at a national and regional level, especially on matters concerning them (Article 2 paragraph 3).

Article 2 of the 1992 Declaration does not impose on the state the obligation to provide public services in the minority language, but requires of the states to refrain from interference that would prevent members of minorities from using their language freely in the private sphere.[77] In this context, all aspects related to the use of language in the private sphere are protected, including the right to a name and surname in the minority language, the right to private communication in the minority language, both orally and in writing, and the right to use the minority language by private media. The use of language by collective private entities, such as cultural or political associations or educational institutions, is also protected.[78]

Article 4 of the 1992 Declaration obliges states to create favourable conditions to ensure that persons belonging to minorities can express their characteristics and develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards. Article 4 paragraph 3 stipulates that states should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue. Article 4 implies a general obligation of the states to take account of the linguistic needs of minorities in the field of education.[79] In cases where the minority language is a regional language, traditionally used by a large number of people in a given region of

75 See UN Human Rights Committee, 1994, para. 6.1; UN Working Group on Minorities, 2005, para. 33.
76 UN Working Group on Minorities, 2005, paras. 35–36.
77 Ibid., para. 21.
78 Ibid., paras. 27–29.
79 Ibid., para. 50.

the state, the state should allocate the maximum available resources to guarantee the protection of the linguistic identity of the minority.[80]

The Convention on the Rights of the Child adopted in 1989[81] was another international instrument adopted under the auspices of the UN, which introduced specific provisions aimed at safeguarding cultural identity of persons belonging to national minorities, with a particular focus on children. Its drafters in the Preamble emphasised the importance of the traditions and cultural values of each nation for the protection and harmonious development of the child. Article 8 of the UN CRC recognises every child's right to preserve his or her identity and obliges the states to respect the child's identity without unlawful interference. Article 8 lists only some elements of the child's identity, notably name, nationality and family relations. However, the Committee on the Rights of the Child holds that the child's identity should be construed in a much broader sense, which also includes national origin, religion and beliefs, as well as cultural identity.[82] Article 20 paragraph 3 of the UN CRC explicitly refers to the preservation of cultural identity in the context of placing the child in alternative care. It requires that state authorities pay due regard to the child's ethnic, religious, cultural and linguistic background when considering solutions for protecting a child deprived of his or her family environment.

Article 30 of the UN CRC, modelled on Article 27 of the ICCPR, addresses the rights of children belonging to national minorities and indigenous peoples.[83] It provides that

> 'in those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.'

Article 30 of the UN CRC requires from the states to take positive measures in order to protect the cultural identity, language or religion of a national minority or indigenous group, both in terms of actively fulfilling the right, and to protect against interferences by third parties.[84] The protective obligations stemming from Article 30 of the UN CRC encompass the duty of States Parties to identify the ethnic, religious or linguistic minorities and indigenous groups existing within their jurisdiction.[85] The limits of the enjoyment of rights protected under Article 30 are delineated by the existing human

80 UN Working Group on Minorities, 2005, para. 61.
81 Convention on the Rights of the Child adopted by the UN General Assembly on 20 November 1989, UNTS, No. 27531.
82 UN Committee on the Rights of the Child, 2013a, para. 55.
83 For more on the rights of children belonging to national minorities and indigenous peoples, see Zombory, 2025; Espejo-Yaksic, 2019.
84 UN Committee on the Rights of the Child, 2009, para. 17; Hodgkin and Newell, 2007, p. 456.
85 UN Committee on the Rights of the Child, 1996, para. 166.

rights framework, therefore, cultural practices of the given community cannot justify practices that are prejudicial to the child's dignity, health or development. Harmful cultural or religious practices, such as female genital mutilation or early marriages, do not enjoy protection under minority rights.[86]

Article 31 of the UN CRC recognises the right of the child to participate freely in cultural life and the arts. It obliges the states to respect and promote the right of the child to participate fully in cultural and artistic life, and to encourage the provision of equal opportunities for cultural and artistic activity. Involvement of children in the cultural life of their community is an important element of the child's sense of belonging to this community. Children inherit the cultural and artistic life of their families, communities and society, and in the process, they discover and shape their own identity.[87] Participation in cultural life and artistic activities is necessary to create in the child a sense of awareness of his or her own culture and respect for other traditions. Not only does it broaden the child's horizons and foster learning from other cultures, but it also allows the child to express his or her distinct identity. The Committee on the Rights of the Child has emphasised that children belonging to minorities or indigenous communities require special attention in connection with the exercise of the rights guaranteed in Article 31 of the UN CRC, which may be hindered, for example, by ethnic, racial or religious discrimination, assimilation policies, hostility, rejection or aggression. Children from ethnic, religious or linguistic minorities should be encouraged to use their own culture and participate in the cultural life of their community. The state should respect the cultural distinctiveness of such children and enable them the possibility participate in artistic activities and cultural life reflecting their own language, religion and culture on an equal footing with other children.[88]

4.3. Everyone's Right to Participate in Cultural Life

In addition to the general principle of non-discrimination and the specific minority rights enshrined in various binding and non-binding UN instruments, cultural rights of national minorities can be protected through the right to participate in cultural life – a right every individual is entitled to regardless of whether they belonging to a national minority. The provisions guaranteeing this right in general human rights treaties are not limited to members of minority groups. However, for persons belonging to national minorities and indigenous peoples, the protection of a distinct cultural identity can only be achieved through participation in the cultural life of their community together with other members. According to the CESCR, the right to participate in cultural life includes the right of national minorities to preserve and develop their cultural identity.[89]

86 UN Committee on the Rights of the Child, 2009, para. 22.
87 UN Committee on the Rights of the Child, 2013b, para. 11.
88 Ibid., para. 28.
89 UN Committee on Economic, Social and Cultural Rights, 2009.

The first document adopted under the auspices of the United Nations which contained provisions on participation in cultural life was the Universal Declaration of Human Rights of 1948 (UDHR).[90] Article 27 paragraph 1 of the UDHR guaranteed that 'everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' States have decided to include the right to participate in cultural life in the catalogue of rights guaranteed in the UDHR due to the importance of culture as an essential aspect of human life.[91] At the time of adopting the UDHR, culture was treated as an elite phenomenon and identified with the so-called high culture, associated with art and literature, which only the social and intellectual elites had access to.[92] Article 27 paragraph 1 of the UDHR was intended to encourage states to take action to popularise culture and promote access to it among average consumers. The term 'the right to freely participate in the cultural life of the community' used in the UDHR referred to the society as a whole. The right of persons belonging to national minorities to participate in the cultural life, local or indigenous communities remained outside the scope of Article 27 paragraph 1 of the UDHR.

In 1966, with the adoption of the ICESCR, the right to participate in cultural life has received protection in a binding international document, under Article 15 paragraph 1(a) of the ICESCR.[93] Initially, similarly to Article 27 paragraph 1 of the UDHR, Article 15 of the ICESCR was also interpreted in relation to the dominant culture.[94] This view was revised the by the CESCR in the early 1990s. The understanding of the right to participate in cultural life was then extended to include 'the right of every person to participate in the cultural life which he or she considers pertinent, and to manifest his or her own culture'.[95] The States Parties to the ICESCR were obliged to indicate in their periodic reports what measures they have taken to promote cultural identity as a factor of mutual understanding between individuals, groups, nations and regions, and to promote awareness of and use of the cultural heritage of ethnic groups, minorities and indigenous peoples.

The General Comment on Article 15 paragraph 1(a) of the ICESCR, issued by the CESCR in 2009, refers to the broad meaning of the terms "culture" and "cultural

90 Art. 27(1) of the UDHR states that 'every person has the right to freely participate in the cultural life of society, to enjoy the arts, to participate in the progress of science and to enjoy its benefits', while pursuant to art. 15(1)(a) of the ICCPR, 'the States Parties to the Covenant recognise the right of everyone to participate in cultural life'.

91 Donders, 2008, p. 3.

92 Ibid, pp. 3–4, see also Holt, 2007, p. 218.

93 Art. 15 para. 1(a) of the ICESCR states that 'The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life'.

94 Holt, 2007, p. 218; Donders, 2008, p. 4.

95 Revised General Guidelines regarding the form and contents of reports to be submitted by States Parties under arts. 16 and 17 of the International Covenant on Economic, Social and Cultural Rights of 17 June 1990, E/C.12/1991/1, see the guidelines concerning the implementation of art. 15 of the ICESCR.

life".[96] The definition of culture developed by the CESCR for the purpose of Article 15 paragraph 1(a) of the ICESCR includes, among others, various ways of life, language, written and oral literature, music and songs, non-verbal communication, religion and belief system, rituals and ceremonies, natural and man-made environment, cuisine, clothing, art, customs and traditions through which individuals, groups and communities express their humanity and meaning, which they attribute to their existence, and build their worldview.

The CESCR expressly held that Article 15 paragraph 1(a) also includes the right of minorities and persons belonging to minorities to participate in the cultural life of society, as well as to preserve, promote and develop their own culture. Corresponding to this right is the duty of the state to identify, respect and protect minority cultures.[97] The right of minorities to participate in cultural life includes all forms of expression of their cultural identity, including traditions, customs, religion and language. In the case of indigenous peoples, the right to participate in cultural life also includes the right to land and natural resources owned or traditionally used by such peoples.[98]

The core obligation of the states in relation the right to participate in cultural life is the obligation to create and promote an environment within which a person individually, or within a community or group, can participate in the culture of their choice.[99] Obligations of the state also include respecting the right of every person to choose their own cultural identity and to have their choice respected, protecting the right of each person to participate in their own cultural practices, eliminating obstacles to having access to their own culture and to other cultures, and enabling persons belonging to minorities and indigenous peoples to participate in the adoption and implementation of legislation and policies that affect them.[100]

The CESCR highlights the importance of the right to freely choose one's cultural identity, including the right to protection against forced assimilation and discrimination based on cultural identity. Other protected values include the right to freedom of opinion and expression in the language of one's choice, as well as access to one's own cultural and linguistic heritage. In this regard, the CESCR declares that states have a duty to respect the free access of minorities to their own culture, heritage and other forms of expression, as well as the free exercise of their cultural identity and practices.[101] These obligations require the state to take positive action, including financing, that will enable the exercise of the right to participate in cultural life. These activities should aim at the adoption of policies to protect and promote cultural diversity and

96 UN Committee on Economic, Social and Cultural Rights, 2009, para. 10.
97 UN Committee on Economic, Social and Cultural Rights, 2009, para. 32.
98 In General Comment No. 26 on land and economic, social, and cultural rights, the CESCR took a far-reaching approach on the implementation of art. 15 para. 1(a) of the ICESCR in connection with land rights and cultural rights of indigenous peoples, see UN Committee on Economic, Social and Cultural Rights, 2022.
99 UN Committee on Economic, Social and Cultural Rights, 2009, para. 55.
100 Ibid., paras. 49, 55.
101 Ibid., para. 49.

facilitate access to various forms of cultural expression. Cultural diversity should also be fostered through public media in minority and regional languages. The states should support the exercise by members of national minorities of the freedom of association, in order to better exercise their cultural and linguistic rights.[102]

The relationship between Article 15 of the ICESCR and Article 27 of the ICCPR can be described as one in which their provisions reinforce and complement each other. Otherwise, Article 27 of the ICCPR can be interpreted as *lex specialis* in relation to Article 15 of the ICESCR.[103] According to Capotorti, states are obliged to ensure the rights guaranteed by Article 15 of the ICESCR with respect to the culture of national minorities located on their territory.[104]

In the universal system of human rights, ensuring the enjoyment of the right to cultural participation is closely related to the mandate of UNESCO. Several documents refer to the cultural rights in the context of minority protection, albeit all of them are soft-law instruments. These are, among others, the 1976 Recommendation on Freedom of Cultural Participation, the 1978 Declaration on Race and Racial Prejudice, the 1982 Mexico City Declaration on Cultural Policy.[105]

4.4. The Case-Law of the Human Rights Committee on Minority Rights

The HRC is a treaty body monitoring the implementation of the International Covenant on Civil and Political Rights by its States Parties. Based on the first Optional Protocol to the ICCPR from 1966 (OP1-ICCPR), the HRC has the competence to receive and consider individual communications (complaints), from or on behalf of a person(s) claiming to be victims of a violation of the ICCPR by a States Party. The HRC's extensive case law regarding the rights of persons belonging to ethnic, religious, or linguistic minorities has developed around complaints filed by indigenous peoples concerning the violation of Article 27 of the ICCPR in connection with of the right to the traditional use of land and natural resources.

The relationship between the right to land and the culture of a given community were examined by the HRC in the case *Lubicon Lake Band v. Canada* in 1990.[106] Bernard Ominayak, the chief of the indigenous Indian community in Canada, claimed on behalf of the entire tribe a violation of the right to self-determination, guaranteed in Article 1 of the ICCPR. The Canadian government, despite officially recognising the right of indigenous tribes to a traditional way of life, allowed the provincial government to expropriate tribal members from their lands for the benefit of private mining

102 Ibid., para. 52.
103 Groni, 2008, p. 11.
104 Capotorti, 1976, p. 3.
105 Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it, adopted in Nairobi on 26 November 1976, UNESDOC CC.88/WS/34, Declaration on Race and Racial Prejudice, adopted in Paris on 27 November 1978, E/CN.4/Sub.2/1982/2/Add.1, annex V (1982); Mexico City Declaration on Cultural Policies, adopted in Mexico City in 1982, UNESDOC CLT/MD/1.
106 HRC, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, decision of 26 March 1990, communication no. 167/1984.

companies. The applicant alleged that Canada had violated the tribe's right to freely determine its political status and its right to economic, social and cultural development, as guaranteed by Article 1 paragraph 1 of the ICCPR. He also referred to the violation of the tribe's right to dispose of its own resources, which is protected under Article 1 paragraph 2 of the ICCPR. In the applicant's view, the Lubicon Lake tribe was deprived of its own means of subsistence and the right to self-determination.

The HRC noted that the applicant as an individual cannot be a victim of a violation of the right to self-determination, which in the light of Article 1 of the ICCPR is vested in group entities (peoples). At the same time, the right to self-determination may not be asserted in the manner provided for in the OP1-ICCPR, that is by way of an individual complaint to the HRC.[107] However, the circumstances of the case undoubtedly fall within the scope of Article 27 of the ICCPR. According to the HRC, the guarantees under Article 27 include the right to carry out economic and social activities that are part of the culture of a given community[108]. Consequently, the Committee concluded that 'historical inequalities [...] and some recent events pose a threat to the way of life and culture of the Lubicon Lake tribe and constitute a violation of Article 27 for as long as they occur.'[109]

The HRC adopted a dynamic and comprehensive interpretation of the right to safeguard cultural identity, including traditional ways of using land and natural resources, in connection with the Sami population in Northern Europe. In *Ivan Kitok v. Sweden* (1988),[110] the HRC considered a complaint of a Swedish citizen belonging to the Sami ethnic minority. The traditional activities of this population include, among others, reindeer herding. The HRC acknowledged that, in principle, the regulation of economic activities falls within the exclusive competence of the state, however, in a situation where such activity is an essential element of the culture of an ethnic community – as in the case of Sami – it may fall within the scope of Article 27 of the ICCPR.[111]

The HRC analysed the state's interference in terms of its impact on the ability of members of minorities to exercise their rights in two other cases of members of the Sami minority, claiming the right to enjoy culture under Article 27 of the ICCPR. In *Ilmari Länsman v. Finland* (1994) and *Jouni E. Länsman v. Finland* (1996),[112] the HRC

107 Ibid., paras. 13.3, 32.1.
108 Ibid., para. 32.2.
109 Ibid., para. 33. For an extensive analysis concerning the right to safeguarding cultural identity by members of Indian tribes in North America in connection with the right to live in a reserve, see also: HRC, *Sandra Lovelace v. Canada*, decision of 30 July 1981, communication no. R.6/24, in which the HRC found that the applicant's right to enjoy her culture was interfered with because there were no communities outside of the reserve that share the same language and culture.
110 HRC *Ivan Kitok v. Sweden*, decision of 27 July 1988, communication No. 197/1985.
111 Ibid., para. 9.2.
112 HRC, *Ilmari Länsman and Others v. Finland*, decision of 26 October 1994, communication No. 511/1992; HRC, *Jouni E. Länsman and Others v. Finland*, decision of 30 October 1996, communication No. 671/1995.

considered complaints brought by Sami reindeer herders concerning the right to enjoy their own Sami culture, which is largely based on traditional herding. According to the applicants, their right to their own cultural life was infringed by the state, which had authorised private operators to build quarries, cut down trees and build roads in reindeer grazing areas. According to the HRC, the state intervention did not have a significant impact on the applicants' activities in the field of breeding, and therefore did not constitute a violation of Article 27 of the ICCPR. The HRC took the view that measures which have only a limited impact on the way of life of people belonging to minorities do not necessarily mean a violation of the minority's rights to their own culture.[113] In *Ilmari Länsman v. Finland*, the applicants argued that the area where the quarries had been established was a sacred place according to Sami beliefs. The HRC analysed the case by examining whether the extraction of the stone did in fact prevent the applicants from exercising their right to their own culture in the region concerned.[114] The HRC found that the extraction of stone on the traditional land of the Sami populations in the quantities in which it has occurred so far had not constituted a denial of the authors' right to enjoy their own culture, guaranteed under Article 27 of the ICCPR.[115]

The HRC further developed its approach towards the protection of minority right to their own cultural life in *Ángela Poma Poma v. Peru* (2009).[116] The HRC decided that in order for the state to take actions affecting the traditional activities of minorities, it is necessary to obtain the prior consent of its members. The applicant, Ángela Poma Poma, a Peruvian national from the community of Aymara, ran an alpaca and llama farm with her family. The applicant's farm was located at an altitude of 4000 m above sea level, where there were suitable pastures and groundwater underground springs that brought water to the highland wetlands. In the 1950s, the Peruvian government diverted the course of the Uchusuma River, which resulted in a partial cut-off of the water supply to the wetlands on the pastures owned by the applicant. However, the water supply was provided from springs located in another part of the grazing field. Later, the state authorities commissioned drillings that had led to a significant reduction in the supply of drinking water and water necessary for farming on the applicant's grazing field. According to the applicant, as a result of the state's actions, the wetlands on which llamas were bred gradually dried up. For the families concerned, who were descendants of the Aymara people, llama breeding had been part of their way of life, customs and traditions for thousands of years. As a result of the significant reduction in livestock, the community lost its only source of livelihood. The state's actions also had a negative impact on the private and family life of the community, which consisted of customs, social relations, the Aymara language, and methods of breeding and caring for animals. Consequently, the applicant alleged that the Peruvian

113 *Ilmari Länsman v. Finland*, para. 9.4.
114 Ibid., para. 9.5.
115 Ibid., para. 9.6.
116 HRC, *Ángela Poma Poma v. Peru*, decision of 27 March 2009, communication No. 1457/2006.

Government had infringed the following provisions of the ICCPR: Article 1 paragraph 2 (right to freely dispose of natural resources), Article 2 paragraph 3(a) (right to an effective remedy), Article 14 paragraph 1 (right to a fair trial) and Article 17 (right to respect for family and private life).

The HRC analysed whether the state's activities related to the abstraction of water which led to the destruction of the applicant's land infringed her rights under Article 27 of the ICCPR. The applicant was a member of an ethnic minority, for whom llama breeding was an essential element of the culture, and constituted a form of survival and a tradition passed down from parents to children.[117] The HRC referred to its previous case-law, which demonstrated that not every state interference is a violation of the rights of minorities guaranteed in Article 27 of the ICCPR, but only interference that constitutes a refusal to exercise the right of a given community to enjoy its own culture can be considered as such. However, the case also introduced a new element to the HRC's case-law on the protection of cultural rights in the context of traditional economic activities. In the HRC's view, the legal assessment of measures that significantly interfere with the economic activities of cultural importance for a minority or indigenous community depends on whether members of the community have had the opportunity to participate in the decision-making process and expressed their views on these measures. When assessing the measures, it should be taken into account whether members of the community will still be able to benefit from traditional economic activities.[118] At the same time, the HRC defined the conditions that should be met by the participation of minorities in the decision-making process. Effective participation requires both consultation with the community concerned and the free, prior and informed consent of the members of the minority.[119] State interference should be proportionate so that it does not threaten the existence of the community.[120]

In the case in question, the applicant and other members of her community were not involved by the government in the decision-making process on well drilling. Nor have independent studies been commissioned on the impact of well construction on traditional economic activities, and no measures have been taken to mitigate or remedy the negative consequences. The Committee found that Article 27 of the ICCPR had been violated on the grounds that the state's actions significantly negatively

117 Ibid., para. 7.3.
118 Ibid., para. 7.6.
119 The principle of the free, prior and informed consent, explicitly recognised in the 2006 UN Declaration on the Rights of Indigenous Peoples, requires the states to consult and cooperate in good faith with the indigenous peoples, before adopting and implementing legislative or administrative measures that may affect them, especially in case of the projects that affect indigenous communities' rights to land, such as mining and or other exploitation of natural resources, see e.g. arts. 19, 28, 29, 32 of the 2006 UN Declaration on the Rights of Indigenous Peoples.
120 *Ángela Poma Poma v. Peru*, para. 7.6.

affected the applicant's way of life and culture, and violated her right to enjoy her own culture with other members of her group.[121]

More recently, the HRC has considered complaints about the violation of minority rights guaranteed in Article 27 of the ICCPR in the context of the protection of political rights under Article 25 of the ICCPR. In *Sanila-Aikio v. Finland* (2017)[122] and *Käkkäläjärvi and Others v. Finland* (2018),[123] the HRC examined complaints from members of the Sami community concerning unlawful state interference in the process of establishing the electoral roll entitled to vote in elections to the representative body of the Sami population (autonomous Sami Parliament).

The Sami Parliament is central to the cultural and linguistic autonomy of the Finnish Sami people, guaranteed by the Constitution of Finland, and its composition and competences are defined in Act No 974/1995 on the Sami Parliament. According to the statutory regulations, the task of the Parliament is to 'take care of the Sami language and culture, as well as care for matters related to their status as indigenous peoples'.[124] The Act No 974/1995 contains a legal definition to determine who can be considered a member of the Sámi community for the purposes of being admitted to vote in elections to the Sámi Parliament. This definition was constructed by combining a subjective criterion (a sense of belonging to the Sami) and objective criteria (e.g. the Sami language as the mother tongue of a given person or one of his ancestors). Before each election, the Electoral Commission of the Sami Parliament establishes a list of voters entitled to vote, and those who are not included in it can apply to be added to the electoral roll. The decision in this respect is taken by the Electoral Commission and the Board of the Sami Parliament, using the criteria set out in the statutory definition contained in the Act on the Sami Parliament when assessing whether applicants have the right to stand for election. This decision is subject to judicial review by the Supreme Administrative Court of Finland.

After 2011, the earlier practice of the Supreme Administrative Court, according to which while interpreting the statutory definition of Sami, both subjective and objective criteria should be taken into account, had changed. In 2015, 93 such persons were nevertheless allowed to vote in the elections to the Sami Parliament, whose applications to be added to the electoral roll had not been approved by the autonomous bodies of the Sami community, because they had not met the objective criteria for recognition as a member of this community. However by the decision of the Supreme Administrative Court, which had overruled the decision of the Sami autonomous bodies, they obtained the right to stand for election solely due to their subjective sense

121 Ibid., para. 7.7. The HRC refrained from examining the infringement of the applicant's right to respect for family and private life.

122 HRC, *Tina Sanila-Aikio v. Finland*, decision on admissibility adopted on 28 March 2017, communication No. 2668/2015, and HRC, *Tina Sanila-Aikio v. Finland*, decision on merits adopted on 1 November 2018, communication No. 2950/2017.

123 HRC, *Klemetti Käkkäläjärvi et al. v. Finland*, decision adopted on 2 November 2018, communication No. 2950/2017.

124 *Tina Sanila-Aikio v. Finland*, decision on admissibility, para. 2.2.

of belonging to the Sami community.[125] According to the applicants, the state intervention had led to a change in the national proportions of the members of the Sami Parliament and weakened the voice of the indigenous people in its representative body. As a consequence, the effectiveness of the Sami Parliament as a body representing indigenous peoples vis-à-vis the state authorities in making decisions concerning their culture, territories and economic interests has been significantly reduced. In both cases, the applicants therefore alleged that the state had violated Article 1 (right to self-determination), Article 25 (right to political participation), Article 26 (right to equal legal protection) and Article 27 of the ICCPR (rights of minorities).

The HRC pointed out that the guarantees under Article 27 of the ICCPR, interpreted in the light of Article 1 of the ICCPR and the provisions of the UN Declaration on the Rights of Indigenous Peoples,[126] include not only the inalienable right of indigenous peoples to freely pursue economic, social and cultural development, but also to freely determine their political status.[127]

The HRC considered that the proper functioning of the Sami Parliament and its ability to effectively represent the views of indigenous peoples were essential for the proper implementation of Articles 25 and 27 of the ICCPR by the state.[128] Their own Parliament enables Sami to exercise the rights protected under Articles 25 and 27 of the ICCPR, individually and collectively. In addition, the state uses it to ensure that members of the indigenous population participate effectively in decisions that affect them and that affect their right to enjoy their own culture or to use their own language in community with others. The HRC reminded that any restrictions affecting the exercise of political rights guaranteed by Article 25 of the ICCPR by indigenous peoples should be rational and objectively justified and consistent with other provisions of the ICCPR, including the right of peoples to internal self-determination.[129]

The HRC agreed with the allegations that the jurisprudence of the Finnish Supreme Administrative Court undermined the ability of the Sami people to exercise their right to self-determination in its key aspect, namely the ability to decide who ethnic Sami

125 Ahead of the 2015 Sami parliamentary elections, several hundred new applications were submitted to be added to the electoral roll, the vast majority of which were not approved by the Electoral Commission and the Sámi Parliament's Executive Board.182 appeals were filed against the decisions of the first-instance authorities to the Supreme Administrative Court, which granted 93 appeals, *Käkkäläjärvi and others v. Finland,* paragraph 2.9. The mass influx of new applications for entry on the electoral roll was related, inter alia, to the activity of organisations unfavourable to Sami communities, which persuaded non-indigenous Finns to apply for entry in the register of voters to the Sami Parliament, ibid., para. 8.9.

126 UN Declaration on the Rights of Indigenous Peoples, UN General Assembly resolution of 13 September 2007, A/RES/61/295.

127 *Tina Sanila-Aikio v. Finland*, decision merits, paragraph 6.8; *Käkkäläjärvi and Others v. Finland*, para. 9.8.

128 *Tina Sanila-Aikio v. Finland*, views on merits, para. 6.10; *Käkkäläjärvi and Others v. Finland,* para. 9.10.

129 Ibid.

is.[130] According to the HRC, the Finnish court's rulings constituted an interference with the right of the applicants and the entire Sami community to participate in the procedure of electing representatives to an institution enabling them to exercise their right to their own language and culture, and thus effectively exercise their right to internal self-determination. The HRC took the view that the state had violated Article 25 of the ICCPR, read separately and in conjunction with Article 27 of the ICCPR, and in the light of Article 1 of the ICCPR.[131] The HRC recommended Finland to amend the provisions of the Law on the Sami Parliament so that the criteria for the right to stand as a candidate in elections to the Sami Parliament are defined and applied in a manner that respects the right of the population to internal self-determination, in accordance with the provisions of Articles 25 and 27 of the ICCPR.[132]

As far as the Central and Eastern Europe is concerned, the quasi-jurisprudential activity of the HRC related to communications on alleged violations of minority rights under Article 27 of the ICCPR has not been substantial. In the Central-European context, the HRC has dealt with a few cases concerning the use of minority language in the public sphere, and the official recognition (spelling) of the name in minority language. In *Raihman v. Latvia*,[133] the name and surname of the applicant, who belonged to the Russian and Jewish minorities in Latvia, had been changed from 'Leonid Raihman' to 'Leonīds Raihmans' against his will. The original version of the name was registered by the state authorities in the Soviet Union, and in 1998 the Latvian authorities, by issuing a temporary passport to the applicant, made changes to adapt it to the form in accordance with the rules for the creation of male surnames in the Latvian language. This form was incompatible with the Russian and Jewish language rules. In 2001, the applicant was granted Latvian nationality and identity documents in which his name was written in accordance with Latvian rules, and subsequently applied unsuccessfully for a correction. The applicant alleged a violation of Article 17 (the right to respect for private and family life), Article 17 in conjunction with Article 2 (prohibition of discrimination in the exercise of the rights guaranteed by the ICCPR), Article 26 (general prohibition of discrimination) and Article 27 of the ICCPR (minority rights) before the HRC. According to the applicant, a unilateral modification of his name and surname after 40 years of using it in its original form caused inconveniences in everyday life and a sense of alienation due to the arbitrariness of the authorities.

The HRC noted that a surname is an essential element of identity and that protection against arbitrary and unlawful invasion of privacy includes the right to choose

130 *Tina Sanila-Aikio v. Finland*, decision on merits, para. 6.11; *Käkkäläjärvi and Others v. Finland,* para. 9.11.
131 Ibid. At the same time, the HRC refrained from considering the notifications in the remaining scope, i.e. in connection with the allegation of violation of art. 26 of the ICCPR.
132 *Tina Sanila-Aikio v. Finland*, decision on merits, para. 8; *Käkkäläjärvi and Others v. Finland,* para. 11.
133 HRC, *Raihman v. Latvia*, decision of 30 November 2010, communication No. 1621/2007.

and change one's name.[134] While examining whether the state's action met the criteria of unlawful interference under Article 17 of the ICCPR, the HRC noted that the change of the applicant's name was intended to align it with the Latvian grammatical rules. The change took place based on the provisions of the Latvian language legislation, so it could not be considered illegal. Analysing the premise of arbitrary interference, the HRC reminded that arbitrary interference may also characterise state actions taken based on legal provisions.[135] The concept of 'arbitrary interference' was introduced to ensure that legitimate state interference is compatible with the objectives set out in the ICCPR and justified in specific circumstances. The purpose of Latvia's interference with the applicant's right was to protect the Latvian language and its grammatical integrity. The HRC also took into account the historical context (the difficulties to which the Latvian language was exposed during the Soviet occupation) and concluded that the objective of the state interference was a legitimate one. At the same time, however, the HRC found that the interference with the applicant's right entailed significant inconveniences for him, which were not justified or proportionate to the purpose of the interference. The HRC confirmed that the issue of legislative policy and the determination of measures aimed at protecting and promoting official languages is left to the discretion of the state. However, according to the HRC, 'the forceful addition of a declinable ending to a surname, which has been used in its original form for decades, and which modifies its phonic pronunciation, is an intrusive measure, which is not proportionate to the aim of protecting the official state language'.[136] Referring to its previous case law, the HRC held that the right to choose and change one's name and surname, protected under Article 17 of the ICCPR, also means protection against forced change of name and surname by the state. The HRC concluded that the arbitrary change of the applicant's name and surname in official documents had not been justified and constituted an interference with his privacy, which amounted to a violation of Article 17 of the ICCPR. Recognising the violation of the right to respect for private and family life, the HRC did not consider the case in terms of violation of Article 26, Article 27 or Article 2 paragraph 1 in conjunction with Article 17 of the ICCPR. Therefore, the language rights of the applicant, who belonged to a national minority, were protected based on legal guarantees available to every person, not minority-specific rights (Article 27 of the ICCPR). The issue of the spelling of the name and surname was also the subject of a complaint in *Valery Moyseenko v. Ukraine*,[137] brought before the HRC by a person belonging to the Russian community, living in the eastern part of Ukraine. In the applicant's birth certificate issued by the Soviet Union, his given name, patronymic and surname were written according to the rules of Russian spelling. In the applicant's identity card, already issued by the Ukrainian authorities, the given name, patronymic and surname were written

134 Ibid., para. 8.2.
135 Ibid., para. 8.3.
136 Ibid., para. 8.3.
137 HRC, *Valery Moyseenko v. Ukraine*, decision of 8 November 2019, communication No. 2717/2016.

in two language versions – Russian and Ukrainian. In 2009, the applicant received a passport in which his name was written only in Ukrainian. Also, the transliteration of the Russian's name and surname into the Latin alphabet was made on the basis of Ukrainian, not Russian spelling. According to the applicant, the right to a name and surname guaranteed by the Civil Code of Ukraine requires that national traditions be taken into account when spelling and transliterating names and surnames. The applicant applied for the correction of the transliteration in the passport on several occasions, both before public administration authorities and in courts. His requests were not taken into account by the Ukrainian authorities, who referred to the fact that Russian is not the official language of Ukraine and, according to the applicable regulations, cannot be used as a basis for transliteration of the names and surnames of Ukrainian citizens into the Latin alphabet. The applicant alleged before the HRC that Ukraine had violated Article 17 (the right to respect for private and family life) and Article 27 of the ICCPR (minority rights).

The HRC rejected the complaint on the grounds that it did not meet the admissibility criteria specified in Article 2 of the OP1-ICCPR. The applicant failed to demonstrate sufficiently that the state had committed arbitrary and unlawful interference with his rights guaranteed by Articles 17 and 27 of the ICCPR, nor did he explain how he was adversely affected by the transliteration of his name and surname into the Latin alphabet on the basis of Ukrainian spelling.

The analysis of the HRC case law related to Article 27 of the ICCPR demonstrates that over the years, the HRC's approach to protecting cultural rights has evolved toward more far-reaching protection of groups with different cultural identities. In the case-law of the HRC, the protection of certain rights of national minorities, primarily linguistic rights, sometimes comes to effect through fundamental human rights available to every person, such as the prohibition of discrimination, the right to freedom of expression or respect for private and family life, rather than through provisions directly protecting linguistic rights (that is Article 27 of the ICCPR).[138] These guarantees are not directly intended to protect cultural rights, and yet the case law of the HRC demonstrates that they can serve the protection of the linguistic and cultural identity of minorities better than Article 27 of the ICCPR, which also showcases the interdependence of all human rights.

5. Case Study of South Tyrol as an Example of Addressing Minority Issues Within the UN Forum

The case of South Tyrol serves as a good practice example of resolving a minority-related bilateral conflict within the UN forum. From 14th century until the end of the First World War, South Tyrol was part of the Habsburg Monarchy. At the turn

138 See also HRC, *J.G.A. Diergaardt and others v. Namibia*, decision of 6 September 2000, communication No. 70/1997.

of the 19th and 20th centuries, this region was inhabited by only 4% of the Italian population, and the remaining part was inhabited by German-speaking and Romansh (Ladin) population.[139] Nonetheless, after the First World War, the border between Austria and Italy was set along the Brenner Pass, and the area south of this border was incorporated into Italy, leaving a substantial number of German-speaking population on the territory of Italy.[140] In the period that followed the annexation of South Tyrol to Italy, the German-speaking minority was affected by intensive assimilation policy from the part of the Italian state.[141]

After the Second World War, South Tyrol still remained within the borders of Italy. Austria and Italy began direct negotiations on the regulation of the legal status of minorities in the Alto Adige-Trentino region, which resulted in the signing on 5 September 1946 of a bilateral agreement. The signing of the act was attended by the Italian Prime Minister Alcide Degasperi and the Austrian Foreign Minister Karl Gruber, therefore, the bilateral treaty was referred to as the Gruber-Degasperi Treaty. It became part of the Paris Peace Treaty signed with Italy in 1947.[142] The treaty provided for the autonomous status of South Tyrol, including *inter alia* equal rights for the German-speaking minority and the Italian population, equal status for the Italian and German languages, and also established parities in employment in the public service. The provisions of the Gruber-Degasperi Treaty, which is the international legal basis for the autonomy of South Tyrol, were incorporated into the provisions of the Italian Constitution of 1947 granting the Trentino-Alto Adige region a specific form of autonomy.[143] On 26 February 1948, the so-called first autonomous statute was adopted the purpose of implementing international obligations.[144]

The Constitution of Italy of 1948 granted autonomous legislative and executive powers to the entire Alto Adige-Trentino region, but not to the province of Bolzano (Bozen) itself, where the German-speaking population was the dominant group. In such a designated autonomous region, Italians constituted over 70% of the population,

139 Lantschner, 2008, p. 5.

140 In his peace programme for the post-war Europe, the U.S. President Wilson suggested that a readjustment of the frontiers of Italy along clearly recognisable lines of nationality should be made.

141 Actions aimed at depriving the German population of its cultural identity involved among others: intensive Italianisation and displacement of the German language from the public sphere, including education, and mass resettlement of the Italian population to the German-speaking province of Bolzano in order to change the national structure. These actions were drastic and covered all spheres of private and public life, the names and surnames of members of the German minority were Italianised even on the already existing tombstones. The name of the entire region – South Tyrol (German: *Südtirol*) – was replaced by the Italian name Alto Adige, and any reference to the name Tyrol was banned. Győri Szabó, 2006, p. 222. For more information, see Lantschner, 2008, pp. 6–9.

142 Treaty of Peace with Italy, adopted in Paris on 10 February 1947. Agreement between the Governments of Austria and Italy, signed in Paris on 5 September 1946 (Gruber–Degasperi Agreement).

143 Art. 116 of the Constitution of the Italian Republic of 27 December 1947.

144 Lantschner, 2008, p. 10.

which left the German population in the minority and was an attempt to weaken its influence.[145] Representatives of minorities supported by Austria negated the Autonomous Statute of 1948, considering it incompatible with the international obligations assumed by Italy in the Gruber-Degasperi Treaty.[146]

In 1960, the Foreign Minister of Austria Bruno Kreisky presented the issue of the German-speaking minority in South Tyrol to the UN General Assembly.[147] The Austrian government filed a complaint against Italy, on the account of discriminatory policy towards the German minority and non-compliance with the international obligations. The issue of the German-speaking population in South Tyrol was on the agenda of the UN General Assembly twice. Two resolutions adopted in 1960 and 1961 by the UN General Assembly reaffirmed Austria's right to intervene in the matter of civil protection in South Tyrol by virtue of its status as a party to the Treaty on the Protection of Minorities in the region (the so-called Gruber-Degasperi Treaty).[148] The resolutions urged the States Parties to resume negotiations in order to reach a common position on the implementation of the Treaty. In the event that a compromise is not reached within a reasonable time, it was recommended to have recourse to other peaceful means of resolving international disputes as set out in the UN Charter, including bringing the case to the International Court of Justice (ICJ). The possibility of bringing a case related to the protection of national minority before the ICJ had its legal basis in an international (bilateral) treaty.

Austria and Italy entered into negotiations which involved the participation of a mixed commission, the so-called Commission of Nineteen. They led to the adoption in 1969 of a bilateral international agreement, the so-called 'Package Agreement', which included a comprehensive proposal for reforms in relation to the first Autonomous Statute.[149] The most important change in relation to the previous legal status was extending the autonomous status to the province of Bolzano, and the establishment of a separate autonomy for the neighbouring province of Trentino. The Constitutional Law of 10 November 1971 (Second Autonomous Statute) conferred the autonomous legislative and executive powers on each province separately.[150] The Package

145 Ibid.
146 Medda-Windischer, 2008, p. 18.
147 Győri Szabó, 2006, p. 226.
148 N General Assembly Resolution 1497 (XV) on the Status of the German-speaking element in the province of Bolzano, implementation of the Paris Agreement of 5 September 1946, 31 October 1960; UN General Assembly Resolution 1661 (XVI) on the Status of the German-speaking element in the province of Bolzano/Bozen, November 28, 1961. Text of the resolution available on the UN website.
149 The Package Agreement was signed on 29 November 1969 by the Austrian Foreign Ministers, Kurt Waldheim, and the Italian Foreign Ministers, Aldo Moro, after its earlier adoption by the Trentino-Alto Adige Regional Assembly. See also Alcock, 1982.
150 On 31 August 1972, the President of the Italian Republic issued Decree No. 670 on the autonomy of the Trentino-Alto Adige Region. The current art. 116 of the Italian Constitution states that the Trentino-Alto Adige/Südtirol Region consists of the autonomous provinces of Trento and Bolzano.

Agreement also included a timetable for the various actions to implement autonomy.[151] In the 1970s, the provinces were given administrative powers in the field of education, and in parallel, rules for determining employment parities in public administration were put in place. At the end of the 1980s, the use of German and Romansh in contacts with public administration and in court proceedings was legally regulated.[152] The full implementation of the second autonomous statute took twenty years. In June 1992, the Austrian and Italian governments officially declared the end of the dispute, and the fulfilment of their obligations regarding South Tyrol under bilateral international agreements and GA 1497 (XV).[153]

The participation of the UN in the protection of national minorities in South Tyrol was important for resolving the dispute. Some authors point to the minimalist nature of the General Assembly resolutions, the content of which was limited to calling on the parties to continue negotiations.[154] No specific actions were imposed on the parties to the conflict, which allowed the countries concerned to develop appropriate solutions. At the same time, however, the issue was brought under observation of the international community, which urged the parties of the dispute to work out a peaceful solution, using the means set out in the UN Charter. The international nature of the case was also confirmed and the legitimacy of Austria as the kin-state was recognised, allowing it to act as protector of the German-speaking minority in South Tyrol.

Austria presented the issue of the protection of the rights of national minorities in South Tyrol before the General Assembly without making territorial claims. While demanding the protection of the German-speaking population, Austria referred to international standards for the protection of minority rights, and requested the GA to deal with the issue based on Articles 10 and 14 of the UN Charter.[155] Such an approach to the issue of the protection of national minorities was recognised at the UN forum as an acceptable form of interference by a kin-state in the issue of the protection of minority rights on the territory of another state. It was recognised that national minorities do not have the right to *external self-determination*, i.e. to act for the sake of gaining independence or joining the kin-state. However, the minority's right to *internal self-determination*, which consists of efforts aimed at obtaining autonomous status within the host state was reaffirmed.[156]

151 Győri Szabó, 2006, p. 226.
152 Lantschner, 2008, p. 14.
153 Documents of 17 June 1992; UN Doc. A/46/939 and UN Doc. A/46/940.
154 Medda-Windischer, 2008, p. 22.
155 Ibid., p. 21.
156 Ibid., p. 25; see also Kymlicka, 2008, pp. 46–47; Crawford, 2006, pp. 388–391; UN Committee on the Elimination of Racial Discrimination, 1996, para. 9.

6. Summary

The vulnerable situation of persons belonging to national minorities stems from their distinct cultural identity and the linguistic, ethnic or religious characteristics that make members of a national minority different from the majority of the population. Different national and cultural backgrounds can give incentives for discriminatory attitudes from the state authorities and majority population. The discriminatory practices not only hinder the full exercise of human rights and freedoms by persons belonging to minorities, but they can also impede the preservation of their distinct cultural identity and lead to what is usually described as assimilation or cultural erosion.

The legal guarantees that serve to protect the cultural identity of persons belonging to national minorities and aim to prevent their discrimination are referred to as *minority rights*. They encompass, among others, the right to use the minority language, the right to learn a minority language and receive education in that language, the right of individuals belonging to national minority to establish their own educational institutions, to practice their own religion, to enjoy their own culture and participate in the cultural life of their community. In the international human rights law, the guarantees which protect free access and enjoyment of culture, not only with respect to the protection of national minorities, are referred to as *cultural human rights*, and belong to the second generation of human rights.

Although there is no universally agreed definition of national minorities in international law, there is a wide consensus that the term national minorities denotes a group numerically smaller than the rest of the population of a state, in a non-dominant position, and whose members possess ethnic, religious or linguistic characteristics differing from the rest of the population and show a sense of solidarity directed towards preserving their culture, traditions, religion or language (Capotorti). The term *national minority* is more commonly used in the European instruments on minority rights than in UN documents, which typically refer to ethnic, linguistic and religious minorities.

The origins of the legal framework for the protection of national minorities can be traced back to the interwar period and the League of Nations system for national minority protection. It consisted of various kinds of international treaties and documents (the peace treaties signed after the First World War with the defeated states, separate minority treaties signed with newly formed countries, as well as bilateral agreements regulating the situation of specific national minorities, and declarations on respect for national minorities made by countries later joining the League of Nations). The League of Nation's regime provided for legal protection for specific ethnic or national groups, such as the Jewish minority, the Szeklers or the Saxon minority. The League of Nation's treaty system laid the ground for a comprehensive framework for minority protection, which equipped the Permanent Court of

International Justice with the jurisdiction over minority disputes; nevertheless, the system lacked effectiveness primarily due to asymmetry in international relations.

After 1945, with the creation of the United Nations and the development of the universal human rights system, the protection of collective rights of national minorities, central to the League of Nation's system of minority protection, was replaced by the focus on guaranteeing individual rights of persons belonging to national minorities. The protection of minorities was to be ensured through the principle of equality and non-discrimination, whose purpose was to ensure that all persons, irrespective of their nationality, race, colour, language, religion, national or social origin, can fully and effectively exercise their human rights. The developments in international human rights law in the second half of the 20th century at the universal level have not led to the adoption of an international treaty dedicated solely to minority rights.

The present UN framework for the protection of national minorities is based on general, as well as minority-specific provisions. The general legal norms relevant for the protection of national minorities primarily include the prohibition of discrimination (UDHR, ICCPR, ICESCR), as well as the right to the protection of cultural identity anchored in the right of everyone to participate in cultural life (ICESCR). Minority-specific rights are included in several binding instruments (Article 27 of the ICCPR, Article 30 of the CRC, Article 5 paragraph 1(c) of the UNESCO Convention against Discrimination in Education), as well as in soft-law documents (the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities).

The implementation of states' obligations concerning the protection of human rights, including minority rights, is monitored by the competent treaty bodies. The monitoring takes place through periodic reporting, as well as within the individual communication procedure, albeit the latter is only possible with respect to states that have ratified the relevant optional protocol providing for the possibility to file an individual complaint to the given treaty body. The Human Rights Committee has developed significant case-law related to protecting cultural rights of national minorities guaranteed in Article 27 ICCPR, albeit primarily with respect to natural resources and traditional ways of life of indigenous peoples, which also enjoy protection under minority rights. The Human Rights Committee has not typically focused on cases related to the protection of national minority rights in Central and Eastern Europe. Other treaty bodies (CESCR, CRC) have less influence on the universal human rights system and minority protection.

The substantial contribution of the UN human rights system to minority protection is evident in the adoption of several binding, although fragmented standards related to the rights of national minorities. These standards have provided impetus for further initiatives in minority protection at both the universal and regional levels, including the European system of human rights. The last two decades have not seen any substantial progress in developing the legal framework for minority protection within the universal human rights system. With the intensive development of the European framework for minority protection in 1990s, and the inclusion

of the respect for national minorities into the EU membership criteria (Copenhagen criteria), the concept of protecting national minorities – deeply embedded in the European history – achieved a higher level of recognition and became more effective at the European level compared to the UN human rights system. Nonetheless, it was the UN that spearheaded the international protection of the right of every nation to express and preserve its 'fundamental spiritual sovereignty' through the right to its own culture.[157]

157 'A presupposition of a nation's rights is certainly its right to exist: therefore no one — neither a state nor another nation, nor an international organisation — is ever justified in asserting that an individual nation is not worthy of existence. […] Its right to exist naturally implies that every nation also enjoys the right to its own language and culture, through which a people expresses and promotes that which I would call its fundamental spiritual 'sovereignty'.' John Paul II, 1995.

Bibliography

Alcock, A.E. (1982) 'The South Tyrol Package Agreement of 1969 and Its Effect on Ethnic Relations in the Province of Bolzano', *Irish Studies in International Affairs*, 1(3), pp. 47–54.

Bándi, Gy. (2020) 'A fenntartható fejlődés és az őshonos nemzeti kisebbségek' in Dabis, A. (ed.) *Magyarok jogvédelme a Kárpát-medencében*. Budapest: Kisebbségi Jogvédő Intézet, pp. 11–44.

Benyusz, M. (2024) 'Optional Protocol on a Communications Procedure' in Benyusz, M., Raisz, A. (eds.) *International Children's Rights*. Miskolc–Budapest: Central European Academic Publishing. pp. 241–257; https://doi:10.71009/2024.mbar.icr_10.

Capotorti, F. (1976) 'The protection of Minorities under Multilateral Agreements on Human Rights', *Italian Yearbook of International Law*, 2(1), pp. 3–32.

Capotorti, F. (1979) *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. UN Doc. E/CN.4/Sub.2/384/Rev.1.* New York: United Nations.

Crawford, J. (2006) *The Creation of States in International Law*. Oxford: Oxford University Press.

de Varennes, F. (1997) *To speak or not to speak: the rights of persons belonging to linguistic minorities. Working paper. E/CN.4/Sub.2/AC.5/1997/WP.6* [Online]. Available at: https://digitallibrary.un.org/record/239464 (Accessed: 28 February 2025).

Donders, Y. (2008) *Cultural Life in the Context of Human Rights. E/C.12/40/13*. 9 May 2008. [Online]. Available at: https://digitallibrary.un.org/record/627390/files/E_C.12_40_13-EN.pdf (Accessed: 28 February 2025).

Eide, A. (2006) 'The Framework Convention in Historical and Global Perspective' in Weller, M. (ed.) *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*. Oxford: Oxford Academic, pp. 25–48.

Espejo-Yaksic, N. (2019) 'International Laws on the Rights of Indigenous Children' in Kilkelly, U., Liefaard, T. (eds.) *International Human Rights of Children*. Singapore: Nature Singapore, pp. 587–616; https://doi.org/10.1007/978-981-10-4184-6_21.

Galántai, J. (1993) *Trianon and the Protection of Minorities*. Budapest: Corvina.

Groni, C. (2008) *The right to take part in cultural life. E/C.12/40/3*. 9 May 2008. [Online]. Available at: https://digitallibrary.un.org/record/627364/files/E_C.12_40_3-EN.pdf?ln=en (Accessed: 28 February 2025).

Győri Szabó, R. (2006) *Kisebbség, autonómia, regionalizmus*. Budapest: Osiris Kiadó.

Hannum, H. (2007) 'The Concept and Definition of Minorities' in Weller, M. (ed.) *Universal Minority Rights. A Commentary on the Jurisprudence of International Courts and Treaty Bodies*. Oxford: Oxford University Press, pp. 49–74.

Hanson, J., Weller, M. (2018) *The UN Declaration on the Rights of Indigenous Peoples. A Commentary*. Oxford: Oxford University Press.

Heinze, H.J. (2006) 'Article 1' in Weller, M. (ed.) *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*. Oxford: Oxford Academic, pp. 77–96.

Hodgkin, R., Newell, P. (2007) *Implementation Handbook for the Convention for the Convention on the Rights of the Child*. 3rd edn. Geneva: UNICEF Regional Office for Europe.

Holt, S. (2007) 'Family, Private Life, and Cultural Rights' in Weller, M. (ed.) *Universal Minority Rights. A Commentary on the Jurisprudence of International Courts and Treaty Bodies*. Oxford: Oxford University Press, pp. 203–252.

Jackson-Preece, J. (2006) 'Article 18' in Weller, M. (ed.) *The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities*. Oxford: Oxford University Press, pp. 507–518.

John Paul II (1989) *Message of His Holiness Pope John Paul II for the Celebration of the World Day of Peace, 1 January 1989* [Online]. Available at: https://www.vatican.va/content/john-paul-ii/en/messages/peace/documents/hf_jp-ii_mes_19881208_xxii-world-day-for-peace.html (Accessed: 28 February 2025).

John Paul II (1995) *Address of His Holiness Pope John Paul II to the 50th General Assembly of the UN*. New York, 5 October 1995 [Online]. Available at: https://www.vatican.va/content/john-paul-ii/en/speeches/1995/october/documents/hf_jp-ii_spe_05101995_address-to-uno.html (Accessed: 28 February 2025).

Kardos G. (2002) 'A kultúrához való jog védelme a nemzetközi jogban', *Fundamentum*, 2002/2, pp. 29–38.

Kovács, P. (2000) *International Law and Minority Protection. Rights of Minorities or Law of Minorities?*, Budapest: Akadémiai Kiadó.

Kymlicka, W. (2008) 'The Evolving Basis of European Norms of Minority Rights: Rights to Culture, Participation and Autonomy' in Weller, M., Blacklock, D., Nobbs, K. (eds.) *The Protection of Minorities in the Wider Europe*. London: Palgrave Macmillan, pp. 11–41; https://doi.org/10.1057/9780230582293_2.

Lantschner, E. (2008) 'History of the South Tyrol Conflict and Its Settlement' in Marko, J., Palermo, F., Woelk, J. (eds.) *Tolerance through Law: Self-Governance and Group Rights in South Tyrol*. Leiden–Boston: Martinus Nijhoff Publishers, pp. 3–15.

Lerner, N. (2003) *Group Rights and Discrimination in International Law*. Dordrecht–Boston: M. Nijhoff.

Marinkás, Gy. (2016) 'Cultural Rights as a Tool of Protecting the Rights of Indigenous Peoples' in Szabó, M., Varga, R., Láncos, P.L. (eds.) *Hungarian Yearbook of International Law and European Law 2015*. The Hague: Eleven International Publishing, pp. 15–38.

Marinkás, Gy. (2018) *Az őslakos népek védelmének aktuális jogi kihívásai*. Miskolc: Miskolci Egyetem Állam- és Jogtudományi Kar.

Medda-Windischer, R. (2008) 'Minorities under International Law and in South Tyrol' in Marko, J., Palermo, F., Woelk (eds.) *Tolerance through Law: Self-Governance and Group Rights in South Tyrol*. Leiden-Boston: Martinus Nijhoff Publishers.

Muszyński, M. (2022) *Siła norma idea. Prawo międzynarodowe w ujęciu historycznym T.3*. Warszawa: Wydawnictwo Naukowe UKSW.

PCIJ (1930) *The Greco-Bulgrian "Communities" / Question des "Communautés" Gréco-Bulgares. Advisory opinion of 31 July 1930*. Leiden: Publications de la Cour Permanente de Justice Internationale.

Pentassuglia, G. (2000) *Defining 'Minority' in International Law: A Critical Appraisal*. Rovaniemi: Lapland's University Press.

Raisz, A. (2008) 'Indigenous Communities before the Inter-American Court of Human Rights – New Century, New Era?', *Miskolc Journal of International Law,* 5(2), pp. 35–51.

Reidel, L. (2011) 'What are Cultural Rights? Protecting Groups with Individual Rights' in Ssenyonjo, M. (ed.) *Economic, Social and Cultural Rights*. New York: Routledge.

Rosas, A., Scheinin, M. (1999) 'Categories and beneficiaries of human rights' in Hanski, R., Suksi, M. (eds.) *An Introduction to the International Protection of Human Rights: A Textbook*. Turku–Åbo: Åbo Akademi University Institute for Human Rights.

Sándor-Szalay, E. (2022) 'International Law in the Service of Minority Protection – Hard Law, Soft Law, and a Little Practice' in Raisz, A. (ed.) International Law From a Central European Perspective. Miskolc–Budapest: Central European Academic Publishing. pp. 157–179; https://doi.org/10.54171/2022.ar.ilfcec_8.

Szalai, A. (2018) 'Nemzeti kisebbségek védelme' in Lamm, V. (ed.) *Emberi Jogi Enciklopédia.* Budapest: HVG–ORAC, pp. 523–529.

Thornberry, P. (1991) *International Law and the Rights of Minorities*. Oxford: Clarendon Press.

Peace Treaty concluded between the Allied and Associated Powers and Czechoslovakia concluded in Saint Germain-en-Laye on 10 September 1919 (1920) *American Journal of International Law,* 14(4), pp. 311–323.

Peace Treaty concluded between the Allied and Associated Powers and the Kingdom of Serbs, Croats and Slovenes concluded in Saint Germain-en-Laye on 10 September 1919 (1920) *American Journal of International Law,* 14(4), pp. 333–343.

Treaty between the Principal Allied and Associated Powers and Austria, signed at Saint-Germain-en-Laye, September 10, 1919 (1920) *American Journal of International Law* 14(1–2), pp. 1–183.

Treaty between the Principal Allied and Associated Powers and Bulgaria and its Protocol, signed at Neuilly-sur-Seine on 27 November 1919 (1920) *American Journal of International Law,* 14(3), pp. 185–188.

Treaty between the Principal Allied and Associated Powers and Romania, concluded in Paris on 9 December 1919 (1920) *American Journal of International Law,* 14(4), pp. 324–332.

Treaty concluded between the Allied and Associated Powers and Greece in Sévres on August 10, 1920 (1921) *American Journal of International Law,* 15(2), pp. 161–169.

Treaty of Peace between the Allied and Associated Powers and Hungary concluded in Trianon on 4 June 1920 (1920) *American Journal of International Law,* 15(1), pp. 23–151.

Treaty of Peace with Turkey signed at Lausanne on 24 July 1923 (1924) in *The Treaties of Peace 1919–1923. Vol. II*. New York.

UN Committee on Economic, Social and Cultural Rights (2009) *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights). E/C.12/GC/21*.

UN Committee on Economic, Social and Cultural Rights (2022) *General Comment No. 26 on land and economic, social and cultural rights. E/C.12/GC/26*.

UN Committee on the Elimination of Racial Discrimination (1996) *General Recommendation No. 21 on the right to self-determination. UN Doc A/51/18.*

UN Committee on the Rights of the Child (1996) *General Guidelines Regarding the Form and Contents of Periodic Reports. CRC/C/58.* 11 October 1996.

UN Committee on the Rights of the Child (2009*) General Comment No. 11. Indigenous children and their rights under the Convention*. *CRC/C/GC/11.*

UN Committee on the Rights of the Child (2013a) *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*. *CRC/C/GC/14.*

UN Committee on the Rights of the Child (2013b) *General comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts*. *CRC/C/GC/17.*

UN Economic and Social Council (1950) *Study of the Legal Validity of the Undertakings Considering Minorities. E/OT. V367.* 7 April 1950. [Online]. Available at: https://digitallibrary.un.org/record/573952?v=%5B%27%5B%22%5B%5C%27pdf%5C%27%5D%22%5D%27%5D&ln=es (Accessed: 28 February 2025).

UN Human Rights Committee (1994) *General Comment No. 23: Article 27 (Rights of Minorities). CCPR/C/21/Rev.1/Add.5*. 26 April 1994.

UN Working Group on Minorities (2005) *Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. E/CN.4/Sub.2/AC.5/2005/2*.

Vasak, K. (1977) 'A 30-year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights', *The UNESCO Courier,* 30(11), pp. 29–32.

Weller, M. (2007) *Universal Minority Rights. A Commentary on the Jurisprudence of International Courts and Treaty Bodies*. Oxford: Oxford University Press.

Wilson, W. (1918) *Address to a Joint Session of Congress on the Conditions of Peace ["The Fourteen Points"]* [Online]. Available at: https://catalog.archives.gov/id/5752371?objectPage=6 (Accessed: 28 February 2025).

Zombory, K. (2023a) 'The Right to Cultural Identity in the Case Law of the Inter-American Court of Human Rights: A New Global Standard for the Protection of Indigenous Rights and Future Generations?', *Journal of Agricultural and Environmental Law,* 18(34), pp. 171–191; https://doi.org/10.21029/JAEL.2023.34.171.

Zombory, K. (2023b) *Prawnomiędzynarodowa ochrona praw kulturalnych mniejszości narodowych: wybrane zagadnienia*. Warszawa: Instytut Wymiaru Sprawiedliwości.

Zombory, K. (2025) ‘Religious rights of children belonging to national minorities and indigenous peoples’ in Zombory, K., Benyusz, M. (eds.) *Religion and children’s rights*. Budapest–Miskolc: Central European Academic Publishing, pp. 153–176; https://doi.org/10.71009/2025.kzmb.racr_7.

| Chapter 14 |

The Rights of Ethnic, National and Religious Minorities in the Jurisprudence of the European Court of Human Rights

Dalibor Đukić

ABSTRACT

This chapter analyses landmark judgements of the European Court of Human Rights (ECHR) concerning the protection of the rights and freedoms of religious, ethnic, and national minorities, with a special focus on Central and Eastern Europe. While the European Convention on Human Rights primarily safeguards individual rights, the Court has developed an approach that protects minority rights without dealing with identity-related disputes, thereby avoiding contentious debates tied to emerging identities in Eastern and Southeastern Europe. The Court applies a high level of scrutiny when assessing differential treatment based on ethnicity, race, and nationality, requiring "very weighty reasons" for justification. However, the Court has been reluctant to recognise religion as a suspect ground, as its jurisprudence under Article 9 grants states a wide margin of appreciation in issues related to state-religion relations. The chapter addresses challenges such as power-sharing systems that disadvantage minorities, cases of discrimination against Roma communities, and the complex interplay of ethnic and religious identities. Special attention has been granted to the Court's role in safeguarding religious freedom, including the rights of minority religious organisations to acquire legal personality and the freedom to manifest one's religion or belief. Despite the progress made in addressing violations identified by the Court, the chapter highlights the limited effectiveness of the Council of Europe's human rights system in certain regions, where some national minorities and their organisations remain unrecognised or even securitised. Finally, the chapter underscores the European Court for Human Rights' (ECtHR) potential to advance minority protection in Europe, taking into account that international consensus strengthens around the need to safeguard security, identity, and cultural diversity of minorities.

KEYWORDS

ECHR, ECtHR, religious minorities, national/ethnic minorities, discrimination, ethnicity, religion, vulnerability, Roma, Central Europe, Eastern Europe

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1. Introduction

The European Convention on Human Rights (hereinafter ECHR or the Convention) does not explicitly impose any specific obligations on States Parties regarding the legal status of national, ethnic, and religious minorities. The Convention mentions national minorities only in Article 14 and Protocol No. 12, both of which provide protection against discrimination in the enjoyment of rights guaranteed by other substantive provisions of the ECHR. Religious minorities are not explicitly mentioned, even though the freedom of thought, conscience and religion is protected under Article 9 of the ECHR. In both cases, it should be highlighted that the focus of the Convention is to protect individual rather than group rights so 'generally speaking minority organisations may assert rights of their own only if they are, *mutatis mutandis*, similar to individual rights'.[1] In theory, a compensation for this "deficiency" could be identified 'in the development of positive obligations for states so that individual members of a minority may enjoy their rights effectively'.[2] Nonetheless, this substitute does not appear to be always efficient, given the difficulties in proving the existence of such obligations, whereas it is relatively easy for a state to demonstrate that it has met them.

The non-discrimination jurisprudence of the European Court for Human Rights (hereafter ECtHR or the Court) was widely criticised as being relegated to second-class status,[3] and Article 14 was named the "Cinderella" of the ECHR.[4] This article has an adjectival role, as it does not have an independent existence, but its application is conditioned on the application of one of the other substantive provisions of the Convention and its Protocols.[5] As the Court reiterated in several cases 'there can be no room for its application unless the facts at issue falls "within the ambit" of one or more of the latter'.[6] In the words of the Court, 'it is as though Article 14 [...] formed an integral part of each of the articles laying down rights and freedoms whatever

1 Harris et al., 2023, p. 811.
2 Ibid., p. 810.
3 Henrard, 2016, pp. 157–177.
4 O'Connell, 2009, p. 211.
5 Art. 14 has been described as a "parasitic" provision as its applicability depends on the substantive provisions of the Convention and its Protocols and it is not "a free-standing prohibition on discrimination". Harris et al., 2023, p. 774.
6 ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Application Nos. 9214/80, 9473/81, and 9474/81, Judgement of 28 May 1985, para. 71; ECtHR, *Petrovic v. Austria*, Application No. 20458/92, Judgement of 27 March 1998, para. 22; ECtHR, *Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, Application No. 7552/09, Judgement of 4 March 2014, para. 39; ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, Judgement of 22 December 2009, para. 39; ECtHR, *Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' (merits)*, Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgement of 23 July 1968, para. 30.

their nature'.[7] Even though Article 14 applies to rights and freedoms enshrined by other substantive provisions, its application is not conditioned on the breach of these provisions. For example, Article 9 of the Convention does not oblige states to enter into agreements with churches and religious communities, provide religious instruction in public schools, or recognise religious marriages. If a state voluntarily provides such rights and privileges to religious organisations, it goes beyond its obligations under the Convention and it does not violate Article 9 of ECHR per se. The fact that the state went beyond its obligations does not justify the application of those rights in a discriminatory manner, (e.g. by excluding certain religious groups from their enjoyment).[8] Therefore, it is possible that interference with the right does not constitute a violation of the Article of the Convention protecting that right, but it may constitute a violation of that Article when read in conjunction with Article 14 due to its discriminatory nature. Hence, the application of Article 14 extends to any right falling "within the ambit" of any Convention provision, including those that a state voluntarily provides. This extended application of Article 14 is particularly important for ethnic, national, and religious minorities, as it protects them from the arbitrariness of state authorities regarding the enjoyment of rights that the state has voluntarily provided to them.

Certain restrictions of rights of ethnic, national, and religious minorities can be so severe that they constitute a violation of Article 3 of the ECHR (prohibition of torture). Thus, for Article 3 to apply, the ill-treatment must reach the required threshold of severity. The Court insists that racial discrimination 'can of itself amount to degrading treatment within the meaning of Article 3 of the Convention'.[9] Depending on the ground on which the difference in treatment is based, the Court may decide to apply the "very weighty reasons test", which in practice implies a very narrow margin of appreciation for the states and often results in the finding of a violation.[10] According to the well-established case law of the Court, among the "suspect" grounds of discrimination to which the "very weighty reasons test" can be applied are race, ethnicity, nationality, and religion.[11] Therefore, in addition to the protection provided to ethnic and religious minorities under Article 14, their members enjoy protection from ill-treatment, as provided by Article 3 of the ECHR.

Interferences with fundamental rights of religious and national minorities have been found by the Court also to violate Article 8 (right to respect for private and family life) that provides protection to human beings to establish their personal identity.

7 ECtHR, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium (Merits)*, Application Nos. 474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgement of 23 July 1968, para. 9.
8 ECtHR, *Savez crkava 'Riječ života' and Others v. Croatia, Application* No. 7798/08, Judgement of 9 December 2010, para. 58.
9 ECtHR, *Moldovan and Others v. Romania*, Applications Nos. 41138/98 and 64320/01, Judgement No. 2 of 12 July 2005, para. 111.
10 Gerards, 2013, p. 5.
11 Gerards, 2018, p. 35.

The Court has concluded that along with other characteristics of an individual's personal identity, religion and ethnic identity constitute 'an essential aspect of his or her private life and identity'.[12] Another fundamental right for religious and national/ethnic minorities is the freedom of assembly and association as protected by Article 11 of the ECHR. The Court has said that

> 'freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity"'.[13]

Finally, there is a tension between the freedom of expression, as protected by Article 10, and the protection of the dignity of ethnic/national and religious minorities. Freedom of expression has been recognised by the Court as a valuable tool that should be exercised responsibly:

> '[a]ttacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner'.[14]

Particularly sensitive are issues involving racist motives and ethnic hatred, especially when they emerge amid intense social debates and tensions that involve ethnic or religious minorities.

The ECHR does not explicitly mention religious minorities. Article 9 of the Convention protects freedom of thought, conscience and religion; however, it does not explicitly address religious rights of minority groups. Most of the case law is about rights of individuals who do not belong to the prevailing religion in their country, as well as about minority religious organisations. Even when applicants are members of the dominant religion, they often belong to a specific subgroup within it (e.g., married priests in the Catholic Church, where clerical celibacy is the norm).[15] Nevertheless, the Court avoids addressing such issues within the framework of minority rights. Instead, it focuses on the rights of specific religious groups, so the broader picture

12 ECtHR, *Ciubotaru v. Moldova*, Application No. 27138/04, Judgement of 27 April 2010, para. 53.
13 ECtHR, *Gorzelik and Others v. Poland*, Application No. 44158/98, Judgement of 17 February 2004, para. 93.
14 ECtHR, *Vejdeland and Others v. Sweden*, Application No. 1813/07, Judgement of 9 February 2012, para. 55.
15 ECtHR, *Fernández Martínez v. Spain*, Application No. 56030/07, Judgement of 12 June 2014, para. 12.

remains in the background. Therefore, this chapter aims to take a holistic approach by identifying and connecting the common elements that link different religious minorities in the ECtHR's jurisprudence.

Consequently, the chapter begins with an analysis of the Court's jurisprudence under Article 14 of the Convention, focusing first on the issue of differential treatment and basic characteristics of the Court's anti-discrimination jurisprudence (Section 2). Given that minorities are often at a disadvantage, the next section examines the state's duty to apply differential treatment in cases where situations are not comparable, as well as how the Court addresses indirect discrimination (Section 3). Among the procedural specificities of discrimination cases are the shift in the burden of proof and the narrow margin of appreciation afforded to states (Section 4). The chapter then turns its attention to key issues such as the official recognition of national and ethnic minorities and their organisations (Section 5), as well as the impact of electoral systems and power-sharing regimes on these minorities (Section 6). A subsequent section is dedicated to cases of discrimination involving the most vulnerable group in Europe – the Roma population (Section 7). Section 8 analyses case-law concerning ethnic and national minorities in which the Court has found violations of the freedom of assembly and association, while the next section addresses the prohibition of torture and inhuman treatment (9). Special legal accommodation of religious minorities and their right to manifest religion or belief is explored in section 10, while cases related to the recognition of legal personality for religious associations are explored in the subsequent section (11). The chapter concludes with a summary of the findings and analysis presented throughout.

2. Basic Characteristics of the Court's Anti-Discrimination Jurisprudence

The key provision of the Convention addressing issues that involve ethnic and national minorities is Article 14 (Prohibition of discrimination).[16] Before analysing case law involving ethnic, national and religious minorities, this chapter will outline the fundamental principles of the Court's implementation and interpretation of Article 14. According to the Court, discrimination means 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations'.[17] As evident

16 Art. 14 of the ECHR provides that: 'The enjoyment of the rights and freedoms set forth in this Convention 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'.

17 ECtHR, *Zarb Adami v. Malta*, Application No. 17209/02, Judgement of 20 June 2006, para. 71. ECtHR, *Willis v. the United Kingdom*, Application No. 36042/97, Judgement of 11 June 2002, para. 48; ECtHR, *D.H. and Others v. the Czech Republic*, Application No. 57325/00, Judgement of 13 November 2007, para. 75; ECtHR, *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, Judgement of 13 December 2005, para. 56; ECtHR, *Nachova and Others v. Bulgaria*, Application Nos. 43577/98 and 43579/98, Judgement of 6 July 2005, para. 145; ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications Nos. 27996/06, 34836/06, Judgement of 22 December 2009, para. 42.

from the wording of Article 14 and the Court's jurisprudence, not every instance of differential treatment amounts to a violation of this Article. The differential treatment may be justified, or it may involve providing favourable treatment to a person or group.

Nonetheless, the first condition for the application of Article 14 is the existence of differential treatment, where a person or *group* are treated less favourably than others in a similar situation. In most cases, it is not difficult to determine whether differential treatment exists, however, the issue that gave rise to conflicting views is whether the applicants and their peers are in an analogous situation, i.e. whether they can be properly compared. For instance, in a case involving a 47-year-old single woman who was denied the opportunity to adopt a child by Swiss authorities, the applicant claimed that she was treated differently compared to women who could have biological children at that age. The Court, however, concluded that this distinction 'does not correspond to a difference in treatment on the part of the state in analogous or similar situations' because 'the state has no influence over a woman's ability or inability to have biological children'.[18] For the Court, the applicant may consider herself to have been treated differently than younger women who would likely receive authorisation to adopt a child.

In cases involving national, ethnic and religious minorities and their members, unlawful differential treatment may occur not only when they are treated differently from members of the dominant ethnic or religious group but also when one minority group or its members are treated less favourably in relation to other ethnic or religious minorities or their members. For example, in the case of *Jehovas Zeugen in Österreich v. Austria* Jehovah's Witnesses were treated less favourably than other religious communities recognised as religious societies.[19]

Article 14 enumerates protected characteristics which might render differential treatment discriminatory. For the subject matter of this chapter, it is important to note that among these are race, religion, national origin, and association with a national minority.[20] Furthermore, the same article includes an open-ended "other status" category.[21] The Court adopted a broad meaning of the words "other status" that also includes characteristics that are not strictly personal (for example different categories of property owners).[22] It has been noted that the Court's case law has estab-

18 ECtHR, *Schwizgebel v. Switzerland*, Application No. 25762/07, Judgement of 10 June 2010, paras. 82–85.

19 ECtHR, *Jehovas Zeugen in Österreich v. Austria*, Application No. 27540/05, Judgement of 25 September 2012, para. 49.

20 While the list of protected characteristics of art. 14 of ECHR is influenced by art. 2 of the Universal Declaration of Human Rights, the reference to 'association with a national minority' was added. Schabas, 2015, p. 572.

21 Harris et al., 2023, p. 780.

22 The Court has said that 'the protection conferred by that article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent'. ECtHR, *Clift v. The United Kingdom*, Application No. 7205/07, Judgement of 13 July 2010, para. 59.

lished a hierarchy among the grounds prohibited by Article 14 by referring to "suspect categories".[23] Among suspect grounds or categories are race, ethnicity, ethnic origin and nationality.[24] Furthermore, the Court has established the threshold of "very weighty reasons" that are required to justify differential treatment based on suspect grounds, such as nationality,[25] ethnic origin,[26] and in some cases even religion.[27] The Court is unlikely to ever deem differential treatment based on ethnic or racial grounds as necessary in a democratic society because it has reiterated

> 'that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[28]

Hence, individuals who belong to national, ethnic, and religious minorities receive a high level of protection against unlawful differential treatment based on their racial or ethnic origin, as well as their religious affiliation.

Certainly, this does not mean that differential treatment can never be justified. The assessment of whether a particular distinction is justified must be conducted 'with regard to principles that normally prevail in democratic societies'.[29] The Court applies a two-part test: first, it examines whether the aims pursued by state authorities are legitimate; second, it assesses whether there is a reasonable relationship of proportionality between these aims and the means employed (the proportionality test).[30] The implementation of this test by the Court will be scrutinised in the following sections of this chapter.

23 Schabas, 2015, pp. 573–574.
24 ECtHR, *Eweida and Others v. the United Kingdom*, Application No. 48420/10, Judgement of 15 January 2013, para 71; ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications Nos. 27996/06, 34836/06, Judgement of 22 December 2009, para. 37.
25 ECtHR, *Andrejeva v. Latvia*, Application No. 55707/00, Judgement of 18 February 2009, para. 87.
26 ECtHR, *Oršuš and Others v. Croatia*, Application No. 15766/03, Judgement of 16 March 2010, para. 149.
27 According to the Court, religious belief is a core aspect of an individual's identity that is often interconnected with race and ethnicity. ECtHR, *Eweida and Others v. the United Kingdom*, Application No. 48420/10, Judgement of 15 January 2013, para 71.
28 ECtHR, *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, Judgement of 13 December 2005, para. 58. Cited also in ECtHR, *D.H. and Others v. The Czech Republic*, Application No. 57325/00, Judgement of 13 November 2007, para. 176.
29 Schabas, 2015, p. 564.
30 Harris et al., 2023, p. 91.

3. Formal or Substantive Equality?

The Court had adopted a formal concept of equality, according to which persons and groups in an analogous situation are to be treated identically.[31] Unlawful differential treatment exists only when 'a person or a group is treated less favourably than another, without justification'.[32] Therefore, the differential treatment that provides more favourable treatment to a person or a group may not constitute unlawful discrimination. Those may be "special measures"[33] that aim at the correction of "factual inequalities". In the *Belgian linguistic* case, the Court has noted that occasionally 'certain legal inequalities tend only to correct factual inequalities'.[34] The landmark case is *Thlimmenos v. Greece*. Thlimmenos was a Jehovah's Witness who refused to serve in the Greek army for religious reasons. He was convicted of a felony offence and served a prison sentence for this offence. He submitted the application to the ECtHR because he was refused appointment as a chartered accountant on the grounds of his conviction. The Court has emphasised that the right not to be discriminated against is violated when states treat individuals in analogous situations differently. Moreover, it goes further by recognising that 'the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat persons differently whose situations are significantly different'.[35] The Court found that there had been a violation of Article 14 in conjunction with Article 9, because the state failed 'to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants'.[36] Thus, under the prohibition of discrimination, the Court has established duties of differential treatment of situations that are not similar.[37] This is particularly important for ethnic, national, and religious minorities, as they are often beneficiaries of special affirmative measures or have specific needs that must be appropriately addressed in both law and practice.

The scope of Article 14 is limited only to rights and freedoms protected by other substantive articles of the Convention. It has already been mentioned that interference

31 O'Connell, 2009, p. 212.
32 Schabas, 2015, p. 564.
33 These measures are also known as "affirmative measures", "affirmative action", "positive action" or "positive discrimination". The United Nations Committee for the Elimination of Racial Discrimination in its General recommendation No. 32 uses the term "special measures" and explicitly encourages States Parties to avoid the term "positive discrimination" as a *contradictio in terminis* in the light of international human rights standards. General recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, CERD/C/GC/32, para. 12.
34 ECtHR, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgement of 23 July 1968, para. 10.
35 ECtHR, *Thlimmenos v. Greece*, Application No. 34369/97, Judgement of 6 April 2000, para. 44.
36 Ibid., para. 48.
37 Henrard, 2016, p. 166.

does not have to constitute violation of another article and that it is sufficient to fall "within the ambit" of rights and freedoms protected by the Convention and its Protocols. The Court's "ambit test" alleviates to a certain degree the limitations on the applicability of Article 14. A good example of this approach in the early stages of the Convention's implementation is the *Belgian Linguistic* case in which one of the applicants complained about the access to state education in a preferred language.[38] The Court has accepted that the Convention does not require from the states to provide education in a particular language or to establish any specific system of education, including education in minority languages and religious instruction. However, if a state decides to do so, it must not restrict access to it on a discriminatory basis.

The right to equal treatment is essential for minorities and should not be confined to a formal concept of equality. Instead, it should encompass substantive equality, which has been recognised as a fundamental principle of minority protection.[39] The substantive equality takes into account that members of certain groups are subject to disadvantage and therefore the legal theory 'is more concerned with the effects of the law in reality, rather than whether the law on paper makes distinctions'.[40] Some policies and measures may appear neutral but have a disproportionately negative impact on individuals or specific groups without a reasonable and objective justification. The term "indirect discrimination" is used to denote these types of measures and the Court dealt with this kind of discrimination in the landmark *Thlimmenos* case. The Court noted that 'in the application of the relevant law no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences'.[41] Discriminatory intent is not necessary for the existence of indirect discrimination. The most prominent examples of indirect discrimination are cases of Roma children's segregation, which will be analysed in a later section.[42]

38 ECtHR, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgement of 23 July 1968.

39 Eide, 1996, p. 5.

40 O'Connell, 2009, p. 213.

41 ECtHR, *Thlimmenos v. Greece*, Application No. 34369/97, Judgement of 6 April 2000, para. 42.

42 Traditionally, *Thlimmenos* is regarded in the literature as the first case in which the ECtHR addressed indirect discrimination. However, there are different views according to which *Thlimmenos* concerns the discrimination of an individual based on religious affiliation and that the Greek authorities failed to fulfil their duty to differentiate. This opinion is based on art. 2.2 of the EU Council Directive 2000/43/EC, that is interpreted as linking indirect discrimination to 'a factual group- related effect of allegedly neutral provisions'. Marko, 2019, p. 316.

4. The Shift of the Burden of Proof and the Notion of Margin of Appreciation

It has been noted that, in discrimination cases, the burden of proof shifts from the applicant to the state.[43] The applicant must establish that there was a difference in treatment and after that the burden of proof shifts to the government.[44] However, it may be difficult for the applicant to establish a *prima facie* evidence of discrimination, especially in cases of institutional and indirect discrimination. Therefore, the Court insists that

> 'the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake'.[45]

The case of *Nachova v. Bulgaria* concerned the killing of two Roma men by Bulgarian police officers. The Grand Chamber refused to apply a special allocation of the burden of proof, as it would place an excessively high burden on the government to disprove allegations. The Chamber also ruled that a failure of the state authorities to carry out an effective investigation into the supposedly racist motive for the killing did not establish a *prima facie* evidence of racial discrimination. It emphasised the distinction between two types of obligations: the procedural duty to thoroughly investigate incidents, including potential discriminatory motives, and the substantive obligation to refrain from discriminatory killings. The Grand Chamber accepted three already mentioned key criteria for applying special allocation of the burden of proof: 'the specificity of the facts, the nature of the allegation made and the Convention right at stake'.[46] The shift of the burden of proof encourages victims of discrimination to initiate proceedings at the ECtHR and prevents states from misusing the burden of proof to evade responsibility.

As evident from the above, states have been granted a margin of appreciation in determining whether there is an objective and reasonable justification for differential treatment of individuals in analogous situations. The extent of the margin of appreciation depends on the context, the specific circumstances of the case, the nature of the right at stake, and the presence of a common denominator within the Member States.[47] The Court has noted that 'the margin of appreciation available to

43 Schabas, 2015, p. 570.
44 Ambrus, 2011, pp. 27–30.
45 ECtHR, *D.H. and Others v. The Czech Republic*, Application No. 57325/00, Judgement of 13 November 2007, para. 178.
46 ECtHR, *Nachova and Others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, Judgement of 6 July 2005, para. 147.
47 Schabas, 2015, p. 567.

the legislature in implementing social and economic policies should be a wide one'.[48] By contrast, when measures involve differential treatment based on suspect grounds such as race, ethnicity, or national origin, states are granted only a narrow margin of appreciation. However, the Court has been reluctant to recognise religion as a suspect ground, as its jurisprudence under Article 9 generally affords states a wide margin of appreciation, particularly in matters concerning state-religion relations.[49] Therefore, the case law involving religious minorities will be analysed in a separate section of this chapter.

5. The Recognition of National/Ethnic Minorities

The ECHR does not provide a comprehensive framework for minority rights protection comparable to certain other international conventions and covenants. Although there have been proposals and attempts to add specific provisions addressing minority rights, these efforts have not been successful.[50] Central and Eastern European states have adopted an approach to national minority protection that guarantees special and group-based rights to ethnic and national minorities and their members.[51] Therefore, these minorities often establish associations that receive some form of recognition and legal personality. These associations play a crucial role in protecting and preserving language, history, traditions, the way of life and other important characteristics of national minorities.

A landmark case involving the denial of official registration for a national minority association is *Gorzelik and Others v. Poland*.[52] The applicants, who identified as "Silesians" formed an association named the "Union of People of Silesian Nationality" and applied for registration with the competent state authority in Poland. Silesians live near the border of Poland, Germany, and Czechia and they speak a language that is a mixture of Polish, German and Czech. Polish courts refused their application on the ground that the Silesian people did not constitute a national minority under Polish law and therefore the association could not be described as an "organisation of a national minority", which would give it access to electoral privileges. The domestic courts emphasised that the notion of "national minority" is not defined in any international treaty and that "Silesians" were not a national minority but rather an "ethnic group", drawing a strict distinction between the two. The Katowice Court of Appeal also considered the findings of sociologists, who agreed that 'the Silesians constitute an ethnic group and that the autochthonous inhabitants [of Silesia] do have

48 ECtHR, *James and Others v. the United Kingdom*, Application No. 8793/79, Judgement of 21 February 1986, para. 46.
49 Henrard, 2016, p. 162.
50 More information about those efforts: Schabas, 2015, p. 581.
51 Sadurski, 2014, p. 311.
52 ECtHR, *Gorzelik and Others v. Poland*, Application No. 44158/98, Judgement of 17 February 2004.

some features of a nation but that those features are not fully developed'.[53] The Court further referred to the Polish tradition, which holds that national minorities should be linked to a majority outside of Poland. In other words, to be recognised as a national minority, a group must have its own kin state.

The Court acknowledged the lack of definition of national minorities in international treaties and that practices of recognition of national or ethnic minorities varies across different countries. Therefore, it did not consider the lack of a definition in domestic law to constitute a violation of the state's duty to formulate law in sufficiently precise terms. Thus,

> 'the Court does not consider that leaving to the authorities a discretion to determine the applicable criteria with regard to the concept of "registered associations of national minorities" underlying section 5 of the 1993 Elections Act was, as the applicants alleged, tantamount to granting them an unlimited and arbitrary power of appreciation. As regards the registration procedure, it was both inevitable and consistent with the adjudicative role vested in them for the national courts to be left with the task of interpreting the notion of "national minority", as distinguished from "ethnic minority" within the meaning of the Constitution, and assessing whether the applicants' association qualified as an "organisation of a national minority"'.[54]

Therefore, the Court found no violation of Article 11 of the Convention. The ECtHR has taken a cautious approach by refraining from expressing an opinion on the issue of identity, a stance that has become characteristic of its jurisprudence in other cases as well.

The ECtHR typically examines complaints under Article 14 in addition to one of the substantive articles of the Convention. However, in several cases involving the rights of individuals belonging to national minorities or asserting an ethnic minority identity, the Court has deemed it unnecessary to examine the complaint under Article 14. As a result, there are cases where the unlawful differential treatment of national or religious minorities is evident, yet the Court, having already found a violation of another substantive Convention right, refrains from assessing the alleged violation of Article 14. For example, it was clear that the Macedonian minority in Bulgaria was treated less favourably than other national minorities. However, in several cases the Court concluded that there was no need to separately examine the admissibility or merits of the Article 14 complaint, as it had already found a violation of the right to freedom of association.[55]

53 ECtHR, *Gorzelik and Others v. Poland*, Application No. 44158/98, Judgement of 17 February 2004, para. 32.
54 Ibid., para. 70.
55 The subsequent section provides more details on the case-law on Macedonian minority in Bulgaria.

6. Electoral Systems and Participation of National Minorities

Political systems and power-sharing regimes established by the majority can sometimes be discriminatory toward national minorities. The Constitution of Bosnia and Herzegovina was adopted as Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, signed at the Dayton Air Base in the United States in 1995 (the Dayton Agreement). At the time, the primary focus was on ending the war and ensuring the peaceful coexistence of the three major ethnic groups, while considerations of democratic legitimacy were set aside.[56] Therefore, the Constitution introduced a distinction between "constituent peoples"– Bosniaks, Serbs, and Croats – and "others", which includes members of ethnic minorities and individuals unaffiliated with any ethnic group. The Dayton Agreement established that Bosnia and Herzegovina consists of two entities, Republika Srpska and the Federation of Bosnia and Herzegovina, which were vested with extensive powers. It also introduced a collective Presidency composed of three members: a Serb elected from Republika Srpska and a Bosniak and a Croat elected from the Federation. As a result, only individuals belonging to these ethnic groups could stand for election within their respective entities. The same principle applies to the House of Peoples, the second chamber of Parliament, which is composed of an equal number of Bosniaks, Serbs, and Croats.[57]

In *Sejdić and Finci v. Bosnia and Herzegovina*, the applicants, who identified as Roma and Jewish, were ineligible to stand for election to the House of Peoples and the Presidency solely based on their ethnic origin. The Court employed a structured proportionality test examining the necessity of the measure taken by the state. Recognising the complex interethnic relations in Bosnia and Herzegovina, as well as recent developments in the country's EU integration process, the Court concluded that

> 'there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule [...] there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities'.[58]

Thus, it ruled that the exclusion of individuals from ethnic groups other than Bosniaks, Serbs, and Croats lacked reasonable and objective justification, thereby violating Article 14 in conjunction with Article 3 of Protocol No. 1.[59] The *Sejdić and Finci* case was followed by a series of cases in which individuals, who do not belong to the

56 Bardutzky, 2010, p. 310.
57 Piacentini, 2020, p. 710.
58 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, Judgement of 22 December 2009, para. 48.
59 Ibid.

"constituent peoples", successfully challenged restrictions on their right to stand for election, arguing that these limitations were based on the combination of territorial and ethnic elements.[60]

In the abovementioned cases the Court examined the differential treatment that affected the passive electoral right of the applicants. The recent *Kovačević* case concerned the applicant's inability to vote for candidates of his choice due to the territorial and ethnic requirements imposed by law. As a resident of Sarajevo, he was only allowed to vote for Bosniak and Croat candidates and not for candidates who best represented his political views but were not from the "right" Entity and/or of the "right" ethnic origin.[61] Therefore, the applicant describes Bosnia and Herzegovina as an "ethnocracy" rather than a democracy.[62] As in previous cases, the Court has found a violation of Article 1 of Protocol 12, but the Chamber went beyond the previous case-law urging for major legislative reforms. The Court highlighted that

> 'the current arrangements render ethnic considerations and/or representation more relevant than political, economic, social, philosophical and other considerations and/or representation and thus amplify ethnic divisions in the country and undermine the democratic character of elections'.[63]

Therefore it concluded that 'a reform of the electoral system is an outstanding post-accession obligation of Bosnia and Herzegovina'.[64] Even though the ECtHR identified violations of the passive and active electoral rights of ethnic and national minorities in Bosnia and Herzegovina in 2009, no major legislative reforms have been initiated, and there have been no significant improvements in the electoral legislation.

Another example of a country divided along ethnic lines is Cyprus. The 1960 Cypriot Constitution established separate electoral lists for the Greek Cypriot and Turkish Cypriot communities. However, following the conflicts that erupted on the island in 1963, the participation of the Turkish Cypriot community in elections was suspended. Since then, Turkish Cypriots residing in the Greek Cypriot government-controlled area have been unable to participate in elections. The applicant, a member of the Turkish Cypriot community, complained that he was deprived of his right to vote, as protected by Article 3 of Protocol No. 1 to the ECHR.[65] The Court acknowledged

60 There is a rich body of jurisprudence on passive electoral rights in Bosnia and Herzegovina: ECtHR, *Zornić v. Bosnia and Herzegovina*, Application No. 3681/06, Judgement of 15 July 2014; ECtHR, *Šlaku v. Bosnia and Herzegovina*, Application No. 56666/12, Judgement of 26 May 2016; ECtHR, *Pilav v. Bosnia and Herzegovina*, Application No. 41939/07, Judgement of 9 June 2016; ECtHR, *Pudarić v. Bosnia and Herzegovina*, Application No. 55799/18, Judgement of 8 December 2020.

61 ECtHR, *Kovačević v. Bosnia and Herzegovina*, Application No. 43651/22, Judgement of 29 August 2023, para. 8.

62 Ibid., para. 44.

63 Ibid., para. 56.

64 Ibid., para. 59.

65 ECtHR, *Aziz v. Cyprus*, Application No. 69949/01, Judgement of 22 June 2004, para. 16.

that states have a wide margin of appreciation in regulating parliamentary elections and determining the composition of their parliaments. However, it emphasised that while

> 'the relevant criteria may vary according to the historical and political factors peculiar to each state, these rules should not be such as to exclude some persons or groups of persons from participating in the political life of the country'.[66]

The Court found that the Government had failed to provide reasonable and objective justification for the differential treatment. It concluded that

> 'the applicant, as a member of the Turkish-Cypriot community living in the government-controlled area of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he is a national and where he has always lived'.[67]

Unlike other cases in Eastern and Central Europe, where Court rulings have not led to legislative reforms in the field of electoral rights for national minorities, Cypriot authorities enacted Law 2(I)/2006 in response to the *Aziz* case. This law granted Turkish Cypriots with habitual residence in the government-controlled area of the Republic the right to vote and stand for election.[68] However, Turkish Cypriots residing permanently outside the government-controlled area or those who only occasionally reside there were excluded from these rights. The case of *Erel and Damdelen v. Cyprus* involved Turkish Cypriots living in the Turkish Cypriot-controlled part of Nicosia. They claimed a violation of Article 3 of Protocol No. 1 to the ECHR after Cypriot authorities refused to place them on a separate Turkish Cypriot electoral list. The Court, however, emphasised that establishing a residence requirement 'is not, in principle, an arbitrary restriction of the right to vote and is therefore not incompatible with Article 3 of Protocol No. 1'. Furthermore, it found that the applicants were not directly affected by the legislation adopted by the Cypriot House of Representatives, as they resided in the area under Turkish control.[69] The Court's findings in *Aziz* and *Erel and Damdelen* indicate that the ECHR does not impose an obligation on states to

66 Ibid., para. 28.
67 Ibid., para. 29.
68 Ο περί Άσκησης του Δικαιώματος του Εκλέγειν και Εκλέγεσθαι από Μέλη της Τουρκικής Κοινότητας που Έχουν Συνήθη Διαμονή σε Ελεύθερο Έδαφος της Δημοκρατίας (Προσωρινές Διατάξεις) Νόμος του 2006 (Ν. 2(I)/2006) Ε.Ε., Παρ.I(I), Αρ.4068, 10/2/2006 [O perí Áskisis tou Dikaiómatos tou Ekléyin kai Ekléyesthai apó Méli tis Tourkikís Kinótitas pou Ékhoun Siníthi Diamoní se Elé fthero Édaphos tis Dimokratías (Prosorinés Diatáxis) Nómos tou 2006 (N. 2(I)/2006) E.E., Par.I(I), Ar.4068, 10/2/2006.].
69 ECtHR, *Erel and Damdelen v. Cyprus*, Application No. 39973/07, Judgement of 14 December 2010.

organise separate elections for national minorities or to establish separate minority electoral lists. These cases indicate the difference between belonging to an ethnic group and residence requirements as grounds for differential treatment. While residence requirements might be permissible, ethnic origin cannot serve as a justification for depriving individuals of their right to vote or stand for election.

National minorities may face obstacles in achieving political representation not only in countries with deep ethnic divisions and conflicts, but also in states with established democratic institutions and developed democracy. In Hungary, the 2011 Act on the Election of Members of the National Assembly introduced a preferential system for minority representation in the Parliament. Under this system, each of the 13 officially recognised national minorities was granted the right to establish a minority list through their respective national self-governments.

A preferential quota was introduced, allowing the first candidate on a minority list to secure a parliamentary mandate if they receive at least one-quarter of the votes required for a seat in the general list system. Voters residing in Hungary are entitled to two votes: one for a candidate in a single-member constituency and another for a party list. Individuals belonging to national minorities have the option to register as minority voters on the basis of self-identification. Once registered, they can vote for a candidate in a single-member constituency and for their respective minority list, instead of a national party list. The main problem with this system is that the relatively small number of registered minority voters makes it impossible for any minority group to reach the threshold required to benefit from the preferential quota. As a result, while the system formally provides for minority representation, its practical effectiveness is limited.

The ECtHR examined three key issues related to the Hungarian voting system: the preferential quota system for minorities, the lack of free choice for national minority voters, and the violation of ballot secrecy. In its findings the Court acknowledged that 'no electoral system can eliminate "wasted votes"' but in the case of the Hungarian electoral scheme 'the potential value of votes that might be cast for national minority lists becomes diluted' because it was obvious that the number of voters from any national minority was insufficient to meet the preferential quota, even if all registered minority voters cast their vote for their national minority.[70] Second, the restrictions imposed to registered minority voters deprived them of the ability to choose candidates or party lists which best reflect their political views. National minority voters were only able to vote for the designated minority list or abstain from voting entirely. Thus, the Court expressed doubts if

> 'a system in which a vote may be cast only for a specific closed list of candidates, and which requires voters to abandon their party affiliations in order to

70 ECtHR, *Bakirdzi and E.C. v. Hungary,* Applications Nos. 49636/14 65678/14, Judgement of 10 November 2022, paras. 57–59.

> have representation as a member of a minority ensures "the free expression of the opinion of the people in the choice of the legislature"'.[71]

Third, the Court found that 'the right to full secrecy was not available for the applicants as national minority voters'.[72] Since national minority voters receive a ballot paper with a single list there is 'the obvious likelihood that their electoral preferences would be revealed' – especially during vote counting, where members of national minorities could be easily linked to their votes since the number of registered members of national minorities in each polling station is limited. The Court's ruling emphasises the importance of ensuring that national minorities have full participation in political life and decision-making processes.[73] Despite the ECtHR's 2009 judgement that found a violation of Article 3 of Protocol No. 1 in conjunction with Article 14 of the Convention, Hungary's electoral system for national minorities has remained unchanged.[74] This is another example that reveals problems in the enforcement of execution of ECtHR judgements in the field of the protection of rights of national minorities.

7. Being Undoubtedly Among the Most Vulnerable in Europe Today:[75] The Discrimination of Roma in CEE Countries

One of the most prominent examples of indirect discrimination, deeply rooted in many Councils of Europe Member States, is racial discrimination against the Roma.[76] The ECtHR has recognised the Roma as 'a specific type of disadvantaged and vulnerable minority',[77] and emphasised that special consideration should be given to their needs 'both in the relevant regulatory framework and in reaching decisions in particular cases'.[78] While a number of judgements address this issue, a detailed analysis of all of them exceeds the scope of a single book chapter. This section, therefore, will

71 Ibid., para. 66.
72 Ibid., para. 70.
73 Chronowski and Nagy, 2024, p. 22.
74 Kállai, 2022.
75 ECtHR, *Aksu v. Turkey,* Application Nos. 4149/04 and 41029/04, Judgement of 15 March 2012, dissenting opinion of judge Gyulumyan.
76 Council of Europe Human Rights Commissioner, 2012, p. 11.
77 ECtHR, *Horváth and Kiss v. Hungary,* Application No. 11146/11, Judgement of 29 January 2013, para. 102; ECtHR, *Oršuš and Others v. Croatia,* Application No. 15766/03, Judgement of 16 March 2010, para. 147; ECtHR, *Chapman v. the United Kingdom,* Application No. 27238/95, Judgement of 18 January 2001, para. 96; ECtHR, *Sampanis and Others v. Greece,* Application No. 32526/05, Judgement of 18 January 2001, para.72.
78 Department for the Execution of Judgements of the European Court of Human Rights, 2022, p. 2. ECtHR, *Chapman v. the United Kingdom,* Application No. 27238/95, Judgement of 18 January 2001, para. 96.

focus on cases involving discrimination of Roma children with respect to their access to education.[79]

In a case that involved two Roma children who were misplaced in schools for the mentally disabled the ECtHR has noted that 'the misplacement of Roma children in special schools has a long history across Europe'.[80] Two landmark cases are *D.H. and Others v. the Czech Republic* and *Oršuš and Others v. Croatia*.[81] In *D.H. and Others v. the Czech Republic* 18 Roma children were placed in schools for children with special needs. The applicants claimed that the educational system often quasi-automatically segregated Roma children into such schools. Therefore, a disproportionate number of Roma children were placed in schools for intellectually less able children and received inferior education with inevitable consequences for their future life chances. The applicants did not claim that the system of school selection and allocation of pupils was intentionally discriminatory. They argued that its practical application resulted in a disproportionately high number of Roma children being placed in special schools without justification. At the relevant time, the majority of children in special schools in the Czech Republic were of Roma origin and were often assigned to these schools based on psychological tests that were not adjusted to their ethnic and cultural background. The ECtHR, taking into account statistical data, concluded that

> 'despite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools'.[82] Thus, the Court accepted that discrimination against a group may arise not only from the direct actions of the state, but also from 'a *de facto* situation'.[83]

79 It should be noted that other national minorities may also experience difficulties in accessing education. E. g. in the case *Skender v. The Former Yugoslav Republic of Macedonia*, the applicant, a national of North Macedonia of Turkish origin, was denied the opportunity to enrol his younger daughter to a Turkish-speaking school situated in another district. This refusal was based on provisions of the Primary Education Act, which envisages that pupils were assigned to schools in accordance with their place of residence. While the school in the applicant's district was providing teaching in Turkish, the Constitutional Court of Macedonia found that the provision of such language facilities was contrary to the Constitution. Nevertheless, the school continued to offer education in Turkish, and the applicant's daughter was enrolled there. However, the ECtHR did not have to examine whether the complaint of the applicant fell within the ambit of art. 2 of Protocol No. 1, since it was found inadmissible due to non-exhaustion of domestic remedies. ECtHR, *Skender v. The Former Yugoslav Republic of Macedonia*, Application No. 62059/00, Decision of 10 March 2005.

80 ECtHR, *Horváth and Kiss v. Hungary*, Application No. 11146/11, Judgement of 29 January 2013, para. 115.

81 ECtHR, *D.H. and Others v. the Czech Republic*, Application No. 57325/00, Judgement of 13 November 2007; ECtHR, *Oršuš and Others v. Croatia*, Application No. 15766/03, Judgement of 16 March 2010.

82 Ibid., para. 193.

83 Harris et al., 2023, p. 809.

As in many other cases involving alleged discrimination against individuals or groups, the burden of proof was shifted to the government, which, in this case, failed to convince the Court that there were objective and reasonable justifications for the differential treatment. Consequently, the Court held the state responsible, emphasising that the applicants had received

> 'an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population'.[84]

States may provide various justifications for the segregation of Roma children and their placement in separate classes. In *Oršuš and Others v. Croatia* fifteen Croatian nationals of Roma origin had been segregated into Roma-only classes due to their lack of proficiency in Croatian. The Court held that statistical data alone was insufficient to establish *prima facie* evidence of discriminatory state practices and to allow the reversal of the burden of proof. However, it acknowledged that the case involved indirect discrimination, as the measure in question was applied exclusively to Roma children.[85] The Grand Chamber emphasised that the tests used to determine the placement of Roma children in separate classes did not specifically assess language skills. Moreover, the educational programme they followed did not adequately address language difficulties, nor was their progress systematically monitored. Consequently, the Court found no reasonable relationship of proportionality between the means employed and the legitimate aim pursued by the state.[86] It can be concluded that if the measures in question affect the education of a specific ethnic group, the state has a duty to implement safeguards ensuring that the progress of those affected is regularly assessed and that they are reintegrated into the regular school system as soon as possible.

Another landmark case from Central Europe is *Horváth and Kiss v Hungary*, which involved two young men of Roma origin who claimed that they had received education in schools for the mentally disabled due to misplacement that had amounted to discrimination. The Court referred to the concept of "familial disability", a notion that had been formulated in the 1970s, which coincided with a big wave of re-diagnosis of Roma children transferred to special schools.[87] The Court found that the state had failed to provide adequate safeguards against misdiagnosis, despite its positive obligation to do so in light of a history of discrimination against ethnic minority children.

84 ECtHR, *D.H. and Others v. the Czech Republic*, Application No. 57325/00, Judgement of 13 November 2007, para. 207.
85 ECtHR, *Oršuš and Others v. Croatia*, Application No. 15766/03, Judgement of 16 March 2010, paras. 152–156.
86 Ibid., paras. 158–184.
87 ECtHR, *Horváth and Kiss v. Hungary*, Application No. 11146/11, Judgement of 29 January 2013, para. 91.

The ECtHR emphasised the state's specific duty to 'avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests'. Consequently, the Court ruled that there had been a violation of Article 14 of the Convention, taken in conjunction with Article 2 of Protocol No. 1 (right to education). Similar cases have also arisen recently in Albania concerning the segregation of Roma and Egyptian children,[88] and in north Macedonia.[89]

The numerous cases from Eastern and Central European countries, in which the ECtHR found violations of nearly all rights and freedoms protected by the Convention and its Protocols, indicate that the segregation of Roma people was a widespread issue in the region. The Court found in several cases that Romania and Bulgaria have violated the right to life and prohibition of inhuman or degrading treatment of applicants of Roma origin.[90]

The lack of proper investigation was identified in cases involving the death of a young Roma man in a Romanian psychiatric hospital and the deaths of five Roma individuals in an arson attack in Ukraine.[91] Furthermore, in several cases, Eastern and Central European states were found to have violated Article 2, mostly under its procedural limb, and Article 3 of the ECHR, due to the failure of their authorities to conduct meaningful investigations into deaths occurring in police custody or detention.[92] A series of cases also revealed violations of the Convention by the same states, stemming from their authorities' inability to properly investigate allegations

88 ECtHR, *X and Others v. Albania*, Applications Nos. 73548/17 and 45521/19, Judgement of 31 May 2022.

89 ECtHR, *Elmazova and Others v. North Macedonia*, Applications Nos. 11811/20 and 13550/20, Judgement of 13 December 2022.

90 ECtHR, *Moldovan and Others v. Romania (no. 2)*, Applications Nos 41138/98 and 64320/01, Judgement of 12 July 2005; ECtHR, *Gergely v. Romania*, Application No. 57885/00, Judgement of 26 April 2007; ECtHR, *Kalanyos and Others v. Romania*, Application No. 57884/00, Judgement of 26 April 2007. ECtHR, *Tănase and Others v. Romania*, Application No. 62954/00, Judgement of 26 May 2009; ECtHR, *Nachova and Others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, Judgement of 6 July 2005; ECtHR, *Vasil Sashov Petrov v. Bulgaria*, Application No. 63106/00, Judgement of 10 June 2010; ECtHR, *Soare and Others v. Romania*, Application No. 24329/02, Judgement of 22 February 2011.

91 ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Application No. 47848/08, Judgement of 17 July 2014; ECtHR, *Fedorchenko and Lozenko v. Ukraine*, Application No. 387/03, Judgement of 20 September 2012.

92 ECtHR, *Anguelova v. Bulgaria*, Application No. 38361/97, Judgement of 13 June 2002; ECtHR, *Ognyanova and Choban v. Bulgaria*, Application No. 46317/99, Judgement of 23 February 2006; ECtHR, *Mižigárová v. Slovakia*, Application No. 74832/01, Judgement of 14 December 2010; ECtHR, *Ion Bălăşoiu v. Romania*, Application No. 70555/10, Judgement of 17 June 2014; ECtHR, *Velikova v. Bulgaria*, Application No. 41488/98, Judgement of 18 May 2000; ECtHR, *Ranđelović and Others v. Montenegro*, Application No. 66641/10, Judgement of 19 September 2017.

of police ill-treatment and brutality.[93] Moreover, the lack of proper investigation was found in cases involving violent acts perpetrated by private individuals against Roma persons.[94] The number of such cases indicates that in certain CEE countries crimes and attacks against Roma people were not effectively investigated and this lack of investigation was at times linked to the victims' racial origin, resulting in the insufficient protection of their rights.

Another widespread practice, particularly in Central European states, was the unlawful forced sterilisation of Roma women. In cases addressing this issue, the Court found violations of Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private and family life) of the ECHR.[95] However, the Court refrained from analysing whether the facts of these cases constituted discrimination based on sex, race, or ethnicity. On the one hand, some argue that the forced and coerced sterilisation of the applicants – targeting women from a specific group entitled to non-discrimination protection – underscores the systemic nature of this

93 ECtHR, *Jašar v. "the former Yugoslav Republic of Macedonia"*, Application No. 69908/01, Judgement of 15 February 2007; ECtHR, *Dzeladinov and Others v. "the former Yugoslav Republic of Macedonia"*, Application No. 13252/02, Judgement of 10 April 2008; ECtHR, *Sulejmanov v. "the former Yugoslav Republic of Macedonia"*, Application No. 69875/01, Judgement of 24 April 2008; ECtHR, *Cobzaru v. Romania*, Application No. 48254/99, Judgement of 26 July 2007; ECtHR, *Stoica v. Romania*, Application No. 42722/02, Judgement of 4 March 2008; ECtHR, *Adam v. Slovakia*, Application No. 68066/12, Judgement of 26 July 2016; ECtHR, *Lingurar and Others v. Romania*, Application No. 5886/15, Judgement of 16 April 2019; ECtHR, *Carabulea v. Romania*, Application No. 45661/99, Judgement of 13 July 2010; ECtHR, *Borbála Kiss v. Hungary*, Application No. 59214/11, Judgement of 26 June 2012; ECtHR, *Ciorcan and Others v. Romania*, Application Nos. 29414/09 and 44841/09, Judgement of 27 January 2015; ECtHR, *Boacă and Others v. Romania*, Application No. 40355/11, Judgement of 12 January 2016; ECtHR, *Gheorghiță and Alexe v. Romania*, Application No. 32163/09, Judgement of 31 May 2016; ECtHR, *M.F. v. Hungary*, Application No. 45855/12, Judgement of 31 October 2017; ECtHR, *Kovács v. Hungary*, Application No. 47629/13, Judgement of 17 January 2017; ECtHR, *A.P. v. Slovakia*, Application No. 10465/17, Judgement of 28 January 2020; ECtHR, *R.R. and R.D. v. Slovakia*, Application No. 20649/18, Judgement of 1 September 2020; ECtHR, *X and Y v. North Macedonia*, Application No. 173/17, Judgement of 5 November 2020; ECtHR, *M.B. and Others v. Slovakia*, Application No. 45322/17, Judgement of 1 April 2021; ECtHR, *Memedov v. North Macedonia*, Application No. 1365/17, Judgement of 18 March 2021.

94 ECtHR, *Šečić v. Croatia*, Application No. 40116/02, Judgement of 31 May 2007; ECtHR, *Angelova and Iliev v. Bulgaria*, Application No. 55523/00, Judgement of 26 July 2007; ECtHR, *Beganović v. Croatia*, Application No. 46423/06, Judgement of 25 June 2009; ECtHR, *Koky and Others v. Slovakia*, Application No. 13624/03, Judgement of 12 June 2012; ECtHR, *Škorjanec v. Croatia*, Application No. 25536/14, Judgement of 28 March 2017; ECtHR, *J.I. v. Croatia*, Application No. 35898/16, Judgement of 8 September 2022; ECtHR, *Dimitrova and Others v. Bulgaria*, Application Nos. 44862/04, Judgement of 27 January 2011; ECtHR, *Balázs v. Hungary*, Application No. 15529/12, Judgement of 20 October 2015; ECtHR, *Alković v. Montenegro*, Application No. 66895/10, Judgement of 5 December 2017.

95 ECtHR, *V.C. v. Slovakia*, Application No. 18968/07, Judgement of 8 November 2011; ECtHR, *N.B. v. Slovakia*, Application No. 29518/10, Judgement of 12 June 2012; ECtHR, *I.G. and Others v. Slovakia*, Application No. 15966/04, Judgement of 13 November 2013; ECtHR, *R.K. v. the Czech Republic*, Application No. 7883/08, Decision (strike out) of 27 November 2012; ECtHR, *G.H. v. Hungary*, Application No. 54041/14.

practice.[96] On the other hand, the Court concluded that there was insufficient objective evidence to establish that the practice was part of an organised policy or racially motivated, as it affected vulnerable individuals from various ethnic groups.[97]

Due to their distinct way of life, Roma individuals are sometimes victims of forced evictions. In *Chapman v. the United Kingdom*, the applicant alleged that her right to private life had been violated when she was denied planning permission to station caravans on her land. She argued that living in a caravan was an integral part of her ethnic identity as a Gypsy, reflecting the longstanding tradition of the minority's travelling lifestyle.[98]

The Court, however, found that the measures taken against the applicant did not violate Articles 8 or 14 of the ECHR as the interferences with the applicant's rights were proportionate to the legitimate aim of protecting the "rights of others" through preservation of the environment.[99] According to the Court's reasoning, contracting states to the ECHR are not under the obligation to make available to the Gypsy community an adequate number of suitably equipped sites, as Article 8 does not encompass a right to be provided with a home,[100] or access to safe drinking water.[101] In these cases the Court, unfortunately, omitted to recognise the special needs of Roma: the fact that they are recognised as vulnerable group implies that special consideration must be given by the state.[102] Nevertheless, certain CEE countries have been found to violate Article 8 due to state authorities' failure to protect applicants who were forcibly displaced from their homes due to their Roma origin.[103] Violations were also identified in cases where minimum procedural safeguards were not observed during the enforcement of eviction orders against Roma individuals.[104]

8. Indigenous Peoples Under the ECHR

The ECtHR has been widely criticised for its rulings concerning the rights of indigenous peoples, and especially for the narrow and restrictive interpretation of their land property rights.[105] As referred to earlier, the ECHR, like the Universal Declaration

96 Patel, 2017, p. 1.
97 ECtHR, *V.C. v. Slovakia*, Application No. 18968/07, Judgement of 8 November 2011, para. 177.
98 ECtHR, *Chapman v. the United Kingdom*, Application No. 27238/95, Judgement of 18 January 2001, para. 73.
99 Ibid., paras. 115 and 129.
100 Ibid., para. 98.
101 ECtHR, *Hudorovič and Others v. Slovenia*, Applications Nos. 24816/14 and 25140/14, Judgement of 10 March 2020 para. 116.
102 Khanna, 2024, p. 359.
103 ECtHR, *Burlya and Others v. Ukraine*, Application No. 3289/10, Judgement of 6 November 2018, para. 169; ECtHR, *Paketova and Others v. Bulgaria*, Applications Nos. 17808/19 and 36972/19, Judgement of 4 October 2022.
104 ECtHR, *Yordanova and Others v. Bulgaria*, Application No. 25446/06, Judgement of 24 April 2012, para. 144.
105 Mardikian and Galani, 2023, p. 14; Gismodi, 2016, p. 52; Bankes, 2011, p. 111.

of Human Rights (UDHR) and many other international instruments, primarily protects the individual rather than collective rights. Since indigenous rights tend to be collective in nature,[106] the ECHR does not explicitly protect the collective rights of indigenous peoples, nor does it refer to them. However, provisions of the ECHR can be extended to cover, at least to some extent, the rights of indigenous peoples. Some of these are Article 8 (private and family life), Article 14 (non-discrimination), and Article 1 of Protocol No. 1 which protects property rights. Be that as it may, issues of indigenous peoples played a minor role in the ECHR case law.[107]

The number of cases addressing issues related to indigenous peoples before the European human rights system remains limited. The first such case considered by the European Commission of Human Rights was *G. and E. v. Norway*, which involved the rights of two members of the indigenous Sami community whose traditional lands were threatened by the construction of a dam and hydroelectric plant in the Alta-Kautokeino river valley.[108] Even though the Commission acknowledged that 'under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being "private life", "family life" or "home"', it found that the interference with the rights of applicants were necessary in democratic society in 'the interests of the economic well-being of the country'.[109] However, this approach of equating indigeneity with lifestyle has been criticised. Belonging to an indigenous group is fundamentally a matter of identity, typically an inherent and unchangeable characteristic, whereas lifestyle is more fluid and prone to changes.[110]

In another two cases involving members of the same indigenous group, the Court dealt with procedural difficulties of indigenous people during the court trials. These cases revealed the obstacles that indigenous communities and individuals are facing in order to prove that a certain piece of land belonged to them and their ancestors.[111] In *Handölsdalen Sami* the applicant argued that they have rights to graze reindeers on the lands of the region based on earlier practices and "immemorial usage". The Court found that there were no violations of the right to a fair trial, because 'Swedish legal process met the requirements of a fair trial and that the state had not interfered with protected property rights'.[112]

The case of *Hingitaq 53 v. Denmark* involved the indigenous Inughuit people who were forcibly displaced in the 1950s due to the construction and expansion of a United States military base in Greenland. The ECtHR found no violation of Article 1 of Protocol No. 1, which protects property rights, reasoning that the Danish authorities had

106 Ruozzi, 2011, p. 1.
107 Kirchner, 2016, p. 175.
108 ECtHR, *G. and E. v. Norway*, Application Nos. 9278/81 and 9415/81, Decision of the Commission of 3 October 1983.
109 Ibid., para. 36.
110 Kirchner, 2016, p. 182.
111 ECtHR, *Könkämä and 38 Other Saami Villages v. Sweden*, Application No. 27033/95, Decision of 25 November 1996; ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, Application No. 39013/04, Judgement of 30 March 2010.
112 Ibid.

paid compensation and struck a fair balance between the proprietary interests of the affected individuals and the public interest.[113]

The decisions of the European Commission and the Court have reflected a narrow and restrictive doctrinal approach to property issues raised by indigenous peoples. Since such an interpretation disadvantages indigenous communities, the Court should adopt a broader interpretation of "possessions" protected under Article 1 of Protocol No. 1 to 'encompass communal and customary land use, especially where those rights are integral to Indigenous identity and survival'.[114] Furthermore, the cultural identity of indigenous peoples should be recognised and protected under Article 8 as falling within the scope of "private and family life". The recognition of communal property and its significance for indigenous identity could foster the proper accommodation of specific needs of indigenous peoples and the protection of Indigenous-specific rights.

9. Freedom of Assembly and Association

The case of *Gorzelik and Others v. Poland* is not the only case involving the registration of a Silesian minority association. More recently, the ECtHR ruled in *Association of People of Silesian Nationality (in liquidation) v. Poland*. The applicant association argued that the decision to dissolve and liquidate it was arbitrary and constituted an interference with its freedom of association, thus violating Article 11 of the Convention. The domestic courts justified their decision by asserting that the Association's registration was unlawful because its name referred to a non-existent nation and had the potential to mislead the public. The Supreme Court emphasised that recognising the association as an organisation of a national minority could have serious consequences for the unity and integrity of the Polish state.[115] Furthermore, the Polish Government noted that the registration of the applicant association could create an impression that state authorities have recognised the existence of a Silesian nation 'which might encourage other ethnic groups to take similar steps and, consequently, undermine the integrity of the Polish State'.[116] The ECtHR applied the proportionality test and concluded that the applicant association's name and two provisions of its memorandum did not justify its dissolution, as there was no concrete evidence that they posed a threat to public order or democratic society.

Several cases were brought forward by minority organisations of the Macedonian minority in Bulgaria because their applications were rejected by Bulgarian authorities

113 ECtHR, *Hingitaq 53 and Others v. Denmark*, Application No. 18584/04, Decision of 12 January 2006.
114 ASSEDEL, 2025.
115 ECtHR, *Association of People of Silesian Nationality (in liquidation) v. Poland*, Application No. 26821/17, Judgement of 14 March 2024, para. 44.
116 Ibid., para. 52.

(refer to the list of cases in the footnote).[117] The United Macedonian Organisation Ilinden has attempted several times to register with Bulgarian authorities since 1999, but each time it was refused on the grounds that the association's objectives undermine national unity, as the "Macedonian minority" is not recognised, and that registration could lead to significant tensions and breaches of public order. The Government structured its claims into three groups of arguments. The first group related to alleged formal deficiencies in registration documents because they were signed only by the members of the management committee and not by all founders. This deficiency was rectified during the latter proceeding before the Court of Appeals. However, the ECtHR has found that technical deficiencies in the documents do not constitute a sufficient reason for the rejection of registration. The second group of arguments focused on alleged conflicts of the association's articles with provisions of the Bulgarian Constitution and other laws. However, deeper analysis of Bulgarian legislation and its implementation proved that this divergence was not sufficient for the denial of the registration. And finally, the most important argument relied on the assumption that the registration of a Macedonian minority organisation would be dangerous for the territorial integrity of the country, for the public order and for the rights and freedoms of others. In one of the cases, the Court considered that the applicant's articles were formulated in a virulent style and that the actions of the Bulgarian authorities were described as "state terrorism" and "genocide". Nevertheless, the Court stressed once again that the freedom of expression protects information and ideas 'that offend, shock or disturb, including language as harsh as the one at issue'.[118] Furthermore, there was no evidence that these types of associations were engaged in any kind of violent actions. Hence, the Court found violations of Article 11 in several similar cases involving Macedonian national minority organisations in Bulgaria.

117 ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Application Nos. 29221/95 and 29225/95, Judgement of 2 October 2001; ECtHR, *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, Application No. 44079/98, Judgement of 20 October 2005; ECtHR, *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, Application No. 59489/00, Judgement of 20 October 2005; ECtHR, *Ivanov and Others v. Bulgaria*, Application No. 46336/99, Judgement of 24 November 2005; ECtHR, *United Macedonian Organisation Ilinden and Others v. Bulgaria*, Application No. 59491/00, Judgement of 19 January 2006; ECtHR, *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria* (No. 2), Application No. 37586/04, Judgement of 18 October 2011; ECtHR, *United Macedonian Organisation Ilinden and Others v. Bulgaria* (No. 2), Application No. 34960/04, Judgement of 18 October 2011; ECtHR, *The United Macedonian Organisation Ilinden and Others v. Bulgaria* (no. 3), Application No. 29496/16, Judgement of 11 January 2018; ECtHR, *The United Macedonian Organisation Ilinden and Others v. Bulgaria* (no. 3), Application No. 29496/16, Judgement of 11 January 2018; ECtHR, *Yordan Ivanov and Others v. Bulgaria*, Application No. 70502/13, Judgement of 11 January 2018; ECtHR, *Macedonian Club for Ethnic Tolerance in Bulgaria and Radonov v. Bulgaria*, Application No. 67197/13, Judgement of 28 May 2020; ECtHR, *Vasilev and the Society of the Repressed Macedonians in Bulgaria Victims of the Communist Terror v. Bulgaria*, Application No. 23702/15, Judgement of 28 May 2020.

118 ECtHR, *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, Application No. 59491/00, Judgement of 19 January 2006, para. 76.

Not only did the Court find several violations of the freedom of association for individuals claiming to belong to the Macedonian minority in Bulgaria, but also ruled in a few cases that their right to peaceful assembly was violated.[119] The Bulgarian government justified its interference with the right to peaceful assembly by referring to the possibility that organisers will make separatist declarations, initiate violence, and attempt to create a Macedonian nation among people belonging to the Bulgarian nation.[120] However, the ECtHR was convinced that there was no real risk of violent action or of incitement to violence or any other form of rejection of democratic principles and therefore found that the authorities overstepped their margin of appreciation.[121]

Similar issues were addressed in the cases involving Macedonian Organisations in Greece.[122] These cases arose amid ongoing disputes between Greece and the Former Yugoslav Republic of Macedonia (FYROM) over the name and identity of the region called Macedonia. For the Greek state, Macedonia was a region within Greece, and there was no distinct Macedonian nation or ethnicity. A landmark case in this context is *Sidiropoulos and Others v. Greece*, involving applicants from Greece who claimed to have a "Macedonian national consciousness" and asserted their Macedonian origin. They sought to register an association called the "Home of Macedonian Civilisation". The competent state authority rejected their application, arguing that the association's purpose, among other things, was to promote 'the idea that there is a Macedonian minority in Greece, which is contrary to the country's national interest and consequently contrary to law'.[123] The Court, however, found a violation of Article 11 because the arguments of national authorities were, according to the Court, baseless, vague and unproved and did not correspond to the concept of 'pressing social need', while there was not any proof that the applicants intended to undermine territorial integrity, national security and public order or that they were plotting against Greece. The Court also referred to the political dispute between Greece and FYROM that had

119 ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Application Nos. 29221/95 and 29225/95; ECtHR, *Ivanov and Others v. Bulgaria*, Application No. 46336/99, Judgement of 24 November 2005; ECtHR, *Singartiyski and Others v. Bulgaria*, Application No. 48284/07, Judgement of 18 October 2011; ECtHR, *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, Application No. 44079/98, Judgement of 20 October 2005; *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria* (No. 2), Application No. 37586/04, Judgement of 18 October 2011; ECtHR, *Kiril Ivanov v. Bulgaria*, Application No. 17599/07, Judgement of 11 January 2018.

120 ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Application Nos. 29221/95 and 29225/95, para. 71.

121 Ibid., para. 112.

122 ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, Judgement of 10 July 1998; ECtHR, *Ouranio Toxo and Others v. Greece*, Application No. 74989/01, Judgement of 20 October 2005; ECtHR, *House of Macedonian Civilisation v. Greece*, Application No. 1295/10 2015, Judgement of 9 July 2015.

123 ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, Judgement of 10 July 1998, para. 10.

a decisive influence on the outcome of the proceedings before national authorities.[124] The case demonstrates that merely suspecting national minority associations of undermining territorial integrity, national security, or public order is not a sufficient ground for rejecting their registration. Furthermore, the Court established the threshold of a "pressing social need" that must be met to justify interference with freedom of association.

According to the ECtHR, a fundamental aspect of freedom of association is the ability of citizens to establish legal entities 'to act collectively in a field of mutual interest'.[125] Consequently, a state's refusal to register such associations constitutes an interference with this right.[126] The Court highlighted that 'the way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned'.[127] Furthermore, the Court adopts a holistic approach when assessing the alleged interference, examining whether it was "proportionate to the legitimate aim pursued" and whether the justification provided was "relevant and sufficient".[128] This approach favours national, ethnic, and religious minorities as such organisations play a crucial role in protecting their identity and contribute to the manifestation of their minority conciseness.

10. Prohibition of Torture and Inhumane Treatment

Certain aspects of national/ethnic minorities' protection have been addressed by the ECtHR under the provision of Article 3 of ECHR (Prohibition of torture). Several cases involved violence directed against vulnerable groups based on their ethnicity or religion. For the Court, discrimination, where it attains a sufficient level of severity, may constitute inhumane treatment that is in breach of Article 3 of the Convention. The threshold of the minimum level of severity required for the application of the mentioned article has been implemented in cases involving ill-treatment of ethnic minorities by state authorities. In a case that involved the ill-treatment of Chechens by Russian law-enforcement authorities the Court found violations of Article 14 of the

124 More on the securitisation of Macedonian minority in Bulgaria and Greece: Milenkovska and Gerasimoski, 2024, pp. 16–20.

125 ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, Judgement of 10 July 1998, para. 40; ECtHR, *Zhechev v. Bulgaria*, Application No. 57045/00, Judgement of 21 June 2007, para. 34; ECtHR, *Jehovah's Witnesses of Moscow v. Russia*, Application No. 302/02, Judgement of 10 June 2010, para. 100; ECtHR, *Church of Scientology Moscow v. Russia*, Application No. 18147/02, Judgement of 5 April 2007, para. 73; ECtHR, *Koretskyy and Others v. Ukraine*, Application No. 40269/02, Judgement of 3 April 2008, para. 38.

126 ECtHR, *Gorzelik and Others v. Poland*, Application No. 44158/98, Judgement of 17 February 2004, para. 52; ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, Judgement of 10 July 1998, para. 31; ECtHR, *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, Application No. 59491/00, Judgement of 19 January 2006, para. 53.

127 ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, Judgement of 10 July 1998, para. 40.

128 Ibid.

Convention in conjunction with the substantive and procedural aspects of Article 3 concerning some of the applicants. The Court reiterated that 'an obligation to unmask a possible discriminatory motive behind violent incidents is implied in the responsibilities under Article 14 of the Convention'.[129] Consequently, the Court concluded that

> 'where evidence comes to light of racist verbal abuse being uttered by law-enforcement agents in the context of the alleged ill-treatment of detained persons from an ethnic or other minority, a thorough examination of all the facts should be undertaken in order to discover any possible racial motives'.[130]

The inability of the state to provide satisfactory explanation led the Court to conclude that the behaviour of state authorities 'constituted discrimination based on ethnicity, which is a form of racial discrimination'.[131] The combined effect of Articles 3 and 14 implies that attention should be directed into the interplay between racism and other prohibited forms of discrimination based upon ethnicity or religion and the ill-treatment of members of national/ethnic and religious minorities.

In *Milanović v. Serbia* a member of the Vaishnava Hindu religious community alleged that Serbian authorities failed to protect him from a series of religiously motivated attacks between 2001 and 2007. Despite reporting these incidents to the police, the investigations were inadequate, and no perpetrators were identified or prosecuted. The Court considered that

> 'when investigating violent incidents, state authorities have the additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events and that the authorities had explored just several leads indicated by the applicant that 'amounted to little more than a *pro forma* investigation".[132]

Therefore, it concluded that Serbia had violated Article 3 of the Convention due to the authorities' failure to conduct an effective investigation into the attacks.

The case of *Begheluri and Others v. Georgia* concerned large-scale religiously motivated violence against Jehovah's Witnesses in Georgia during the years 2000–2001. The applicants, 99 Georgian nationals, alleged that they were subjected to physical violence, verbal abuse, and harassment, often with the direct or indirect involvement of state authorities. Despite filing numerous complaints, the authorities failed to

129 ECtHR, *Begheluri and Others v. Georgia*, Application No. 37966/07, Judgement of 3 July 2014, para. 122.
130 ECtHR, *Antayev and Others v. Russia*, Application No. 28490/02, Judgement of 7 October 2014, para. 173.
131 Ibid., para. 128.
132 ECtHR, *Milanović v. Serbia*, Application No. 44614/07, Judgement of 14 December 2010, para. 100.

take effective measures to prevent or investigate the attacks, creating a climate of impunity. The Court found that state authorities were ineffective in preventing and investigating religiously motivated violence and by this, encouraged other attacks against Jehovah's Witnesses.[133] The Court found violations of Articles 3 (prohibition of inhuman or degrading treatment), 9 (freedom of thought, conscience, and religion), and 14 (prohibition of discrimination) of the Convention. There is no need to emphasise how crucial effective protection from religiously motivated violence is for religious minorities. In a pluralistic society, states have a responsibility not only to tolerate religious and ethnic minorities but also to safeguard them from violence and to accommodate them and their specific needs.

11. Religious Minorities and the Right To Manifest Religion or Belief

Religious minorities' rights can be protected under Article 9 of ECHR, which safeguards freedom of thought, conscience and religion, including the individual and collective dimensions of religious freedom.[134] The majority of applications alleging violations of religious freedom submitted to the ECtHR originate from minority religious organisations or their members. Conversely, cases initiated by members of prevailing religious organisations are exceptionally rare. However, the Court generally avoids addressing religious freedom cases as minority issues. It focuses, rather, on them as infringements of individual rights of applicants or communal rights of particular religious organisations.

Religion remains one of the markers of discrimination, as it is a vital element of believers' identity.[135] This is especially evident in modern pluralistic societies. Since its first judgement under Article 9 of the Convention, the Court has consistently insisted that pluralism is indissociable from a democratic society. Consequently, states have a positive obligation to ensure the protection of religious pluralism and to, *inter alia*, maintain state neutrality in religious matters and respect the autonomy of religious organisations.[136] Religious pluralism cannot exist without religious minorities, whose freedom of religion – especially the freedom to manifest their faith and beliefs – must be fully safeguarded. Without entering a wider discussion about what religion is

133 ECtHR, *Begheluri and Others v. Georgia*, Application No. 37966/07, Judgement of 3 July 2014, para. 145.

134 Art. 9 of ECtHR reads as follows: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

135 Henrard, 2011, pp. 51–52.

136 ECtHR, *Kokkinakis v. Greece*, Application No. 14307/88, Judgement of 25 May 1993, para. 31.

under the provisions of the ECHR, it should be noted that a mere "consciousness" of belonging to a minority does not give rise to an Article 9 issue.[137]

While ethnic and national minorities mostly seek protection under Article 14 of the Convention, religious minorities have more options: they seek protection under Article 14 or Article 9, or in conjunction with both articles. However, in cases in which the Court accepted that Article 14 is applicable, it has been reluctant to recognise religion as a suspect ground. Instead, the Court in such cases relies on the margin of appreciation that states enjoy in order to be able to strike a balance between competing Convention rights.[138] The protection against invidious discrimination on the basis of race, national origin, ethnicity or religion is closely linked to the level of scrutiny applied by the Court to assess the proportionality of measures in question. Higher scrutiny demands stronger justifications from the state and increases the possibility of finding discrimination. Both race/ethnic origin and religion are considered suspect grounds of differentiation, with race/ethnicity being immutable and religion viewed as *de facto* immutable because of its role as a core identity characteristic for believers. In cases of discrimination against religious minorities, especially concerning discriminatory violence, the Court typically applies a high level of scrutiny.[139] However, the Court's stance on religion as a suspect ground remains ambiguous, as it avoids explicitly addressing it in its analysis of Article 14 in conjunction with Article 9. This ambiguity stems from the Court's jurisprudence under Article 9, which grants states a broad margin of appreciation in matters concerning religion-state relations. The Court cannot simultaneously grant states a wide margin of appreciation under Article 9 while recognising religion as a suspect ground under Article 14, which would necessitate a narrow margin of appreciation.[140] The broader margin of appreciation afforded by the Court to states, particularly in matters concerning state-religion relations, has enabled it to avoid addressing highly sensitive issues which are quite often intertwined with the historical, legal, religious, and constitutional developments of European countries.

Article 9 of the ECHR safeguards three key components of the freedom of religion: the freedom to hold a religion or belief, the freedom to change one's religion or belief, and the freedom to manifest one's religion or belief.[141] All three components are equally important for religious minorities. The freedom to hold and maintain a religion or belief secures that minority groups are able to preserve their religious identities, even when the number of their followers is relatively small. The freedom to change religion is equally important, as minority religious groups often employ various practices to disseminate their teachings, attract and retain new members.

137 Murdock, 2012, p. 16.
138 ECtHR, *Eweida and Others v. the United Kingdom*, Application Nos. 48420/10, 59842/10, 51671/10, and 36516/10, Judgement of 15 January 2013, para. 106.
139 ECtHR, *Members of the Gldani Congregation of Jehovah Witnesses & 4 Others v. Georgia*, Application No. 71156/01, Judgement of 3 May 2007.
140 Henrard, 2016, pp. 161–162.
141 Schabas, 2015, p. 420.

These types of activities can raise issues under Article 9, particularly regarding tensions between the right to maintain religious beliefs without interferences and the right to spread religious teachings and convince others to adopt a new religion or belief.[142] It is noteworthy that the first U.S. case applying the Free Exercise Clause to the states, and the first European case applying Article 9 of the ECHR both involved issues related to evangelism.[143] Finally, the most disputable component of religious freedom – that gave rise to a large number of cases under Article 9 – is the freedom to manifest one's religion or belief. The Convention states that this freedom can be exercised 'alone or in community with others', while the Court has elaborated that 'it also implies, *inter alia*, freedom to "manifest religion" alone and in private or in community with others, in public and within the circle of those whose faith one shares'.[144] Therefore, the focus of this section of the book chapter will be on the protection afforded to religious minorities to manifest their beliefs and, in connection with this, on their right to obtain legal personality.

There are countless forms of the manifestation of religion or belief. For religious minorities it is crucial that this freedom involve the manifestation of religion in "community with others" and that it can be exercised in public. Article 9 enumerates certain manifestations of religion that are protected: worship, teaching, practice and observance. This list is exemplary but not exhaustive, as the Court has recognised that the Convention also protects other forms of manifestation of religion, not explicitly mentioned in Article 9. Some of these are especially important for religious minorities. For example, the unjustified detention of Jehovah's Witnesses in Baku, Azerbaijan, for door-to-door preaching in an apartment block and distributing religious literature was found by the Court to constitute a violation of Article 9.[145] The wearing of religious symbols or religious dress in the public space has become a highly debated and contentious issue in many European countries, especially in relation to minority religious groups. Nonetheless, the Court has recognised it as a form of manifestation of religion protected under Article 9 of the Convention. The diversity of religions and beliefs and various forms of their manifestation renders it difficult, if not impossible, to be explicitly enumerated.

The Convention does not protect every act inspired, motivated or influenced by religion or belief, as not every such act constitutes a "manifestation" as the term is used in Article 9. The case of *Arrowsmith v. United Kingdom* involved a pacifist who distributed leaflets to soldiers, urging them to refuse service in Northern Ireland. She argued that her actions were a manifestation of her pacifist beliefs, protected under Article 9 of the Convention. However, the European Commission of Human Rights determined that her actions did not constitute a "manifestation" of her beliefs under

142 Hirsch, 1998, p. 409.
143 Durham and Scharffs, 2019, p. 31.
144 ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application No. 45701/99, Judgement of 13 December 2001, para. 114.
145 ECtHR, *Nasirov and Others v. Azerbaijan*, Application No. 58717/10, Judgement of 20 February 2020.

the meaning of Article 9. The Commission distinguished between acts inspired by a belief and those that directly express or manifest it.[146] In this case, the content of the leaflets was deemed political opposition to government policy rather than an expression of pacifist belief. Consequently, the Commission found no violation of Article 9. Furthermore, not all acts conducted by members of traditional religions that are motivated by well-known religious teachings automatically constitute manifestation of religion under Art. 9. In *Pichon and Sajous v. France* two French pharmacists refused to sell contraceptive pills due to their religious convictions.[147] They argued that this refusal was a manifestation of their religion, protected under Article 9. However, the Court rejected their claim, stating that Article 9 does not guarantee the right to act in accordance with one's religious beliefs in all circumstances. The Court held that the word "practice" under Article 9 does not denote every act motivated by religion or belief. It further noted that the applicants could manifest their beliefs in other ways outside the professional sphere.[148] Therefore, the Court in similar cases carefully examines the circumstances of each case in order to determine whether the act in question qualifies as a "manifestation" within the scope of Article 9.

In addition, The ECtHR has established the threshold of the 'existence of a sufficiently close and direct nexus between the act and the underlying belief'.[149] The existence of this nexus also 'must be determined on the facts of each case'.[150] In *Jakóbski v Poland*, a Polish prisoner who adhered to Mahayana Buddhism requested a vegetarian diet in accordance with his religious beliefs. The prison authorities denied his request, citing logistical and financial constraints, and instead provided a pork-free diet that still included other types of meat. The Court dismissed the Polish government's argument that 'vegetarianism could not be considered an essential aspect of the practice of the applicant's religion, since the strict Mahayana school to which the applicant claimed to adhere only encouraged vegetarianism but did not prescribe it'.[151] It insisted that 'observing dietary rules can be considered a direct expression of beliefs' and concluded that adherence to a specific diet in this context constitutes a manifestation of religion that falls within the scope of Art. 9. The Court found that the authorities had failed to strike a fair balance between the needs of the prison system and the applicant's right to religious freedom. In assessing whether there is a direct nexus between the act and religion or belief, the state authorities must remain neutral and refrain from assessing the legitimacy of religious beliefs.

Even though the Court avoids addressing issues of religious communities as minority issues, there is a religious organisation which has often been the subject of discrimination and whose activities give rise to an Article 9 issue – Jehovah's

146 ECtHR, *Arrowsmith v. United Kingdom*, Application No. 7050/75, Resolution of 12 June 1979.
147 Lamačková, 2008, para. 8.
148 ECtHR, *Pichon and Sajous v. France*, Application No. 49853/99, Decision of 2 October 2001.
149 ECtHR, *Eweida and Others v. the United Kingdom*, Application No. 48420/10, Judgement of 15 January 2013, para. 82.
150 Ibid.
151 ECtHR, *Jakóbski v. Poland*, Application No. 18429/06, Judgement of 7 December 2010, para. 43.

Witnesses. The case of *Valsamis v. Greece* involved a Jehovah's Witness student who was suspended from school for refusing to participate in a school parade commemorating a Greek national holiday. The applicant argued that this obligation violated their religious and pacifist beliefs. However, the Court found no violation of Article 9, reasoning that the parade primarily served an educational and commemorative purpose. Furthermore, the Court can discern nothing 'either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions.[152] This approach was widely criticised, as the Court has 'in effect substituted its judgement for the conscience of the persons involved, defining what was "reasonable" for them to believe with regard to their participation in a national commemorative ceremony'.[153] As previously noted, this approach shifts the focus from the motivation behind the manifestation – typically rooted in belief or religion – to its nature, and brings the Court 'dangerously close to adjudicating on whether a particular practice is formally required by a religion'.[154]

As it has been previously noted, members of religious minorities should have the freedom to manifest their religion or beliefs both publicly and privately. However, this freedom also has a negative dimension, as individuals have the right not to be compelled to disclose their religion or beliefs, nor to adopt a position from which such beliefs – or the lack thereof – might be inferred.[155] These issues often arise in countries with a historically predominant religion deeply rooted in the nation's history and legal framework. Certain regulations, some of which date back centuries, implicitly assume that the majority of citizens adhere to the same faith. As a result, individuals who do not belong to the predominant religion may encounter obstacles in exercising their rights or may be forced to partially reveal their religion or beliefs. A typical example of this can be seen in oath-taking cases in Greece.

In the case of *Dimitras and Others v. Greece* (No. 3) the Court addressed the obligation of individuals to disclose their religious beliefs in order to avoid taking a religious oath in court proceedings. The applicants, who were not Orthodox Christians,[156] were required to reveal their religious convictions to request a solemn declaration instead of the standard religious oath. The Court found that the obligation to disclose religious beliefs constituted an unnecessary and disproportionate interference with the applicants' rights, as it presumed adherence to the predominant religion and failed to

152 ECtHR, *Valsamis v. Greece*, Application No. 21787/93, Judgement of 18 December 1996, para. 31. ECtHR, *Efstratiou v. Greece*, Application No. 24095/94, Judgement of 18 December 1996, para. 32.
153 Martínez-Torrón and Navarro-Valls, 2004, p. 234.
154 Harris et al., 2023, p. 1011.
155 Schabas, 2015, p. 428.
156 The Orthodox Church is recognised as the "prevailing religion" under art. 3. of the Greek Constitution. Constitution of Greece from 2008.

respect the principle of neutrality.[157] In other similar cases the Court concluded that the freedom of the individual to manifest their religion or belief 'also includes his right not to reveal his religious faith or beliefs and not to be obliged to act or refrain from acting in a way that can lead to the conclusion that he has such beliefs or not'.[158] An identical issue was addressed in *Buscarini and Others v. San Marino*. Members of the San Marinese Parliament were required to take a religious oath referencing the Gospels upon assuming office. The Court found that 'requiring the applicants to take the oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion, a requirement which is not compatible with Article 9 of the Convention'.[159] The issues with oath-taking procedures that violated Article 9 of the Convention have been addressed by replacing religious oaths with secular alternatives or by allowing individuals to choose between a secular or religious oath without any preconditions.

The negative aspect of the freedom to manifest religion or belief might be of special value for minorities when they are accessing public services. In the case of *Grzelak v. Poland*, a Polish student refrained from attending religious instruction due to his parents' agnostic beliefs. Despite their repeated requests, the school failed to provide an alternative ethics class. Furthermore, the student's school reports displayed a blank space under the "religion/ethics" section, which could lead to him being perceived as a person without religious beliefs. The Court rejected the Government's argument that the absence of a mark was neutral and merely reflected his non-participation in ethics classes. It concluded that this 'amounted to a form of unwarranted stigmatisation of the [...] applicant'.[160] Moreover, the Court highlighted that

> 'there will be an interference with the negative aspect of this provision when the State brings about a situation in which individuals are obliged – directly or indirectly – to reveal that they are non-believers. This is all the more important when such obligation occurs in the context of the provision of a significant public service such as education'.[161]

157 ECtHR, *Dimitras and Others v. Greece*, Application Nos. 42837/06, 3237/07, 3269/07, 35793/07, and 6099/08, Judgement of 3 June 2010, para. 88; Similar Greek cases are: ECtHR, *Dimitras and Others v. Greece (No. 2)*, Application Nos. 34207/08 and 6365/09, Judgement of 3 November 2011; ECtHR, *Alexandridis v. Greece*, Application No. 19516/06, Judgement of 21 February 2008.
158 Lorincz, 2023, p. 5.
159 ECtHR, *Buscarini and Others v. San Marino*, Application No. 24645/94, Judgement of 18 February 1999, para. 39.
160 ECtHR, *Grzelak v. Poland*, Application No. 7710/02, Judgement of 15 June 2010, para. 99.
161 Ibid., para. 87.

12. Legal Personality of Religious Associations

Two distinct categories of minority religious groups can be identified. The first category includes traditional and long-established religious minority groups that have already obtained legal personality and, in many European states, enjoy preferential status. The second category comprises newly established religious groups or those associated with relatively recent religious movements. These groups often seek state recognition or registration, and even when they achieve legal personality, they do not enjoy the most privileged status. Although both categories fall under the umbrella of religious minorities, their interests may be sometimes opposite. For instance, a ban on proselytism may be supported by traditional religious minorities aiming to preserve their membership, whereas newly established religious organisations may oppose such restrictions, as they seek to spread their teachings and attract new members. While the Convention and the Court do not distinguish between these two groups, different types of issues arise in their cases. Traditional groups may face the risk of losing their legal personality due to legislative amendments or reforms, whereas newly established groups encounter obstacles and constraints in their registration process or in accessing rights available to other religious organisations.

The right of religious organisations to acquire legal personality is not explicitly guaranteed by the Convention, but it is recognised as a part of collective right to religious freedom.[162] The Court does not hesitate to interpret Article 9 in the light of Article 11 accepting that 'religious communities traditionally and universally exist in the form of organised structures', and that believers' right to religious freedom 'encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention'.[163]

The Court has found violations of Article 9 in a series of cases where state authorities denied registration or recognition of minority religious groups, such as Jehovah's Witnesses,[164] the Church of Scientology,[165] the International Society for Krishna

162 Ferrari, 2007, p. 3.

163 ECtHR, *Hasan and Chaush v. Bulgaria*, Application No. 30985/96, Judgement of 26 October 2000, para. 62.

164 ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, Application No. 40825/98, Judgement of 31 July 2008; ECtHR, *Jehovah's Witnesses of Moscow and Others v. Russia*, Application No. 302/02, Judgement of 10 June 2010; ECtHR, *Christian Religious Organization of Jehovah's Witnesses in the NKR v. Armenia*, Application No. 41817/10, Judgement of 22 March 2022.

165 ECtHR, *Church of Scientology of St Petersburg and Others v. Russia*, Application No. 47191/06, Judgement of 2 October 2014; ECtHR, *Church of Scientology Moscow v. Russia*, Application No. 18147/02, Judgement of 5 April 2007; ECtHR, *Church of Scientology Moscow and Others v. Russia*, Application Nos. 37508/12, 61695/13, and 16761/14, Judgement of 14 December 2021.

Consciousness,[166] the Orthodox Christian Churches,[167] the Bektashi Community,[168] the Ahmadiyya Muslim Community,[169] the Salvation Army,[170] and others. Furthermore, excessive delays in granting registration, sometimes extending up to 15 years,[171] have been deemed violations of the Convention.[172] It can be concluded from the above that most cases concerning the legal personality of religious organisations have arisen in Central and Eastern European countries. This is due, on the one hand, to the post-communist legal development in these states and, on the other hand, to the overlap between religious and national identities. Across the region, religious and ethnic affiliations are deeply intertwined, making the registration of religious communities prone to inter-ethnic, international, and political influences. Furthermore, mistrust toward small and newly established religious groups was widespread throughout the region. A few of the most prominent cases will be analysed below.

The landmark case of the *Metropolitan Church of Bessarabia and Others v. Moldova* involves a group of Orthodox Christians in Moldova who established the Metropolitan Church of Bessarabia, an Orthodox Church affiliated with the Romanian Orthodox Church.[173] However, the Moldovan political authorities favoured the Metropolitan Church of Moldova, which operates under the jurisdiction of the Moscow Patriarchate. As a result, they repeatedly refused to recognise and register the Metropolitan Church of Bessarabia. The Government justified its refusal by citing the duty of neutrality in inter-denominational relations, arguing that the applicant church should resolve its disputes with the already recognised Metropolitan Church of Moldova, from which it sought to split. Additionally, the Government claimed that the applicant church engaged in political activities threatening the state's territorial integrity and argued that it could continue its activities without registration and obtaining legal capacity due to the tolerance shown by authorities.

166 ECtHR, *Genov v. Bulgaria*, Application No. 40524/08, Judgement of 23 March 2017.
167 ECtHR, *Svyato-Mykhaylivska Parafiya v. Ukraine*, Application No. 77703/01, Judgement of 14 June 2007; ECtHR, *Biserica Adevărat Ortodoxă din Moldova and Others v. Moldova*, Application No. 952/03, Judgement of 27 February 2007; ECtHR, *Fusu Arcadie and Others v. Moldova*, Application No. 22218/06, Judgement of 17 July 2012; ECtHR, *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy) v. The Former Yugoslav Republic of Macedonia*, Application No. 3532/07, Judgement of 16 November 2017.
168 ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, Application Nos. 48044/10, 75722/12, and 25176/13, Judgement of 12 April 2018.
169 ECtHR, *Metodiev and Others v. Bulgaria*, Application No. 58088/08, Judgement of 15 June 2017.
170 ECtHR, *Moscow Branch of the Salvation Army v. Russia*, Application No. 72881/01, Judgement of 5 October 2006.
171 ECtHR, *Kimlya and Others v. Russia*, Application Nos. 76836/01 and 32782/03, Judgement of 1 October 2009.
172 ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, Application No. 40825/98, Judgement of 31 July 2008, paras. 79–80; ECtHR, *Church of Scientology of St Petersburg and Others v. Russia*, Application No. 47191/06, Judgement of 2 October 2014, para. 47.
173 To this day, the Bessarabian Metropolitanate remains a Church of believers with a strong Romanian identity, unable to extend its influence beyond this specific group. Mitrofanova, 2019, p. 109.

The Court's assessments in this case became a standard reference for many subsequent cases. Regarding the state's duty of neutrality, the Court stated that it is 'incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group'.[174] Concerning the alleged threat to territorial integrity, the Court found no evidence to conclude that the applicant Church was linked to organisations working toward the unification of Moldova and Romania. It emphasised that the possibility of the applicant Church, once recognised, constituting a danger to national security and territorial integrity remained purely hypothetical.[175] As such, rejecting registration on the grounds of security risks and territorial integrity concerns must be based on evidence rather than mere allegations. Finally, the Court rejected the argument that the applicant Church's ability to continue certain activities, such as meetings and prayers among its members, could substitute for the recognition of its legal capacity. It concluded that 'in the absence of recognition the applicant Church may neither organise itself nor operate'. Furthermore, it underlined that the authorities' tolerance could not replace formal recognition, stating that 'since recognition alone is capable of conferring rights on those concerned'.[176] Regarding the state's tolerance in the case *of Magyar Keresztény Mennonita Egyház and Others v. Hungary* the Court warned of 'the risk that the adherents of a religion may feel merely tolerated – but not welcome – if the State refuses to recognise and support their religious organisation whilst affording that benefit to other denominations'.[177] The Bessarabian Metropolitanate was recognised by the Moldovan authorities on 30 July 2002, just one day before the deadline established by the Court's ruling.[178]

Legislation governing the legal status of religious organisations often undergoes changes, which can impact already registered religious communities. In the case of *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, the Court addressed the deregistration and re-registration requirements imposed on religious communities under Hungary's 2011 Church Act. This legislation mandated that religious communities re-register with the Hungarian Parliament to regain their legal status and associated benefits, effectively creating a two-tier system that favoured certain denominations. The Court found that

> 'in removing the applicants' Church status altogether rather than applying less stringent measures, in establishing a politically tainted re-registration procedure whose justification as such is open to doubt and, finally, in treating the applicants differently from the incorporated Churches not only with regard to

174 ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application No. 45701/99, Judgement of 13 December 2001, para. 123.
175 Ibid., para. 125.
176 Ibid., para. 129.
177 ECtHR, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Applications Nos. 70945/11 and others, Judgement of 8 April 2014, para. 94.
178 Panainte, 2006, p. 96.

> the possibilities for cooperation but also with regard to entitlement to benefits for the purposes of faith-related activities, the authorities disregarded their duty of neutrality vis-à-vis the applicant communities. These elements, taken in isolation and together, are sufficient for the Court to find that the impugned measure cannot be said to correspond to a "pressing social need"'.[179]

From the Court's decision, it can be concluded that Parliament is not the appropriate authority to decide on the status of religious organisations.[180] The Hungarian 2011 Church Act was amended to introduce a four-tier system for recognising religious communities.[181] As of 2019, the categories of religious organisations in Hungary include religious associations, listed churches, registered churches, and established churches. These amendments granted religious associations a basic form of legal entity status without any constraints or burdensome procedures.

Minority religious organisations may sometimes retain their legal entity status but lack access to the rights and privileges available to other religious communities. In the case of *Savez Crkava 'Riječ Života' and Others v. Croatia*, the applicants challenged the refusal of the Croatian authorities to grant them the same legal benefits enjoyed by other recognised religious organizations. The applicants requested to conclude an agreement with the Croatian Government to gain the ability to provide religious instruction in public schools, access pastoral care in public institutions, and perform religious marriages with civil effects. However, the Government refused to conclude the agreement, arguing that the applicant churches failed to meet the cumulative historical and numerical criteria – specifically, that they had not been present in Croatia since 6 April 1941, and their adherents did not exceed 6,000. The Court noted that Croatian authorities had previously concluded agreements with religious organisations that did not meet the numerical criterion, indicating that the criteria were not applied equally to all religious communities. Therefore, it found that the differential treatment of the applicant churches compared to those with agreements lacked any 'objective and reasonable justification'.[182] The Court's judgement resulted in the agreement that Croatian Government signed with the applicant in 2014.[183] Thus, the Court's jurisprudence promoted equality among religious organisations in other countries of the region. Many states in Central and Eastern Europe have signed agreements with religious organisations, and ECtHR case law ensures that all religious minorities

179 ECtHR, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Application Nos. 70945/11 and others, Judgement of 8 April 2014, para. 115.
180 Csink, 2021, p. 94.
181 Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities.
182 ECtHR, *Savez Crkava 'Riječ Života' and Others v. Croatia*, Application No. 7798/08, Judgement of 9 December 2010, para. 92.
183 Agreement between the Government of the Republic of Croatia and the Alliance of Churches 'Word of Life', the Full Gospel Church, and the Protestant Reformed Christian Church in the Republic of Croatia on matters of common interest, Official Gazette of the Republic of Croatia, No. 112/2014.

have the opportunity to request agreements granting them the same benefits as those already enjoyed by other recognised religious organisations.

The jurisprudence of the ECtHR has developed mechanisms for protecting the rights of minority religious organisations, even though their issues have not been explicitly addressed as minority issues. The effectiveness of the Court's decisions appears to have increased in cases involving religious minorities compared to those concerning national or ethnic minorities. Additionally, there are other rights of religious or belief minorities enshrined in the Convention and recognised by the ECtHR that have not been examined in detail here. Some of these rights are vital for preserving and developing their identity and unique way of life, such as access to religious instruction in public schools (if the state provides it), access to religious services in specialised institutional settings (such as hospitals, the military, and the police), and the use and display of religious symbols.[184] Nevertheless, the Court has supported the accommodation of diverse religious minorities, the preservation of religious pluralism, and enhanced the quality of their legal status. It has done so by protecting the right of religious groups to obtain legal entity status, thereby ensuring their ability to organise and operate effectively within society.

13. Conclusions

This chapter has analysed and presented the most important landmark judgements of the ECtHR concerning the protection of the freedoms and rights of religious, ethnic, and national minorities, with particular focus on the countries of Central and Eastern Europe. Although the primary focus of the ECHR is to safeguard individual rather than collective rights, the Court has adopted an approach that enables it to protect the rights and freedoms of ethnic and religious minorities without directly engaging with identity-related disputes. Through this approach, the Court avoids becoming entangled in the contentious debates surrounding emerging identities, especially in the region of Eastern and Southeastern Europe.

The key provisions of the Convention that protect ethnic and national minorities are Article 14 and Protocol No. 12. Although Article 14 has been described as a "parasitic" provision, as it applies only in conjunction with another substantive provision of the Convention and its Protocols, the "ambit test" employed by the Court has addressed this deficiency. The application of Article 14 extends to any right falling "within the ambit" of any Convention provision, including rights voluntarily provided by a state. This extended scope of Article 14 protects ethnic, national, and religious

184 A valuable resource for researchers studying religion and belief minorities in the European Union is the Atlas of Religious or Belief Minority Rights, which can be accessed at the following link: *Atlas of religious or belief minority (RBM) rights* (no date) [Online]. Available at: https://atlasminorityrights.eu/index.php (Accessed: 4 July 2025).

minorities from arbitrary actions by state authorities concerning the enjoyment of rights that the state has voluntarily granted them.

Ethnicity, ethnic origin, race and nationality are recognised as suspect grounds of discrimination, and the Court has established that "very weighty reasons" are required for a state to justify differential treatment based on these grounds. The Court applies a high level of scrutiny to differentiations based on these criteria. In cases involving differential treatment, the burden of proof shifts to the Government once the applicant has established *prima facie* evidence of discrimination. States are granted a margin of appreciation in determining whether differential treatment is objectively and reasonably justified in analogous situations. In the above analysed cases, states are afforded a narrow margin of appreciation since the Court employs a high level of scrutiny. On the contrary, the Court has been reluctant to recognise religion as a suspect ground. This is evident in its jurisprudence under Article 9, which generally affords states a wide margin of appreciation, particularly in issues related to state-religion relations. Furthermore, given that Article 14 does not impose a general prohibition of discrimination, the Court has, in several cases, deemed it unnecessary to examine complaints under Article 14 when it has already found violations of other substantive Convention rights concerning individuals belonging to national minorities.

It has been observed that power-sharing regimes and political systems may discriminate against ethnic and national minorities. While the ECHR does not require states to organise separate elections for national minorities, the Court has held that belonging to an ethnic group cannot justify denying individuals their right to vote or stand for election. The Court's jurisprudence emphasises the importance of guaranteeing full participation of national minorities in political life and decision-making processes.

In numerous cases from Eastern and Central European countries involving the discrimination of Roma, the Court has found violations of nearly all rights and freedoms protected by the Convention and its Protocols. These states have been found responsible for violations of the right to life, the prohibition of inhuman or degrading treatment, the misplacement of Roma children in special schools, the unlawful forced sterilisation of Roma women, and forced evictions. However, in some cases, the Court failed to acknowledge that the recognition of the Roma as a vulnerable group implies that states must provide special consideration to their needs and ensure their protection.

Religious minorities should be treated as a separate category. As it has been mentioned, the Court's stance on religion as a suspect ground remains ambiguous, as it avoids explicitly addressing it in its interpretations of Article 14. This ambiguity stems from the Court's jurisprudence under Article 9, which grants states a broad margin of appreciation in matters concerning state-religion relations. The Court cannot grant states a wide margin of appreciation under Article 9 while recognising religion as a suspect ground under Article 14, which would imply a narrow margin of appreciation. However, the broader margin of appreciation afforded by the Court in

matters concerning state-religion relations, has enabled it to avoid addressing highly sensitive issues which are quite often intertwined with the historical, legal, religious, and constitutional developments of European countries. This chapter focused on two elements of religious freedom protection that are considered as essential for religious minorities: the right to manifest religion and the right of religious organisations to obtain legal entity status.

The freedom to manifest one's religion, whether publicly or privately, is not an absolute right and may be subject to limitations as prescribed in the second paragraph of Article 9. Religious minorities are more likely to encounter unjustifiable limitations in exercising this right than majority religious group or traditional religions. The central issue is to determine which acts can be considered as manifestations under Article 9. The Court's approach has shifted the focus from the motivation behind the manifestation – that is usually rooted in belief or religion – to its nature, and subsequently very close to establishing whether a particular practice is formally required by a religion. It is well known that numerous practices, while not formally mandated by a particular religion or belief system, still constitute an important element of an individual's identity and affiliation with that religion. Consequently, the Court should not limit the protection under Article 9 to practices formally prescribed by a religion or belief system, as doing so, risks interfering with religious teachings and their interpretation. Moreover, it may be highly challenging, if not impossible, to neutrally and impartially determine whether a specific practice is required, particularly in cases of internal divisions or disputes within a religious group. Instead, the focus should be on whether the applicant's actions were motivated by their religion or belief and whether they have a conscience that certain practice is required to be conducted.

The right of religious organisations to acquire legal personality is acknowledged as an integral aspect of the collective right to religious freedom. The Court has affirmed that 'religious communities traditionally and universally exist in the form of organised structures' and that the right of believers to religious freedom 'includes the expectation that the community will be permitted to operate peacefully, without arbitrary interference by the State'. However, the registration of minority religious organisations has often been a contentious issue.

The Court has found violations of Article 9 in a number of cases where state authorities refused to grant registration not only to minority religious groups but also to minority factions within majority religions. It rejected the argument that the freedom of individuals belonging to a religious minority to practice their faith could substitute the recognition of the group's legal entity status. Furthermore, the Court insisted that mere tolerance by state authorities is insufficient to replace formal recognition. In Central and Eastern Europe, where ethnic and religious identities often overlap, the protection of rights and freedoms of religious minorities may be particularly complex compared to other regions in Europe. For example, some religious organisations have been denied official recognition due to their association with certain ethnic groups. However, the Court has been hesitant to frame these issues

as minority-specific, opting instead to focus on the violation of rights of individuals, groups or organisations.

The cases analysed above underscore the questionable effectiveness of the protection provided by the Council of Europe's human rights system. In every analysed case where the Court found violations of the Convention, the affected national minorities were situated in border regions and were either unrecognised or subject to widespread doubts concerning their specific ethnic or national identity. Despite the ECtHR's judgements, states have not changed their approach towards these minorities. Consequently, they and, in some cases, their organisations remain unrecognised, unregistered, or even securitised to this day.

On the other hand, states appear more willing to implement the Court's decisions concerning religious minorities. For example, while Macedonian and Silesian minorities remain unrecognised in Bulgaria and Poland, the Bessarabian Metropolitanate was recognised in Moldova. Furthermore, Hungary restored legal personality to most churches and religious communities that lost it in 2011, but its electoral system for national minorities has remained unchanged. Croatia signed an agreement with a group of churches that had filed complaints with the ECtHR. However, there are cases where religious organisations remain unregistered despite Court rulings determining that states have violated their freedom of association.

Overall, states seem more inclined to address issues related to religious minorities compared to those involving ethnic or national minorities. However, this proves that the ECtHR holds significant potential to advance minority protection in Europe, especially as an international consensus emerges among Council of Europe Member States

> 'recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community'.[185]

185 ECtHR, *Chapman v. the United Kingdom*, Application No. 27238/95, Judgement of 18 January 2001, paras. 93–94; ECtHR, *D.H. and Others v. the Czech Republic*, Application No. 57325/00, Judgement of 13 November 2007, para. 181.

Bibliography

Literature

Ambrus, M. (2011) *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection: Theory and Four Case Studies*. The Hague: Eleven International Publishing.

ASSEDEL (2025) *The need for an expansive interpretation of Protocol 1 A Comparative Analysis of the latest Indigenous Land Disputes before the European Court of Human Rights and the Inter-American Court* [Online]. Available at: https://assedel.org/wp-content/uploads/2025/06/The-need-for-an-expansive-interpretation-of-Protocol-1.pdf (Accessed: 4 July 2025).

Bankes, N. (2011) 'The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments', *The Yearbook of Polar Law Online*, 2011/3, pp. 57–112; https://doi.org/10.1163/22116427-90000008.

Bardutzky, S. (2010) 'The Strasbourg Court on the Dayton Constitution: Judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009', *European Constitutional Law Review*, 6(2), pp. 309–333; https://doi.org/10.1017/S1574019610200081.

Chronowski, N., Nagy, N. (2024) 'Minority identity in the making? Conceptualization and operationalization of national and ethnic minorities in the case law of the European Court of Human Rights', *Hungarian Journal of Legal Studies*, 65(3), pp. 405–431; https://doi.org/10.1556/2052.2024.00554.

Council of Europe Human Rights Commissioner (2012) *Human Rights of Roma and Travellers in Europe*. Strasbourg: Council of Europe Publishing.

Csink, L. (2021) 'The Legal Regulation of Religious Symbols in the Public Sphere in Hungary' in Sobczyk, P. (ed.) *Religious Symbols in the Public Sphere*, Budapest–Miskolc: Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing, pp. 73–102; https://doi.org/10.54237/profnet.2021.psrs_3.

Department for the Execution of Judgments of the European Court of Human Rights (2022) *Roma and Travellers Thematic Factsheet*.

Durham, W.C., Scharffs, B.G. (2019) *Law and Religion: National, International, and Comparative Perspectives*. New York: Wolters Kluwer.

Eide, A. (1996) *Comprehensive Examination of Thematic Issues Relating to Racism, Xenophobia, Minorities and Migrant Workers - Working Paper for the UN Working Group on Minorities, UN Doc. E/CN.4/Sub.2/1996/30, 25 July 1996* [Online]. Available at: https://documents.un.org/doc/undoc/gen/g96/130/71/pdf/g9613071.pdf (Accessed: 19 January 2025).

Ferrari, S. (2007) 'Religious communities as legal persons: An introduction to the national reports' in Friedner, L. (ed.) *Churches and other organisations as legal persons: Proceedings of the 17th meeting of the European Consortium for Church and State Research*. Luven–Paris–Doodley: Peeters, pp. 3–8.

Gerards, J. (2015) 'Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights' in Claes, M., De Visser, M. (eds.) *Constructing European Constitutional Law*. Oxford: Hart Publishing.

Gerards, J. (2018) 'The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination' in Balboni, M. (ed.) *The European Convention on Human Rights and the Principle of Non-Discrimination*. Naples: Editoriale Scientfiica, pp. 27–62; http://dx.doi.org/10.2139/ssrn.2875230.

Gismondi, G. (2016) 'Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1', *Yale Human Rights and Development Journal*, 18(1), pp. 1–58.

Harris, D., O'Boyle, M., Bates, E., Buckley, C. (2023) *Law of the European Convention on Human Rights*. 5th edn. Oxford: Oxford University Press; https://doi.org/10.1093/he/9780198862000.001.0001.

Henrard, K. (2011) *The Ambiguous Relationship between Religious Minorities and Fundamental (Minority) Rights*. The Hague: Eleven International Publishing.

Henrard, K. (2016) 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?', *Nordic Journal of Human Rights*, 34(3), pp. 157–177; https://doi.org/10.1080/18918131.2016.1225656.

Hirsch, M. (1998) 'The Freedom of Proselytism under the Fundamental Agreement and International Law', *Catholic University Law Review*, 47(2), pp. 407–425.

Kállai, P. (2022) 'Preferential Non-Representation? Case of Bakirdzi and E.C. v Hungary', *Strasbourg Observers*, 20 December 2022. [Online]. Available at: https://strasbourgobservers.com/2022/12/20/preferential-non-representation-case-of-bakirdzi-and-e-c-v-hungary (Accessed: 19 January 2025).

Khanna, V. (2024) 'Roma vulnerability before the European Court of Human Rights: Towards a structural account', *Netherlands Quarterly of Human Rights*, 42(4), pp. 340–362; https://doi.org/10.1177/09240519241274450.

Kirchner, S. (2016) 'Conceptions of Indigenousness in the Case Law of the European Court of Human Rights', *Loyola of Los Angeles International and Comparative Law Review*, 38(2), pp. 169–210.

Lamačková, A. (2008) 'Conscientious Objection in Reproductive Health Care: Analysis of Pichon and Sajous v. France', *European Journal of Health Law*, 15(1), pp. 7–43.

Lorincz, A.L. (2023) 'The religious oath in judicial proceedings from Romania: Towards replacing with a secular formula', *European Journal of Science and Theology*, 19(5), pp. 1–12.

Mardikian, L., Galani, S. (2023) 'Protecting the Arctic Indigenous Peoples' Livelihoods in the Face of Climate Change: The Potential of Regional Human Rights Law and the Law of the Sea', *Human Rights Law Review*, 23(3), pp. 1–24; https://doi.org/10.1093/hrlr/ngad020.

Marko, J. (2019) 'Against discrimination: the right to equality and the dilemma of difference' in: Marko, J., Constantin, S. (eds.) *Human and Minority Rights Protection by Multiple Diversity Governance*. Routledge: London–New York, pp. 307–339; https://doi.org/10.4324/9781315544724-8.

Martínez-Torrón, H., Navarro-Valls, R. (2004) 'The Protection of Religious Freedom in the System of the Council of Europe' in Lindholm, T., Durham, W.C., Tahzib-Lie, B.G., Sewell, E.A., Larsen, L. (eds.) *Facilitating Freedom of Religion or Belief: A Deskbook*. Dordrecht: Springer, pp. 209–238; https://doi.org/10.1007/978-94-017-5616-7_10.

Milenkovska, M, Gerasimoski, S. (2024) 'Securitization of Human Rights: The Case of the Macedonian Minority in Greece and Bulgaria' in Krstevska Savovska, K. (ed.) *Contemporary Security Challenges and Strengthening the Resilience of the Countries of Southeast Europe*. Skopje–Bitola: University "St. Kliment Ohridski"–Faculty of Security-Skopje, pp. 13–22.

Mitrofanova, A.V. (2019) 'Orthodox actors and equal opportunities policies in the Republic of Moldova in the context of the transformation of post-Soviet societies', *Approaching Religion*, 9(1–2), pp. 96–112. https://doi.org/10.30664/ar.82787.

Murdock, J. (2012) *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, Strasbourg: Council of Europe.

O'Connell, R. (2009) 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', *Legal Studies*, 29(2), pp. 211–229; https://doi.org/10.1111/j.1748-121X.2009.00119.x.

Panainte, S. (2006) 'Secularism in Republic of Moldova - Politics of Religion or Religious Politics: Where Do We Draw the Boundaries?', *Romanian Journal of Political Science*, 6(2), pp. 89–100.

Patel, P. (2017) 'Forced sterilization of women as discrimination', *Public Health Reviews*, 38(15), pp. 1–12; https://doi.org/10.1186/s40985-017-0060-9.

Piacentini, A. (2020) '"Nonaligned Citizens": Ethnic Power-Sharing and Nonethnic Identities in Bosnia Herzegovina. The Case of Sarajevo', *Nationalities Papers*, 48(4), pp. 707–720; https://doi.org/10.1017/nps.2019.61.

Ruozzi, E. (2011) *Indigenous rights and international human rights courts: between specificity and circulation of principles*. [Online]. Available at: https://iris.unito.it/retrieve/e27ce426-d8e5-2581-e053-d805fe0acbaa/indigenous_rights.pdf (Accessed: 3 July 2025).

Sadurski, W. (2014) *Rights Before Courts. A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*. Dordrecht: Springer.

Schabas, W. (2015) *The European Convention on Human Rights: A Commentary*. Oxford: Oxford University Press.

Legal Sources

Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities [Online]. Available at: https://njt.hu/jogszabaly/en/2011-206-00-00 (Accessed: 19 January 2025).

Agreement between the Government of the Republic of Croatia and the Alliance of Churches 'Word of Life', the Full Gospel Church, and the Protestant Reformed Christian Church in the Republic of Croatia on matters of common interest, Official Gazette of the Republic of Croatia, No. 112/2014.

Constitution of Greece from 2008 [Online]. Available at: https://www.hellenicparliament.gr/Vouli-ton-Ellinon/To-Politevma/Syntagma/ (Accessed: 19 October 2021).

General recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination. CERD/C/GC/32.

Ο περί Άσκησης του Δικαιώματος του Εκλέγειν και Εκλέγεσθαι από Μέλη της Τουρκικής Κοινότητας που Έχουν Συνήθη Διαμονή σε Ελεύθερο Έδαφος της Δημοκρατίας (Προσωρινές Διατάξεις) Νόμος του 2006 (N. 2(I)/2006) E.E., Παρ.I(I), Αρ.4068, 10/2/2006 [O perí Áskisis tou Dikaiómatos tou Ekléyin kai Ekléyesthai apó Méli tis Tourkikís Kinótitas pou Ékhoun Siníthi Diamoní se Elefthero Édaphos tis Dimokratías (Prosorinés Diatáxis) Nómos tou 2006 (N. 2(I)/2006) E.E., Par.I(I), Ar.4068, 10/2/2006.].

| Chapter 15 |

The Protection of Ethnic, National and Religious Minorities in European Union Law

Ana Radina

ABSTRACT

It has been emphasised that 'questions involving minorities are by their very nature highly political issues, requiring a primarily political approach in which human rights and legal considerations must be embedded. They are often intimately connected to problems, which go to the very heart of the existence of states'.[1] The European Union (EU) does not have competences which would enable it to adopt binding legislation or a comprehensive policy dealing specifically with the protection of minorities, let alone with a particular minority group, ethnic, religious or other. The expansion of EU both in terms of membership and competence over time resulted in an increase in the number of different regulatory instruments affecting religious,[2] ethnic, national and other minorities, but this process did not include granting the EU jurisdiction over minority rights. The entry into force of the Treaty of Lisbon[3] marked the beginning of a new era in the EU legal order[4] because the protection of persons belonging to minorities was introduced in the primary law for the first time. However, this Treaty did not transfer new competence to the EU which is why the EU continues to mostly indirectly exert its influence on the protection of minority rights, by regulating its economic aspects, especially in the area of non-discrimination, freedom of movement and immigration. In other words, the EU often interacts with the rights of minorities by adopting regulations in those areas for which it is competent, but such an approach is, unfortunately, destined to be fragmented and sporadic. The aim of this chapter is to provide an insight[5] into the key aspects of the EU's action in the area of protecting the rights of national, ethnic and religious minorities.

KEYWORDS

European Union, legal protection, minorities, rights of minorities

1 *The Role of the HCNM in OSCE Conflict Prevention*, 1997, p. 17.
2 Doe, 2011, p. 257.
3 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. It was signed in Lisbon on 13 December 2007 and entered into force on 1 December 2009.
4 Radina, 2018, p. 178.
5 Taking into consideration the fragmentary character of minority-relevant provisions in EU law, the well-known proliferation of regulations in general within the EU, and the existence of a large number of different policies and programmes, the given scope of this chapter does not allow for an exhaustive overview.

Ana Radina (2026) 'The Protection of Ethnic, National and Religious Minorities in European Union Law' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 647–682. https://doi.org/10.71009/2026.nj.hrpovg_15

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1. Improving the Legal Position of Minorities through the European Union Enlargement Process

The European Economic Community was established on 1 January 1958 by the Treaty of Rome,[6] which did not mention human rights. It was not until the late 1960s that the fundamental rights started to attract more attention in the EU context as a result of the Court of Justice of the European Union (CJEU) taking the view that fundamental rights are an integral part of the general principles of Community law. However, during that period, minority rights issues barely appeared as relevant considerations in the CJEU's jurisprudence.[7] During the 1980s (and afterwards), the European Parliament passed several resolutions in an effort to draw more attention to the issue of the protection of ethnic, religious, linguistic and other minorities,[8] however these initiatives fell short of significant practical effect. The main link of EU primary law with the legal protection of minorities before the Treaty of Lisbon was its general obligation to respect the fundamental human rights as well as the national identities of Member States, introduced in the EU primary legislation by Article F of the Maastricht Treaty[9] (Treaty on European Union; TEU).

At the time, the EU did not play a truly significant role in the creation of a political and legal system related to the rights of minorities, the construction of which was primarily undertaken by the Council of Europe and the Organization for Security and Co-operation in Europe.[10] During the 1990s, the fall of Communism resulted in political instabilities in the new states of Central and Eastern Europe due to, inter alia, strained relations between the majority population and minorities, some of which turned into violent ethnic conflicts.[11] This prompted the EU to engage in stronger discourse on national minorities protection but only externally.[12] Namely, in 1993 the European Council adopted the package of conditions, known as the Copenhagen criteria, establishing requirements for joining the EU to be fulfilled by the candidate states. These included "respect and protection of minorities". The external pressure of the EU resulted in significant changes, including the development of domestic policies and legislation on non-discrimination and minority rights in the countries of Central and Eastern Europe. The clearest link between the EU and minorities was

6 Treaty establishing the European Economic Community (EEC) was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. It has been amended several times, and today it is called the Treaty on the Functioning of the European Union. It was not published in the Official Journal.

7 For details, see Hofmann and Malkmus, 2022, pp. 18–19.

8 See *infra*, section 2.3.3.

9 Treaty on European Union. It was signed in *Maastricht on 7 February 1992 and entered into force on 1 November 1993.*

10 Hofmann and Malkmus, 2022, p. 16.

11 Ibid.

12 Malloy, 2013, p. 65.

established within this context.[13] Partnership agreements determined specific targets for each candidate state, covering also the area of minority rights. In addition, aspiring members were provided with financial assistance to facilitate the achievement of these targets and to support their overall efforts towards membership.[14] At the same time, the EU did not have similar rules and standards on protection of minority rights to be applied internally, thus the existing Member States were free of demands in this area. This resulted in the EU being accused of applying double standards[15] because once the membership status is achieved, the Member State is relieved of the pressure concerning the minority rights as the EU has no internal competences in this area.[16]

A fundamental objection remains in relation to the use of double standards in the assessments,[17] which is considered to be 'absolutely detrimental to the overall consistency of the EU's legal system',[18] as the protection of minorities is still one of the conditions for becoming a member of the EU, as established in Article 49 TEU.[19] Thus, at least for the foreseeable future, EU shall stay on the path chosen in the 1990s, i.e., employ the enlargement procedure as a medium for channelling actions aimed at improving the legal protection of minorities in candidate states.

The entry into force of the Treaty of Amsterdam[20] in 1999 did not bring about any changes regarding the protection of minority rights internally. The criticism due to double standards had intensified precisely because of the transfer of all the Copenhagen criteria into Article 6(1) of the TEU,[21] which made them internally binding, with the exception of the respect and protection of minorities.[22] The interpretative approach to this provision is twofold. On the one hand, minority rights are considered as an integral element of the human rights protection, thus they should be treated as a foundational principle. On the other hand, the wording of Article 6(1) TEU is considered as proof of the Member States' unwillingness to treat minority rights as one of the fundamental principles of the EU.[23]

13 Hoch Jovanovic, 2013, pp. 81–82.
14 Ahmed, 2015, p. 178.
15 Hoch Jovanovic, 2013, p. 83.
16 Accusations for applying double standards concerned not only the candidate states in comparison to the Member States, but also the different treatment of the candidate countries. For details, see Ahmed, 2015, pp. 178–179.
17 Fortunato, 2013, p. 1362.
18 Ibid.
19 Treaty on European Union (Consolidated version).
20 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. *It was signed in Amsterdam on 2 October 1997 and entered into force on 1 May 1999.*
21 It was stated in art. 6(1) TEU that '[t]he Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.
22 Hofmann and Malkmus, 2022, p. 21.
23 Aslı Bilgin, 2019, p. 95.

However, the Treaty of Amsterdam introduced a novelty in the form of the principle of non-discrimination enshrined in Article 13[24] which, for the first time, prohibited discrimination on the basis of ethnic origin. More precisely, Article 13 enumerated several grounds of discrimination, among which 'racial or ethnic origin' and 'religion or belief' were particularly important for minorities. Even though it did not explicitly include the protection of minority rights as such, Article 13 was understood as a general rule upon which the suppression of discrimination against minorities could be based[25] because it provided a legal basis for the EU institutions to adopt legislation on anti-discrimination,[26] thus signalling the beginning of a new generation of EU anti-discrimination law.[27] The scope of these powers has been extended with the Treaty of Nice[28] by authorising the EU to adopt incentive measures for the purposes of supporting Member States' actions aiming at non-discrimination (Article 11a).

2. Legal Framework for the Protection of Minorities in the European Union

2.1. European Union Treaties

Any discussion about the protection of human rights in the EU, including the rights of minorities, must take into account that 'the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' (Article 2 TEU). During the 1970's, the CJEU established itself as competent to rule on human rights of individuals as "general principles of law". Over time, the CJEU began to draw inspiration from the constitutional traditions common to the Member States and from international human rights treaties binding on Member States.[29] The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court of Human Rights (ECtHR) were the main sources of the general principles of EU law.[30] Today, Article 6(3) TEU expressly states that 'fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law', which means that EU institutions and Member States, when acting within the scope of EU law, are bound to respect these fundamental rights.

24 Malloy, 2013, p. 66.
25 Aslı Bilgin, A., 2019, p. 96.
26 More precisely, the Council could have, by unanimous vote, adopted anti-discrimination measures following a proposal made by the Commission and after consultations with the European Parliament. This was the legal basis for the adoption of the two Directives of particular pertinence for the protection of national, ethnic and religious minorities. See *infra*, section 2.3.
27 Hofmann and Malkmus, 2022, p. 21.
28 The Treaty of Nice amending the EU Treaty, the Treaties establishing the European Communities and certain related acts. It was signed in Nice on 26 February 2001 and entered into force on 1 February 2003. See art. 2(2).
29 *Protecting fundamental rights within the European Union, Part I*, 2024.
30 Peers and Prechal, 2021, p. 1644.

In addition to the fact that all EU Member States are also members of the Council of Europe and parties to the ECHR,[31] Article 6(2) TEU obliges the EU to accede to the ECHR, but this commitment has not yet been implemented.

The distribution of competences between the EU and its Member States is determined by the Treaties in a way that limits the role of the EU as a potential protector of minority rights. The principle of conferral, enshrined in Article 5(2) TEU, 'remains the basic principle of the vertical distribution of powers',[32] thus preventing the EU from deciding on its own competence. It is understood as 'not only a principle of European law but also a reflection of the Union's obligation to respect the Member State's national identity (Article 6.3 TEU)'.[33] The latter is pertinent for the issue of the protection of minorities within the EU because relevant provisions of EU law reflect the obvious reluctance of the Member States to transfer powers to the EU that would authorise it to adopt binding legal rules on minorities' protection or to build its specific minority policy. In other words, the EU can tackle minority issues, but mostly indirectly through other areas which ultimately results in fragmentary and incomplete protection.

Nevertheless, the EU treaties include several provisions relevant for the minorities' rights that offer more opportunities in comparison to the period before the entry into force of the Treaty of Lisbon. The Preamble of the TEU acknowledges 'the cultural, religious and humanist inheritance of Europe' as a source of the universal values of inalienable human rights and equality. For the first time, 'the rights of persons belonging to minorities' were included among the foundational values of the EU listed in the aforementioned Article 2 TEU. While it is true that this remains the only provision of the Treaties mentioning minorities and is still waiting for further elaboration by the EU's institutions,[34] it cannot be ignored that the rights of minorities have become a part of the EU's public order.

There are no provisions in the Treaty of Lisbon that would establish subjective rights for members of minorities. The provisions on the objectives of the EU in Article 3(3) TEU require of the EU to 'combat social exclusion and discrimination', 'respect its rich cultural and linguistic diversity', and 'ensure that Europe's cultural heritage is safeguarded and enhanced'. It seems that the wording of the provision allows to be interpreted as covering diversity between Member States as well as diversity within them but, in any case, it does not establish obligations on the part of the EU.[35] According to the CJEU, the EU may take into account its foundational values (Article 2 TEU) and objectives (Article 3 TEU) when acting upon its competence, i.e., it may

31 While the membership in the Council of Europe is not written expressis verbis as a prerequisite for EU membership, it is a tacit precondition arising from the candidate countries' obligation to respect rule of law and democracy as laid down in the Copenhagen Criteria. For details on EU membership, see, e.g., European Commission, no date.
32 Weber, 2013, p. 259.
33 Ibid., pp. 260. For details on the typology of competence, see ibid., pp. 267–278.
34 Ahmed, 2015, p. 177.
35 Hofmann and Malkmus, 2022, pp. 24–25.

adopt legal acts for the purposes of, inter alia, ensuring 'respect for the values of the European Union, such as respect for the rights of persons belonging to minorities and for cultural and linguistic diversity'.[36]

The latter is in accordance with the Treaty of Lisbon's requirement that the EU make the combatting of discrimination an element of the exercise of its legislative and executive powers.[37] Horizontal clauses laid down in Article 9 and Article 10 of the Treaty on the Functioning of the European Union[38] (TFEU) require that 'the fight against social exclusion' (Article 9) and combatting discrimination based on the grounds of, among others, racial or ethnic origin, and religion or belief (Article 10) become inherent elements of defining and implementing its policies[39] and activities. This is an important aspect of the broader context of minority protection, as individuals belonging to minority groups often subsist in disadvantaged positions. In particular, the Roma people, who represent the largest minority in Europe, experience significant social marginalisation and discrimination.

Direct prohibition of any discrimination on the grounds of nationality is proclaimed by Article 18 TFEU which is a specific expression of the general principle of equality.[40] This provision is applied within the scope of the Treaties, i.e., if discrimination occurs in an area covered by Treaties, and only if the Treaties do not provide for a special provision on the matter. Prohibition established in Article 18 TFEU is relevant for cases of discriminatory treatment of a national of one Member State in relation to nationals of another Member State exclusively on the grounds of nationality.[41] Third country nationals cannot rely on this provision because it is not concerned with differences in treatment between EU Member States nationals and third-country nationals.[42]

The main legal basis for adopting measures fighting discrimination is provided for in Article 19 TFEU which, due to a lack of direct effect, cannot be relied upon by individuals before national courts. It was designed as a *lex generalis* rule, therefore it can be used as the basis for taking appropriate action to combat discrimination in the absence of a *lex specialis* rule in the Treaty. The list of prohibited grounds of discrimination included in Article 19(1) TFEU is exhaustive in nature[43] and does not include nationality or language.

Addressees of Article 19 TFEU are both EU nationals and third-country nationals, however this provision is narrower in scope than Article 18 TFEU because it authorises the EU to take appropriate measures for eliminating discrimination within the

36 C-899/19 P, *Romania v European Commission*, 20 January 2022, para. 55.
37 Aslı Bilgin, 2019, p. 96.
38 Treaty on the Functioning of the European Union (Consolidated version).
39 For provisions on social policy of the EU, see arts. 151–161 TFEU.
40 C-98/91, *A.A. Herbrink v Minister van Landbouw*, 27 January 1994, para. 27, cited in Martin, 2019a, p. 415.
41 Martin, 2019a, p. 414.
42 Ibid., p. 415. For the analysis of the CJEU's expansive interpretation of what falls within the scope of the Treaty in relation to art. 18, see ibid., pp. 419–420.
43 Martin, 2019b, pp. 426–427.

limits of its competence.[44] Albeit these provisions are considered as positive progress due to the expansion of the EU's duty to fight discrimination, it has been argued that 'adequate minority protection will be difficult to achieve on this basis alone'[45] and that 'pertinent action of the EU would presuppose the existence of an explicit competence in this regard'.[46]

The area of culture is of particular relevance for minorities, and the EU's competence is explicitly established by Article 167 TFEU which places commitment upon it to 'contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore' (Article 167(1)). To fulfil these duties, the EU's efforts have to aim at 'encouraging cooperation between Member States and, if necessary, supporting and supplementing their action' concerning, *inter alia*, 'improvement of the knowledge and dissemination of the culture and history of the European peoples' and the 'conservation of cultural heritage of European significance' (Article 167(2)). The existence of a certain tension in the legal basis of the EU's competence over culture has been noted, in the sense that, on the one hand, it clearly mandates the EU to take action, and on the other hand, it limits the EU's action by excluding the possibility of taking measures of harmonising nature.[47]

Religion and language are not expressly mentioned in Article 167, however, as a key form of cultural expression, language is considered to be covered by Article 167 TFEU. Article 24 TFEU is also of relevance regarding the issue of linguistic diversity, which provides EU citizens with the right to correspond with the EU institutions in one of the official languages of the EU.[48] With respect to the protection of religious minorities, the TEU mentions religion once, in the Preamble, while the TFEU establishes a certain competence of the EU only in the context of tackling religious discrimination. Within this context, it has to be borne in mind that Article 13 TFEU requires the EU to respect the 'customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage', while Article 17 TFEU obliges the EU to respect the status of religious associations 'under national law'. The former is a horizontal provision on animal welfare of limited scope[49] while the latter is an expression of the EU's neutral stance towards the organisation of the Member States' relations with churches and religious communities.[50]

In this context, the specific issue of ritual slaughter emerges as a very sensitive topic, subject to conflicts between the right to manifest one's religion and the protection of animal welfare. It follows from the relevant CJEU decisions that religious

44 Aslı Bilgin, 2019, p. 96.
45 Hofmann and Malkmus, 2022, p. 29.
46 Ibid.
47 Garben, 2019, pp. 1440–1441.
48 Craufurd Smith, 2021, p. 642.
49 For more details, see Klamert, 2019, pp. 389–390.
50 C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, 17 April 2018, para 58.

freedoms can be legitimately restricted in order to protect the welfare of animals as 'an objective of general interest recognised by the European Union' and 'as a value to which contemporary democratic societies have attached increasing importance for a number of years'.[51] It has been argued that there is tendency on the part of the CJEU to favour animal welfare over freedom of religion but without denying the importance of the latter.[52]

The horizontal clause in Article 167(4) TFEU[53] requires the EU to mainstream culture, more precisely, to take cultural aspects into account in its action on the basis of the Treaties (i.e., action in those areas for which the competence has been conferred upon the EU), 'in particular in order to respect and to promote the diversity of its cultures'. The concept of "culture" is not defined by the EU law, but regardless of the definition, culture remains an area that both binds and divides Europeans. Cultural richness and diversity is a distinctive European characteristic but at the same national cultures represent a significant obstacle to the European integration.[54] The cultural mainstreaming requirement has gained further importance with the entry into force of the EU Charter of Fundamental Rights[55] (CFR) which, in Article 22, provides that '[t]he Union shall respect cultural, religious and linguistic diversity'. The same requirement, as mentioned *supra*, is established in Article 3(3) TEU.[56]

Education is another important area that offers means for preserving and protecting minorities' identities. The EU's competence with respect to education is determined by Article 165 TFEU in a similar way as for culture. Namely, under Article 165(1) TFEU, the EU has an obligation to 'contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action', however, actions aiming at providing for such contribution have to be taken by 'fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'. In other words, for the most part, the field of education is left to the Member States to regulate as they see fit.

The only provision of a sanctioning nature that could be relied on against Member States in case of a breach of Article 2 TEU is Article 7 TEU which provides for the

51 C-336/19, *Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering*, 17 December 2020, paras. 63, 77. In this case, the CJEU was called to decide upon the legitimacy of the limitations placed by the Flemish legislature on freedom to manifest religion by requiring prior stunning of animals before slaughter. Relying on the standards established in the jurisprudence of the ECtHR, the CJEU reiterated that Member States should be afforded a wide margin of appreciation in deciding about the necessity, and the extent, of a limitation of the right to manifest religion or beliefs. See also: C-426/16, Liga van Moskeeën en Islamitische Organisaties *Provincie Antwerpen and Others v Vlaams Gewest*, 29 May 2018; C-497/17, *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others*, 26 February 2019.
52 Wattier, 2022, p. 274. For details on the CJEU's decision in Centraal Israëlitisch Consistorie van België and Others, see ibid., pp. 270–275.
53 Hofmann and Malkmus, 2022, p. 29.
54 Garben, 2019, p. 1442.
55 Charter of Fundamental Rights of the European Union.
56 Garben, 2019, pp. 1440–1442.

possibility of suspending the membership rights. Nevertheless, it is not realistic to expect that this mechanism, intended for the cases of "serious and persistent breach" of the Article 2 values, will be activated.

Although they are not mentioned in the EU Treaties, in the context of the discussion on minority rights it is necessary to briefly review the position of indigenous peoples. More specifically, the Sámi, who inhabit the northern European countries – Norway,[57] Sweden, Finland and Russia, and are the only indigenous people recognised in the EU.[58] Similar to national, ethnic and religious minorities, the EU does not have a general framework or policy on the rights of indigenous peoples, but rather interacts with them through its general human rights policies, fragmentarily and mostly externally. In 1994, Finland's and Sweden's Accession Treaty[59] provided for certain exceptions concerning the Sámi's traditional practices. Specifically, Article 1 of Protocol No 3 – on the Sámi people[60] allows Finland and Sweden to grant 'exclusive rights to reindeer husbandry[61] within traditional Sámi areas', while Article 2 provides for the possibility of further extending Sámi rights linked to their traditional means of livelihood.[62] It has been argued that the lack of express regulation of this Sámi practice in other EU law areas, together with non-compliance with international law standards on the protection of indigenous peoples by Member States, generated profuse controversy to the detriment of Sámi peoples' interests.[63]

After the EU's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples,[64] protection of indigenous peoples' rights gradually strengthened, but primarily through external actions.[65] For example, one of the EU policies affecting Sámi rights – The EU Arctic Policy[66] – provided support for the integration of indigenous issues and for Sámi culture and livelihoods, while promising to adhere to the human rights principle of "free, prior and informed consent" before adopting measures that may have direct impact on Sámi.[67] However, the attainment of the

57 Norway is not an EU Member State, but it is connected to the EU via membership in the European Economic Area (EEA). The EEA was established in 1994 as a way of extending the EU's internal market to the member countries of the European Free Trade Area (EFTA). European Parliament, 2025, p. 1.
58 European Parliamentary Research Service, 2020.
59 Treaty of Accession of Austria, Finland and Sweden.
60 Protocol No 3 – on the Sami people.
61 Hunting, gathering, and reindeer herding are some of the traditional Sámi livelihoods and are considered to be fundamental to the Sámi culture and society. Council of Europe, 2015, p. 10.
62 For details, see Albanesi, 2019, pp. 28–30.
63 Ibid., pp. 32–38.
64 United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, 2 October 2007.
65 Laframboise, 2023.
66 European Commission, 2022.
67 Hartshaw, 2024, pp. 47–48.

goals of the Critical Raw Materials Act (CRM Act)[68] adopted in 2024 – providing the EU with access to a sustainable supply of critical raw materials with the ultimate aim of meeting its 2030 climate and digital objectives – means a likely intrusion into and the use of the Sámi territory. The CRM Act was criticised for not including the principle of "free, prior and informed consent" and for being contrary to the Protocol No 3 – on the Sámi people.[69]

2.2. The Charter of Fundamental Rights of the European Union

As established in Article 6(1) TEU, the CFR has the same legal value as the Treaties, thus it forms part of the EU primary law. Minorities are referred to once, in Article 21(1) which prohibits any discrimination based on any ground, among others, on the grounds of ethnic origin, language, religion or belief and membership of a national minority. The principle of non-discrimination 'is a particular expression' of the principle of equal treatment as 'a general principle of EU law, enshrined in Article 20 of the Charter'.[70] The prohibition of discrimination on the grounds of nationality laid down in Article 21(2) is considered to be 'a central foundational element of the treaties' that reflects the EU's 'long and exceptional history of opening the borders of its states to the movement of EU people, goods and services'.[71]

The provisions of the Charter of Fundamental Rights (CFR) do not extend the EU's competencies beyond the scope defined in the Treaties, as stated clearly in Article 6(1) TEU. Additionally, Article 19 TEU authorises the EU to adopt legislative acts aimed at combatting certain forms of discrimination,[72] but it does not explicitly include belonging to a national minority as a prohibited ground for discrimination. Therefore, the non-discrimination provision in Article 21(1) should not be interpreted as going beyond the EU's obligation not to discriminate; it does not imply a duty to take positive action in this area. Rather, it provides a basis for reviewing acts adopted by EU institutions in the exercise of their powers. This was confirmed by the CJEU[73] which relied on the prohibition of language discrimination laid down in Article 21 CFR when annulling competitions based on just three official languages.

The personal field of application of Article 21(1) is very broad as the CJEU accepts[74] that there does not even need to be a prohibited ground of discrimination on the part of an individual in order for him/her to be afforded protection under that provision. With regards to Article 21(2), the CJEU applied it to both natural and legal persons

68 Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020.
69 Hartshaw, 2024, pp. 48–50.
70 C-356/12, *Wolfgang Glatzel v Freistaat Bayern*, 22 May 2014, para. 43.
71 Eklund and Kilpatrick, 2021, p. 621.
72 Ibid., p. 613.
73 C-566/10 P, *Italy v. Commission*, 27 November 2012.
74 C-83/14, "*CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia*, 16 July 2015 (CHEZ).

and to goods and services.[75] Also, Article 21 does not explicitly mention EU citizens as the exclusive addressees of its provisions but the CJEU has so far mostly avoided the application of Article 21 in connection with the discrimination of citizens of third countries and its case-law is also struggling with overlaps between race, ethnicity and nationality as grounds of discrimination.[76]

The obligation of the EU 'to respect cultural, religious and linguistic diversity', established in Article 22 CFR does not introduce individual rights either, and is considered only as a principle[77] which means that it (only) requires the EU to refrain from disproportionate interference with Member States' policies related to issues of cultural, religious and linguistic diversity.[78] The content of Article 22 should be considered in connection with Article 167(1) TFEU, which provides grounds for the development of the EU cultural policy, and Article 167(4) TFEU, the "mainstreaming" provision[79] which requires the EU to take cultural aspects into account in all its actions,[80] i.e., internally and in relations with non-member countries. On the basis of Article 167(5), the EU can adopt incentive measures for the purposes of achieving objectives established by Article 167.

Furthermore, Article 22 is closely related to other CFR provisions, particularly those proclaiming the freedom of thought, conscience and religion (Article 10), freedom of expression (Article 11), freedom of assembly and association (Article 12), and academic freedom (Article 13). At the same time, due to its focus on group interests, this also results in a considerable potential for conflicts to arise between Article 22 and other CFR articles. One such conflict is the one between animal welfare and religious groups over ritual slaughter.[81]

Principle embedded in Article 22 has the potential to provide protection to Member States against EU's harmonising policies.[82] In addition, the "diversity" in the sense of Article 22 could serve as a legitimate aim justifying restrictions of primary law.[83] One of the examples is Article 107(3)(d) TFEU which allows Member States to grant aid 'to promote culture and heritage conservation', i.e., such aid will not be considered incompatible with the internal market.

Obviously, there is a strong link as well as an overlap between Article 21 and Article 22 CFR. The former has a wider scope and covers discrimination based also on grounds which are not of cultural nature. However, some of the inherent attributes

75 Eklund and Kilpatrick, 2021, p. 622.
76 Ibid., pp. 622–627, 630–634.
77 According to art. 52(5) CFR, principles contained in the Charter's provisions may be implemented via legislative and executive acts of EU institutions and Member States when they are implementing EU law. Such provisions 'shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.
78 Hofmann and Malkmus, 2022, p. 28.
79 Craufurd Smith, 2021, p. 641.
80 Ibid., pp. 640–641.
81 Ibid., pp. 646, 661.
82 See art. 167(5) TFEU.
83 Hofmann and Malkmus, 2022, p. 28.

covered by Article 21 can be linked to specific cultural practices which are covered by Article 22. Although Article 21 contains a non-exhaustive list of discriminatory grounds, it is focused on national minorities while Article 22 is formulated more broadly, therefore it could cover all minority groups in the sense of Article 2 TEU.[84]

It should be taken into account that CFR provisions recognising rights and freedoms may be subjected to limitations, according to Article 52(1) CFR, provided that those limitations are established by law and respect the principle of proportionality.[85] Provisions of the CFR which contain principles are 'judicially cognisable only in the interpretation of such acts and in the ruling on their legality' (Article 52(5) CFR). The content of EU primary law suggests that it is unlikely that an adequate and comprehensive policy and protection of minorities will be possible in the foreseeable future. Nevertheless, it is also true that the EU has 'the ever-expanding human rights dimension'.[86] If Articles 2 and 3(3) TEU are considered together with other relevant provisions of the TEU, TFEU and the CFR, it can be said that the EU law has a significant potential for further developing anti-discrimination practices and policies aiming at providing protection for minorities.

In addition to Article 2 TEU, the Preamble of the CFR reaffirms the rights as they are guaranteed by the ECHR. The relationship between the CFR and the ECHR, whose contents overlap for the most part, is determined by Article 52(3) CFR. Arguably 'one of the most important provisions in the entire Charter',[87] Article 52(3) aims at ensuring consistency between these two instruments[88] and provides that the meaning and scope of the rights in the CFR which correspond to rights guaranteed by the ECHR 'are the same as those laid down by the ECHR', including authorised limitations of these rights.[89] This means that the EU institutions, including the CJEU,[90] are obliged to respect the standards established in the jurisprudence of the ECtHR, and in addition, Article 52(3) also allows the EU to provide more extensive protection.

2.3. EU Secondary Legislation Relevant in the Protection of Minorities

The EU exerts its influence on the protection of minorities mostly indirectly, by regulating its economic aspects, especially in the area of non-discrimination. In 2000, two important Directives were adopted along with subsequent programmes aiming at eliminating discrimination[91] – the Racial Equality Directive[92] (RED) and the Employ-

84 Craufurd Smith, 2021, p. 645.
85 C-190/16, *Werner Fries v Lufthansa CityLine GmbH*, 21 March 2017, paras. 26, 31–32.
86 Henrard, 2002, p. 364.
87 Peers and Prechal, 2021, p. 1644.
88 Explanations relating to the Charter of Fundamental Rights.
89 Ibid.
90 See for example, Centraal Israëlitisch Consistorie van België and Others, especially paras. 56–58, 67, 77.
91 Malloy, 2013, p. 66.
92 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Member States were required to transpose and implement RED by 19 July 2003.

ment Equality Directive[93] (EED). The adoption of the Directives was possible thanks to Article 13 of the Amsterdam Treaty – now Article 19 TFEU – 'which marked the transformation from market integration to the protection of fundamental rights'.[94] Interestingly enough, although the wording of Article 19 TFEU clearly illustrates the unwillingness of Member States to authorise the EU to adopt measures to combat discrimination, and consequently the lack of specific requirement that the EU adopt directives, especially directives that prohibit discrimination, the rise of racism in some Member States at the end of 1990s actually prompted the adoption of these two Directives.[95] Protection offered by the Directives differs with regard to the grounds of discrimination,[96] i.e., protected groups, and with regard to areas in which discrimination is prohibited.

2.3.1. Racial Equality Directive

The purpose of RED, according to Article 1, 'is to lay down a framework for combatting discrimination on the grounds of racial[97] or ethnic origin[98]', and to be a means of the realisation of the principle of equal treatment.

The personal scope of the prohibition of discrimination is wide and covers all persons, in public and private sectors. As laid down in Article 3, sectors covered include employment and occupation, social protection, social security, healthcare, social advantages, education, and access to and supply of goods and services available to the public, including housing. Difference of treatment based on nationality is explicitly excluded from the scope of RED (Article 3(2)). However, third-country nationals may be protected on the grounds of racial or ethnic origin as, in general, 'protection against discrimination is not conditional on nationality, citizenship, or residence status'.[99]

93 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Member States were required to transpose and implement RED by 2 December 2003.

94 Farkas, Chopin and Germaine, 2020, p. 5.

95 Martin, 2019b, p. 429.

96 Neither of the two Directives includes definitions of the race, ethnicity, religion or other grounds of discrimination covered, therefore their interpretation is left to the Member States.

97 Within the Council of Europe, "racism" is described as 'the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons'. Cf. European Commission against Racism and Intolerance (ECRI), 2018, p. 5.

98 Certain guidelines on the interpretation of "ethnic origin" can be found in the CJEU's cases, e.g., CHEZ, where it is stated that the concept of ethnicity 'has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds' (para. 46). In the case C-668/15, *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic*, 6 April 2017 (Jyske Finans), the CJEU stated that the country of birth is one of the relevant elements that point to the conclusion about someone being a member of an ethnic minority, however, it is not decisive (paras. 18, 20).

99 Farkas, Chopin and Germaine, 2020, p. 10.

Equal treatment in the sense of Article 2 RED is understood as prohibition of both direct and indirect discrimination. Direct discrimination exists if 'one person is treated less favourably than another, has been or would be treated in a comparable situation on grounds of racial or ethnic origin' (Article 2(2)(a)), while indirect discrimination exists

> 'where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary' (Article 2(2)(b)).

Besides the fact that the very definition of indirect discrimination generally allows for exceptions, RED also explicitly permits exceptions to the prohibition of discrimination in the form of genuine and determining occupational requirements and positive action. Namely, Member States are allowed to provide that a difference of treatment shall not be considered as discrimination where, due to the nature of the particular occupational activities concerned, a characteristic related to racial or ethnic origin 'constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate' (Article 4). Also, Member States are allowed to implement 'specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin' (Article 5), but it should be noted that they are not obliged to take positive action.

Some guidelines on the interpretation of the concepts of direct and indirect discrimination are offered by the CJEU. In its case law, for the indirect discrimination on the grounds of ethnic origin to be established, a person belonging to a specific ethnic group has to be put in a disadvantaged position.[100] Also, direct discrimination covers formally neutral practices which affect one specific group, even when the complainant who suffered less favourable treatment or a particular disadvantage is not actually a member of the protected group concerned.[101] In other words, it covers 'discrimination by association'.[102] Discrimination may be based on several prohibited grounds, however, 'no new category of discrimination resulting from the combination of more than one of those grounds [...] may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established'.[103]

Additionally, RED provides protection from harassment which is to be treated as discrimination when 'an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment' (Article

100 Jyske Finans, para. 31.
101 CHEZ, paras. 56, 60, 129. In this case, the complainant was affected by measures aiming at the Roma, but was not a member of that minority herself.
102 Belavusau and Henrard, 2019, p. 621.
103 C-443/15, *David L. Parris v Trinity College Dublin and Others*, 24 November 2016, para 80.

2(3)). Instructions to discriminate are also prohibited (Article 2(4)). Member States are committed to put in place measures preventing victimisation i.e., adverse treatment or consequences taken as a revengeful reaction towards a complainant (Article 9). In order to provide for legal protection of discriminated persons, RED obliges Member States to establish adequate procedures and to shift the burden of proof to the respondent/alleged perpetrator (Articles. 7 and 8). This does not change the fact that the victim must satisfy the court of the likelihood that he/she was discriminated against, but it improves the position of the complainant[104] as discrimination is usually difficult to prove because the evidence is often in the possession of the perpetrator.[105]

2.3.2. Equality Employment Directive

The non-discrimination principle has always been an important element of the European integration, but the principle of equal treatment regardless of one's religious or other beliefs found its way into the EU's legal order most recently.[106] EED lays down the general framework for combatting various forms of discrimination in employment, including 'on the grounds of religion or belief' (Article 1).[107] It applies to all persons[108] but since it covers only the dimension of employment (Article 3),[109] the material scope of EED is significantly more restrictive than RED's.[110]

Just as RED does referring to race and ethnicity, EED prohibits both direct and indirect discrimination, harassment, instructions to discriminate (Article 2) and victimisation (Article 11) on the grounds of religion and belief,[111] and obliges Member States to provide for effective sanctions against those who discriminate (Article 17)[112] but without any specific detail on the latter,[113] thus leaving Member States with discretion to choose the measures they find appropriate.

104 It is not uncommon that persons discriminated against refrain from using available legal avenues of protection due to a number of reasons, including the complexity of procedures or its costs. It is worth mentioning that the CJEU allows for *actio popularis* claims by organisations that are acting in the public interest. See, e.g., C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, 10 July 2008.

105 Farkas, Chopin and Germaine, 2020, p. 18.

106 Rorive, 2009, p. 2689.

107 In addition to religion or belief, prohibited grounds of discrimination in employment also include disability, age and sexual orientation.

108 Similar to RED, discrimination on grounds of nationality is expressly excluded from the scope of EED (art. 2(2)).

109 For more on the interpretation of the scope of EED by the CJEU see, e.g., C-406/15, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, 9 March 2017; C-644/19, *FT v Universitatea "Lucian Blaga" Sibiu, GS and Others, HS, Ministerul Educaţiei Naţionale*, 8 October 2020.

110 Carrera and Parkin, 2010, p. 34.

111 Similar to RED, EED also requires that adequate legal procedures be provided for complainants by Member States and that the burden of proof be shifted to respondents (arts. 9 and 10).

112 So does the RED in art. 15.

113 For details about the views of the CJEU on the appropriateness of sanctions, see Wladasch, 2015, pp. 13–15.

Likewise, EED provides for exceptions to the principle of non-discrimination. Namely, the difference in treatment based on a religious characteristic is permitted if that characteristic is a genuine and determining occupational requirement which meets the criteria of legitimacy and proportionality (Article 4) and if it takes form of a positive action (Article 7). Providing objective justification would require activity undertaken for the purposes of facilitating the religious choices of the employee and thus strengthening his/her religious freedom.[114] The employer's duty to conduct actively would mean taking reasonable measures for the purpose of adapting to the employee's religious duties,[115] however, this obligation will be limited by the need to protect the rights and freedoms of others and the legitimate interests of the employer, i.e., the demands of the market.[116]

EU anti-discrimination regulations have certain implications for the presence of religious symbols in public space, especially from the point of view of the prohibition of indirect discrimination. The dress code of an employer would constitute such discrimination if it forbade, for example, the wearing of a specific religious symbol without an objective justification like safety at work, protection of public health, etc.[117] The CJEU emphasised that 'it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement'.[118] Namely, that concept 'is objectively dictated by the nature of the occupational activities concerned', in other words, 'it cannot cover subjective considerations',[119] such as 'the willingness of an employer to take account of the particular wishes of a customer to no longer have the services of that employer provided by a worker wearing an Islamic headscarf'.[120]

In this context, Article 4(2) EED has to be mentioned because it allows organisations whose value system is based on a particular religion to require employees to behave in accordance with those values. This exception to the prohibition of discrimination could include, for example, the prohibition of wearing symbols of any other religion than the one on which the activity of a certain school is based, or the

114 McCrea, 2014, p. 295.

115 See e.g., C-130-75, *Vivien Prais v Council of the European Communities*, 27 October 1976. In this case the complainant objected about not being able to take part in a job testing because it was held on a religious holiday. The CJEU concluded that the employer's duty to facilitate the expression of religion entails only the obligation to take reasonable measures to avoid scheduling testing on a day when the employee fulfils his religious obligations. The employer in this case was not informed about this in a timely manner, so it was within his discretion to refuse to set another date. Cited in Doe, 2011, p. 245.

116 McCrea, 2014, pp. 154, 295–296, 305.

117 Rorive, 2009, pp. 2691, 2693.

118 C-188/15, Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA, 14 March 2017, para. 38.

119 Ibid., para. 40.

120 Ibid., para. 41. See also C-157/15, Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, 14 March 2017.

requirement that a teacher must practice the religion of that school, provided that it is objectively justified for performing his occupational duties.[121]

It has been argued that formal distinction made by the two Directives between the different grounds of discrimination – religion, race and ethnic origin – despite the fact that the boundaries between these categories are not always clear, results in inconsistencies.[122] Moreover, if their respective scopes are compared, it can be said that this distinction generates a sort of "hierarchy" on the basis of the level of protection that is provided because some of the grounds of discrimination laid down in Article 19 TFEU, i.e., race, are covered more comprehensively than others, i.e., religion. This "uneven approach' is explained as 'the result of a compromise reflecting the different levels of commitment to different forms of discrimination among the Member States'.[123] Complemented by the exceptions permitted regarding direct and indirect discrimination, and the overall sporadic and fragmentary approach of the EU to the protection of minorities, these shortcomings seriously undermine the chances of effective protection of members of minorities[124] as well as the possibility of really achieving the equality of treatment.

The right to equal treatment had a significant role since the beginning of the European Economic Community. By now, the EU anti-discrimination law "has come a long way", 'partly due to changes in the founding treaties [...] and partly due to the jurisprudence of the CJEU';[125] It is considered to be 'undoubtedly an independent discipline within the narrative of EU law'.[126] However, notwithstanding the efforts aiming at integration of the equality dimension in all EU policies and initiatives, there is a general perception that the progress has been too slow, and the discrimination on the grounds of racial or ethnic origin is still widespread throughout the EU, particularly against the Roma.[127]

121 Howard, 2012, pp. 118–119.
122 Carrera and Parkin, 2010, p. 9.
123 Ibid., p. 10.
124 In 2008, the European Commission proposed the adoption of a directive that would include religion as a basis for the prohibition of discrimination and, in addition to employment, would cover the areas of healthcare, social security, education, etc. Commission of the European Communities, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, Brussels, 2 July 2008. However, Member States were not able to reach an agreement on the adoption of this document.
125 Belavusau and Henrard, 2019, p. 616.
126 Ibid.
127 European Commission, Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final, 19 March 2021 (European Commission, 2021), pp. 1–2, 16, 20.

The European Commission emphasises that equality bodies[128] are key partners which could assist in addressing the persisting challenges,[129] and give incitement to further and faster development towards achieving the full equality of minorities in the EU. In this context, it is to be welcomed that in 2024 two new Directives[130] were adopted aiming at strengthening national equality bodies and ensuring their independence. The Directives also provide for enhanced competence for equality bodies in the areas of preventing discrimination, promoting equality, providing assistance for victims of discrimination on the grounds of religion or belief, disability, age and sexual orientation in the area of employment. Since Member States have until June 2026 to transpose the Directives in their respective national legal frameworks, it remains to be seen whether the high expectations will be met.

2.3.3. European Parliament Resolutions

In 2006, in the Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe,[131] the European Parliament explicitly stated its position about minority issues not being 'high enough on the agenda of the Union' (pt. 3). It pointed out that 'recent and future enlargements have led and will lead to a greater number of Member States characterised by cultural and linguistic diversity' (pt. 4) and expressed its belief about the EU having 'a particular responsibility in safeguarding the rights of minorities' (pt. 4). Considering that there is a difference between the protection of minorities and anti-discrimination policies (recital A) and that minority rights are an integral part of basic human rights (pt. 5), European Parliament[132] expressed concern over the 'inconsistency of policy toward minorities' in the sense that protection of minorities is a part of the Copenhagen criteria, but there is no standard for minority rights in EU policy (pt. 7). The need for the special protection of Roma people[133] was emphasised as they have been 'historically marginalised and

128 See art. 15 RED which requires Member States to designate a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.
129 European Commission, 2021, pp. 25–26.
130 Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC, 29 May 2024; Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU, 29 May 2024.
131 European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe.
132 This section provides for a brief overview of several key resolutions among many adopted by the European Parliament that relate to the protection of minorities in the EU.
133 See also European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015.

prevented from developing in certain key areas' (pt. 38), and still face racial segregation and discrimination in their everyday lives (pt. 39).

Similar observations were presented again in 2018, in the European Parliament resolution on the protection and non-discrimination with regard to minorities in the EU Member States.[134] The Parliament pointed out that discrimination on the grounds of ethnic origin is 'the most common form of discrimination' (recital G), and highlighted the protection of cultural heritage of national minorities in the Member States as 'a key component of the cultural identity of communities, groups and individuals' and a 'crucial element of social cohesion' (recital K). Promotion of teaching and ensuring the right to use minority languages are encouraged as a means of protecting linguistic diversity of the EU (pt. 18).[135]

According to the European Parliament resolution on EU mechanism on democracy, the rule of law and fundamental rights,[136] approximately 8% of EU citizens belong to a national minority and approximately 10% speak a regional or minority language. However, the EU lacks a legal framework to guarantee their minority rights, therefore the European Parliament strongly recommended the establishment of an effective mechanism to monitor their rights in the EU as an action of 'outmost importance' (recital T).

In 2018, European Parliament adopted a resolution on the minimum standards for minorities in the EU,[137] observing that the EU's diversity of cultures, languages, religions, traditions and history is not as protected and nurtured as it should be. Namely, 'persisting harassment, discrimination – including multiple and intersectional discrimination – and violence limit the ability of people to fully enjoy their fundamental rights and freedoms' (recital C), preventing them from participating equally in society. This Resolution provides a comprehensive insight into the Parliament's views and includes an extensive list of recommendations addressed to EU institutions and the Member States aiming at protecting all national or ethnic,[138] religious and linguistic minorities, with particular focus on several crucial areas: combating discrimination, hate crime and hate speech; national and ethnic minorities; right to education; cultural rights; language rights. Among other groups, this Resolution expresses concern over the extremely unfavourable position of Roma

134 European Parliament resolution of 7 February 2018 on protection and non-discrimination with regard to minorities in the EU Member States.

135 See also European Parliament resolution of 11 September 2013 on endangered European languages and linguistic diversity in the European Union.

136 European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.

137 European Parliament resolution of 13 November 2018 on minimum standards for minorities in the EU.

138 The Parliament described 'national and ethnic minorities are groups of persons belonging to minorities who have been living on the same territory and sharing a common identity, in some instances as a result of border changes, in others as a result of living for a long time in an area, whereby they have managed to preserve their identity' (pt. 35).

people, explicitly regarding the high number of stateless Roma people in Europe, who are often pushed to marginalisation.

Concern over the persecution of religious minorities worldwide prompted the adoption of the European Parliament resolution on the persecution of minorities on the grounds of belief or religion in 2022.[139] 'Stressing the paramount importance of holding accountable perpetrators of human rights abuses against persons belonging to belief or religious minorities' (pt. 15), the Parliament called on the EU and Member States to cooperate with relevant UN mechanisms in relation to 'investigations into ongoing human rights violations against belief or religious minorities around the world' (pt. 15).

The European Parliament Resolution of 18 April 2023 on the institutional relations between the EU and the Council of Europe[140] is also significant for minorities. Namely, this Resolution calls the EU to strengthen and expand cooperation with the Council of Europe with the aim of enhancing the protection of minorities. The Parliament proposes that the EU establish the protection of minorities as an integral part of monitoring the rule of law and the observance of fundamental human rights in the Member States, i.e., not only in candidate countries during the accession process. Additionally, in 2023, the Parliament adopted a resolution proposing a number of amendments to the Treaties.[141] Among others, proposals are made to expand non-discrimination protections to include membership of a national minority and language.

3. Protection of the Roma Minority in the European Union

The Roma are the largest ethnic minority in Europe. It is estimated that 10–12 million Roma live in Europe; some 6 million live in the EU and most of them are citizens of one of the Member States.[142] The term "Roma" itself is difficult to define because it includes many diverse groups.[143] Regardless of the definition as well as the estimated share of the Roma which varies from 10.3% in Bulgaria to less than 1% in the majority

139 European Parliament resolution of 3 May 2022 on the persecution of minorities on the grounds of belief or religion.

140 European Parliament resolution of 18 April 2023 on the institutional relations between the EU and the Council of Europe.

141 European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties. See, in particular, pts. 30–31 and the Annex to the Resolution (Amendments 2, 82, 85, 92).

142 European Parliament, 2020, p. 3.

143 European Commission refers to "Roma" as an umbrella term which includes a wide range of different people of Romani origin such as Roma, Sinti, Kale, Romanichels and Boyash/Rudari, Ashkali, Egyptians, Yenish, Dom, Lom, Rom and Abdal, Travellers, gens du voyage, Gypsies, Tsiganes or Tziganes. Cf. European Commission, Communication from the Commission to the European Parliament and the Council, A Union of Equality: EU Roma strategic framework for equality, inclusion and participation, COM(2020) 620 final, Brussels, 7 October 2020 (EU Roma Framework 2020), p. 1.

of other Member States,[144] and despite the EU's legal instruments and policy aiming at building a true union of equality, many Roma people are still facing discrimination, antigypsyism[145] and socioeconomic exclusion.[146]

Within the EU, achieving Roma equality, inclusion and participation is considered as a joint endeavour in the sense that Member States hold the main responsibility for making progress in the areas covered by the EU Roma strategic framework, while the European Commission is providing them support by mobilising a wide range of tools and resources.[147] The initial stage of policymaking towards Roma was marked by the adoption of national strategies in the EU candidate countries from Central and Eastern Europe as part of their accession process.[148] During the 1990s, accession countries with large Roma populations were called to further the social integration of the Roma through national measures and, later, to implement RED.[149] The second round of policymaking developed during the Decade of Roma Inclusion 2005–2015 ("Roma Decade").[150] This initiative was adopted by twelve European governments,[151] with the support of the European Commission, Open Society Institute (OSI), the World Bank, Council of Europe, UNDP, UNICEF, UNHCR and European Roma organisations. It provided a framework for Central and Eastern European governments to work towards Roma integration on the basis of their national action plans focusing on core issues including poverty and discrimination.

The European Council's acknowledgment in December 2007 that the Roma face 'a very specific situation'[152] was soon followed by the call to the Commission to 'examine existing policies and instruments'.[153] In April 2011, the European Commission adopted a Communication – EU Roma Framework 2011. Economic integration of the Roma

144 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, COM(2011) 173 final, 5 April 2011 (EU Roma Framework 2011), pp. 15–18.

145 European Commission describes "antigypsyism" as a form of racism against Roma, 'a historically rooted structural phenomenon that appears at institutional, social and interpersonal levels. It has its origins in how the majority views and treats those considered "gypsies". EU Roma Framework 2020, p. 1.

146 Ibid.

147 European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the national Roma strategic frameworks in light of the EU Roma strategic framework for equality, inclusion and participation and the Council Recommendation on Roma equality, inclusion and participation, COM(2024) 422 final, Brussels, 25 September 2024 (European Commission Roma Report, 2024), p. 17.

148 Rostas, 2020, p. 191.

149 European Parliament, 2020, p. 3.

150 Ibid.

151 Bulgaria, Croatia, the Czech Republic, Hungary, North Macedonia, Romania, Serbia, Montenegro, and Slovakia, with Albania, Bosnia and Herzegovina and Spain that joined the initiative in 2008.

152 European Parliament, 2023, p. 5.

153 Council of the European Union, 2008, p. 14.

was expected to 'contribute to social cohesion and improve respect for fundamental rights'[154] embedded in Article 2 TEU, 'including the rights of persons belonging to minorities, and help eliminating discrimination' on all of the grounds laid down in Article 21 CFR.[155] Member States were invited to adopt or revise their national strategies on Roma integration in order to achieve EU Roma integration goals in 'four crucial areas: access to education, employment, healthcare and housing'.[156] In addition, in 2013 the European Council adopted the Recommendation on effective Roma integration measures in the Member States,[157] providing guidance for the implementation of their national strategies.

The EU Framework 2011 was criticised for a number of shortcomings, including the fact that it lacked a strong antigypsyism component,[158] it was adopted without the participation of Roma, and it did not encourage Roma participation at national or local levels. Also, there were no precise outcomes, time frames or monitoring mechanism.[159] The actual progress with respect to improving the lives of Roma population was more than modest. Discriminatory experiences among Roma people have been somewhat reduced and acceptance of Roma by the general population has slightly increased, however, the Commission's and the Parliament's reports showed that discrimination of Roma, antigypsyism, hate crime and their negative effects persist.[160] The latter being the proof of the need for renewing the commitment to Roma, in October 2020 the Commission, aiming to achieve more progress faster, adopted the EU Roma Framework 2020. This new Framework builds on evaluations of the previous one and its content clearly shows that the Commission is seeking to address and amend the shortcomings of the EU Roma Framework 2011.

EU Roma Framework 2020 sets seven objectives – three horizontal objectives pertain to the areas of equality, inclusion and participation, while the four sectoral objectives refer to the areas of education, employment, housing and health.[161] Unlike the previous Framework, EU Roma Framework 2020 is based on an intersectional approach.[162] Every objective is complemented by the quantitative headline targets which determine minimum progress to be achieved by 2030 and will enable measuring the progress of Member States. For example, 'fighting and preventing antigypsyism and discrimination' as one of the horizontal objectives includes the target 'cut

154 Ibid., p. 2.
155 Ibid.
156 Ibid., pp. 3–9.
157 Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States.
158 EU Roma Framework 2011 does not even mention antigypsyism.
159 Rostas, 2020, pp. 192–197.
160 European Commission, Report on the evaluation of the EU Framework for National Roma Integration Strategies up to 2020, COM(2018) 785 final, Brussels, 4 December 2018; European Parliament, 2020.
161 EU Roma Framework 2020, pp. 3–4.
162 Ibid., pp. 2, 7, 15.

the proportion of Roma with discrimination experience by at least half',[163] while the objective to 'promote participation through empowerment, cooperation and trust' sets the target 'double proportion of Roma who file a report when they experience discrimination'.[164]

The proportion of Roma varies significantly across Member States; therefore, in addition to a series of common features, certain more targeted commitments are prposed to allow for a differentiated approach. The Commission also invited Member States with significant Roma populations to include more ambitious commitments in their national frameworks.[165] As another mean of strengthening the monitoring process, Member States were committed to adopt and implement respective national Roma strategic frameworks[166] and to report to the Commission every two years from 2023 onwards. In addition to the request of carrying out Roma surveys, the Fundamental Rights Agency is requested to devise objectives and indicators for Member States to use as a part of the monitoring process.[167] The EU, for its part, will continue with efforts in supressing the discrimination of Roma people by enforcing the existing legal framework.[168]

The Commission's assessment in 2023[169] showed that only five Member States met the deadline for submitting their national frameworks (September 2021). Progress regarding other requirements has also been unsatisfactory. *Inter alia*, most Member States introduced measures aimed at preventing and combatting antigypsyism and discrimination into their national frameworks, but they did not do so systematically and in a cross-cutting manner. Only some of the national frameworks address intersectional and multiple discrimination on all grounds. Some Member States have only partly set national targets corresponding to EU level targets, and some have set national targets on issues different from those addressed at the EU level, which means that their progress cannot be accurately measured. Moreover, some Member States have not even set any targets yet.

Similar conclusions can be found in the most recent assessment of the Commission delivered in September 2024,[170] on the implementation of national Roma frameworks and their suitability for achieving the targets of the EU Roma Framework 2020 by 2030.

163 The minimum progress to be achieved by 2030 is reducing the percentage of Roma experiencing discrimination to less than 13%. Ibid., p. 4.
164 The minimum progress to be achieved by 2030 is increasing the percentage of Roma reporting discrimination to at least 30%. Ibid.
165 Ibid., pp. 6–10.
166 Complementary to the EU Roma Framework 2020 is the Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation, *which provides for a number of specific measures to be taken by Member States, including combatting discrimination in the online world as well as multiple and structural discrimination which often affects Roma minority.*
167 European Union Agency for Fundamental Rights, 2020.
168 EU Roma Framework 2020, pp. 10–11.
169 European Commission, Assessment report of the Member States' national Roma strategic frameworks, COM/2023/7 final, Brussels, 9 January 2023.
170 European Commission Roma Report 2024.

This report reveals certain promising developments, e.g., most Member States have explicitly recognised antigypsyism in their legal frameworks and developed specific measures targeting this root cause of Roma exclusion.[171] Also, Roma NGO's appear to be more involved in designing and implementing mechanisms tackling discrimination than they used to be.[172] At the same time, however, educational segregation not only remains an issue of serious concern, but the situation has even worsened.[173] Overall, the Commission assesses the current level of Member States'[174] ambition as insufficient[175] to enable the achievement of the minimum progress set by the EU Roma Framework 2020 targets until 2030, which is why it appealed to them to 'proceed rapidly and decisively' and 'more vigorously' with implementing their commitments with the ultimate goal of making a real difference for the Roma.[176]

4. European Union Anti-Racism Action Plan 2020–2025

By adopting the EU Anti-Racism Action Plan 2020–2025[177] (Action Plan) in September 2020, the EU once more expressly admitted that the racial discrimination in the EU persists. More precisely, for the first time the EU recognised that the "structural racism" on the basis of racial or ethnic origin requires proactive response through an intersectional perspective.[178] Distinction is made between "individual racism" – overt expressions of individual racism based on one's beliefs and bias,[179] and "structural racism" – racist and discriminatory behaviours 'embedded in social, financial and political institutions'.[180]

The starting point of the Action Plan is the fact that 'a comprehensive system of protection against discrimination requires first and foremost the effective enforcement of the legal framework',[181] however it is acknowledged that gaps exist in this protection in practice because the legal guarantees are not effectively implemented.

171 Ibid., pp. 4–6.
172 Ibid., pp. 13–14.
173 Ibid., pp. 8–10.
174 Both the EU Roma Framework 2011 (pp. 11–12) and the EU Roma Framework 2020 (pp. 16–17) include requirements also addressed to candidate countries.
175 Twelve Member States and the enlargement countries still lack clear targets associated with realistic indicators to measure the progress and impact of measures. Cf. European Commission Roma Report 2024, p. 21.
176 Ibid.
177 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of equality: EU anti-racism action plan 2020–2025, COM/2020/565 final, 18 September 2020.
178 It is stated that racism comes in different forms, more or less explicit, but always damaging. They often intersect with discrimination on other grounds. Ibid., p. 2.
179 Ibid., p. 1.
180 Ibid., p. 2.
181 Ibid., p. 3.

Therefore, the Action Plan outlines a wide range of measures pertaining to different areas, including law enforcement, new technologies, employment, education, health and housing, underlined by the thought that addressing racism more effectively requires a common endeavour of actors at all levels.

Several key areas are highlighted with respect to the need to tackle structural racism. *Inter alia*, in the area of combatting stereotypes and raising awareness of history, the importance of 'acknowledging the historical roots of racism' is emphasised as an effective means of addressing stereotypes, while 'ensuring remembrance' is seen as a valuable contribution to removing barriers and encouraging the social inclusion of disadvantaged groups.[182] Further, it is noted that underreporting of racial and ethnic discrimination is partly related to a lack of trust in the authorities,[183] which is all the more problematic when police officers and public officials demonstrate racial bias or harassment.[184] The lack of accurate and reliable data, which are essential for assessing the true scale and nature of discrimination, requires a new approach, i.e., a common methodology which is now missing. The latter leaves room for Member States to avoid collecting and disaggregating data by ethnic or racial origin.

In addition to encouraging Member States 'to develop and adopt national action plans against racism and racial discrimination',[185] the Commission also adopted Common Guiding Principles for national action plans against racism and racial discrimination[186] as a means of supporting the Member States in this process. Nevertheless, the progress in this area is still slow.

Reports show that in 2024 most Member States have not been allocating budget specifically for the implementation of the national action plans. Also, Member States differ significantly in their understanding and the interpretations of the concept of structural racism, 'which led most of them to adopt rather fragmented measures, with some Member States having no provisions at all against structural racism. The same is true for the application of an intersectional approach to combatting racism'.[187] Despite the EU allocating funds for a number of programmes, racism and hate speech persist also e.g., within sports, at all levels.[188]

Overall, it is established that the Action Plan had a positive impact on the development and implementation of the national action plans against racism and the development of cooperation with and between Member States. However, 'available

182 Ibid., p. 14.
183 According to the surveys, racial considerations influence the likelihood of being stopped by the police. For example, of the 14% of the people surveyed who said they had been stopped by the police in the last year, 40% think that their ethnic origin or immigrant background was the reason. Action Plan, p. 3.
184 European Commission, Report on the implementation of the EU anti-racism action plan 2020–2025 and on national action plans against racism and discrimination, COM(2024) 419 final, 25 September 2024 (European Commission Anti-Racism Report 2024), pp. 4–5.
185 Action Plan, p. 17.
186 European Commission, 2022.
187 European Commission Anti-Racism Report 2024, pp. 10–11.
188 Ibid., pp. 14–15.

data, which is still scarce, shows the prevalence of individual and structural racism still today. Stakeholders confirm that the situation of people facing racism has not improved'.[189] 2025 is now "knocking on the door" and it remains to be seen what exactly has been achieved by the implementation of the Action Plan.

5. The Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages

The Framework Convention for the Protection of National Minorities[190] (FCNM) and the European Charter for Regional or Minority Languages[191] (ECRML) are most prominent expressions of the Council of Europe's commitment to the protection of national minorities. When dealing with minority issues, the EU usually relies on these two documents, so it is appropriate to briefly refer to their main features.

Welcomed as 'a breakthrough on national minority rights',[192] FCNM was the first and, to this day, is the only legally binding multilateral instrument dedicated specifically to the protection of national minorities. Interestingly enough, it does not include the definition of a "national minority',[193] thus, the States Parties[194] are given the margin of discretion to States Parties to determine which minorities shall enjoy protection on their territory.

Although it is grounded in the view that 'the protection of national minorities and of the rights and freedoms of members of those minorities[195] form an integral part of the international protection of human rights' (Article 1),[196] FCNM does not

189 Ibid., p. 19.

190 Framework Convention for the Protection of National Minorities (ETS No. 157), Council of Europe. It was opened for signature in Strasbourg, on 1 February 1995 and entered into force on 1 February 1998.

191 European Charter for Regional or Minority Languages (ETS No. 148), Council of Europe. It was opened for signature in Strasbourg, on 5 November 1992 and entered into force on 1 March 1998.

192 Malloy, 2013, p. 56.

193 For the criticism due to lack of this definition, see ibid., pp. 58–60. According to the Explanatory Report to the FCNM, it was not possible to reach an agreement on a definition that would have the general support of the Member States of the Council of Europe, so the writers of the Framework Convention opted for a pragmatic approach and left the definition out. Explanatory Report to the Framework Convention for the Protection of National Minorities, Council of Europe, 1 February 1995 (Explanatory Report), p. 3.

194 The FCNM is ratified by 38 Member States of the Council of Europe. Out of 8 that have not still ratified it, 4 of them are EU Member States (Belgium, France, Greece, and Luxembourg). *Chart of signatures and ratifications of Treaty 157,* no date.

195 The distinction between national minorities and persons belonging to minorities in art. 1 reveals that the Framework Convention does not recognise collective rights. The emphasis is placed on the protection of persons belonging to national minorities who are free to exercise their rights individually and in community with others. Explanatory Report, p. 5.

196 The European Parliament regularly reiterates this provision in its resolutions, including those mentioned *supra* in this chapter.

grant individual rights for members of national minorities but rather it obliges the States Parties to create these rights.[197] Particular emphasis is placed on recognising the right of minorities to identity[198] and on ensuring effective equality alongside the prohibition of discrimination. In this context, a number of duties are imposed upon the States Parties to take targeted measures in order to ensure that persons belonging to minorities can freely express ethnic, cultural, linguistic and religious elements of their minority identities (Preamble); 'to preserve the essential elements of the minorities' identities and culture, namely their religion, language, traditions[199] and cultural heritage' (Article 5(1)); 'to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity' (Article 6(2)). A number of principles are established concerning the participation of national minorities in the sphere of public life, including freedom of peaceful assembly, freedom of association, freedom of expression, access to the media.

The ECRML also does not contain subjective rights[200] and is much narrower in scope as it is dedicated specifically to the protection of the rights of linguistic minorities. It aims to ensure protection and promotion of the use of historical regional and minority languages[201] in private as well as in public life. States Parties[202] are expected to base their policies, legislation and practice in respect of regional or minority languages on several objectives and principles laid down in particular in Article 7 of the ECRML, including recognition of regional or minority languages as an expression of cultural wealth, 'the need for positive action to protect such languages',[203] the facilitation of the use of such languages, the provision of appropriate means for the teaching and study of such languages. For the purposes of implementing these principles, a number of States Parties' obligations are elaborated that cover several key areas, including education, justice, administrative authorities, public services, media and cultural activities. States Parties themselves, at the time of ratification, specify the languages to which the ECRML shall apply.

197 Malloy, 2013, p. 57.
198 Henrard, 2002, p. 374.
199 It is emphasised that the concept of "traditions" does not imply acceptance of practices which are contrary to public order, national law or international standards. Explanatory Report, p. 6.
200 Henrard, 2002, p. 375.
201 The ECRML covers regional and minority languages, non-territorial languages and less widely used official languages. Their definitions are included in art. 1. For the list of languages currently protected under ECRML see *States Parties to the European Charter for Regional or Minority Languages and their regional or minority languages*, no date.
202 So far 25 Council of Europe's Member States have ratified the Charter. *Chart of signatures and ratifications of Treaty 148*, no date.
203 Malloy, 2013, p. 61.

6. Summary

The protection of ethnic, national, and religious minorities in the EU is characterised by a complex legal and institutional structure, circumscribed mainly by the limited competences conferred upon the EU in this area. This has resulted in a fragmented and indirect approach despite the increase in the number of legal instruments relevant to minority rights, especially in the context of non-discrimination.

The founding treaties of the European Communities did not include references to human rights nor minority rights. In the late 1960s, the CJEU began to recognise fundamental rights as general principles of EU law. During the 1980s and 1990s, the European Parliament adopted several resolutions aimed at strengthening the protection of minorities within the EU, however these documents were not binding. A general obligation of the EU to respect fundamental rights and the national identities of Member States was established by the Maastricht Treaty (1992). The Treaty of Amsterdam (1999) introduced the legal basis for anti-discrimination legislation.

The EU enlargement process has been proven to be a rather effective mechanism for exerting influence on minority protection in candidate countries from Central and Eastern Europe. In 1993, the EU adopted the Copenhagen criteria which require candidate countries to ensure protection of minorities' rights. In addition, aspiring countries are provided with financial assistance for the purposes of implementation of these requirements. However, once they attain the Member State status, European countries are no longer subjected to the same level of scrutiny. This has provoked criticism towards the EU for applying double standards in its internal and external policies on minority protection.

The Treaty of Lisbon (2009) did not expand the EU's competences with regards to the minorities' protection, although it gave impetus to further development by including the rights of persons belonging to minorities among the EU's fundamental values. As a result, minority-related issues continue to be addressed predominantly indirectly, within a broader human rights framework and certain sectoral policies, including anti-discrimination, cultural and linguistic diversity policies and external action, especially the process of enlargement.

The EU body of law includes several provisions relevant to minority rights, including Articles. 2, 3(3), 6, and 7 TEU, and Articles. 9, 10, 18, and 19 TFEU. The CFR, which has the same legal value as the Treaties, also incorporates relevant provisions, particularly Article 21, prohibiting discrimination based on ethnic origin, religion or belief, language, and membership of a national minority, and Article 22, requiring the EU to respect cultural, religious, and linguistic diversity. However, the scope of these provisions is limited by the principle of conferral.

The protection of the Sámi, as the only indigenous people recognised in the EU, further illustrates the limitations of EU competence, with relevant safeguards included only in specific accession instruments and policy declarations.

Secondary legislation is of crucial importance for combatting discrimination. The Racial Equality Directive (RED) and the Employment Equality Directive (EED) prohibit direct and indirect discrimination, harassment, and victimisation in various sectors. Both of the Directives apply to all individuals regardless of nationality; the material scope of the EED is focused on employment-related matters, thus it is narrower than the scope of the RED which applies across several sectors. The CJEU's jurisprudence offers clarification of key legal concepts, including "indirect discrimination" and "positive action", but the EU still faces challenges in ensuring the consistent and effective application of Directives in Member States.

Competences in the area of culture and education, as established by Articles. 165 and 167 TFEU, provide the EU with limited capacity to promote minority identities, thus it is primarily within Member State jurisdiction to take action in these fields, with the possibility of the EU undertaking activities of a supporting and coordinating nature. Similarly, religious freedom is addressed mainly through general principles and sporadic references, such as Articles. 10 and 17 TFEU. Member States have the autonomy in regulating church-state relations.

Roma inclusion is one of the focal points of EU policies. However, despite the implementation of several strategic frameworks, targeted funding and monitoring mechanisms, results at a national level are inconsistent and insufficient. Reports from EU institutions show limited progress in key areas such as education, housing, and non-discrimination. Although the EU Roma Framework 2020 introduced measurable targets and an intersectional approach, the most recent assessments of the European Commission in 2023 and 2024 highlight insufficient Member State ambition and shortcomings in addressing antigypsyism and segregation.

Complementary to these efforts, the EU Anti-Racism Action Plan 2020–2025 acknowledges the persistence of both individual and structural racism, and proposes actions across different sectors, including law enforcement and data collection. However, there are still significant differences regarding the way Member States understand and implement the required measures, with structural racism continuing to be under-addressed in practice.

The EU often relies on Council of Europe instruments such as the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. Neither of these instruments are legally binding within the EU legal order, i.e., they do not bind the EU itself, but they are taken into consideration when shaping relevant EU policies.

In conclusion, the EU's role in minority protection is marked by a strong rhetorical commitment but constrained legal powers and limited practical effects. Its efforts are primarily channelled through anti-discrimination law, cultural support measures, and political conditionality in the context of the enlargement process. While normative developments have created space for further policy evolution, the absence of a unified legal framework and enforceable internal standards limits the EU's capacity to ensure comprehensive and consistent protection for minorities across its Member States.

Bibliography

Literature

Ahmed, T. (2015) 'The EU's Relationship with Minority Right's' in Psychogiopoulou, E. (ed.) *Cultural Governance and the European Union: Protecting and promoting cultural diversity in Europe*. London: Palgrave Macmillan, pp. 177–191; https://doi.org/10.1057/9781137453754_14.

Albanesi, E. (2019) 'Sámi's Reindeer Husbandry and EU Legislation (beyond Finland and Sweden's Accession Treaty)', *The Yearbook of Polar Law,* 10(1), pp. 21–40; https://doi.org/10.1163/22116427_010010004.

Aslı Bilgin, A. (2019) 'Minority Protection in the European Union: To Protect or not to Protect?', *International Journal on Minority and Group Rights*, 26(1), pp. 92–115.

Belavusau, U., Henrard, K. (2019) 'A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives', *German Law Journal*, 20(5), pp. 614–636; https://doi.org/10.1017/glj.2019.53.

Carrera, S., Parkin, J. (2010) *The Place of Religion in European Union Law and Policy: Competing Approaches and Actors inside the European Commission*. *RELIGARE Working Document No. 1*. [Online]. Available at: https://www.files.ethz.ch/isn/122138/01.pdf (Accessed: 5 July 2025).

Chart of signatures and ratifications of Treaty 148 (no date) [Online]. Available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=148 (Accessed: 5 July 2025).

Chart of signatures and ratifications of Treaty 157 (no date) [Online]. Available at: https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=signatures-by-treaty&treatynum=157 (Accessed: 5 July 2025).

Council of Europe (2015) *The Sámi: The People, Their Culture and Languages* [Online]. Available at: https://edoc.coe.int/en/national-minorities/6684-the-sami-the-people-their-culture-and-languages.html (Accessed: 4 July 2025).

Council of the European Union (2008) *Presidency Conclusions, 16616/1/07 REV 1*, 14 February. [Online]. Available at: https://data.consilium.europa.eu/doc/document/ST-16616-2007-REV-1/en/pdf (Accessed: 3 July 2025).

Craufurd Smith, R. (2021) 'Article 22 - Cultural, Religious and Linguistic Diversity' in Peers, S., Hervey, T., Kenner, J., Ward, A. (eds.) *The EU Charter of Fundamental Rights: A Commentary*. 2nd edn. Oxford: Beck–Nomos–Hart, pp. 639–666.

Doe, N. (2011) *Law and Religion in Europe: A Comparative Introduction*. Oxford: Oxford University Press.

Eklund, H., Kilpatrick, C. (2021) 'Article 21: Non-Discrimination' in Peers, S., Hervey, T., Kenner, J., Ward, A. (eds.) *The EU Charter of Fundamental Rights: A Commentary*. 2nd edn. Oxford: Beck–Nomos–Hart, pp. 613–637.

European Commission (2022) *Common guiding principles for national action plans against racism and racial discrimination* [Online]. Available at: https://commission.europa.eu/system/files/2022-05/common_guiding_principles_for_national_action_plans_against_racism_and_racial_discrimination.pdf (Accessed: 3 July 2025).

European Commission (no date) *Conditions for membership* [Online]. Available at: https://enlargement.ec.europa.eu/enlargement-policy/conditions-membership_en (Accessed: 2 July 2025).

European Parliament (2020) *Framework for national Roma integration strategies up to 2020: European Implementation Assessment*. Brussels: European Union.

European Parliament (2023) *Understanding EU action on Roma inclusion* [Online]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690629/EPRS_BRI(2021)690629_EN.pdf (Accessed: 5 July 2025).

European Parliament (2025) *The European Economic Area (EEA), Switzerland and the North* [Online]. Available at: https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_5.5.3.pdf (Accessed: 3 July 2025).

European Parliamentary Research Service (2020) *International Year of Indigenous Languages – Sami people and languages in the EU* [Online]. Available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2020)646118 (Accessed: 3 July 2025).

European Union Agency for Fundamental Rights (2020) *Monitoring framework for an EU Roma Strategic Framework for Equality, Inclusion and Participation: Objectives and indicators*. Vienna: FRA – European Union Agency for Fundamental Rights.

Farkas, L., Chopin, I., Germaine, C. (2020) 'Handbook on the Racial Equality Directive with a special focus on Italy, Romania and Sweden', *Euractiv*. [Online]. Available at: https://www.euractiv.com/section/politics/news/handbook-on-the-racial-equality-directive/ (Accessed: 5 July 2025).

Fortunato, S. (2013) 'Article 49 [Accession to the Union]' in Blanke, H.J., Mangiameli, S. (eds.) *The Treaty on European Union (TEU): A Commentary*. Berlin–Heidelberg: Springer, pp. 1357–1383; https://doi.org/10.1007/978-3-642-31706-4_50/.

Garben, S. (2019) 'Article 167 TFEU' in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.) *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. 1st edn. New York: Oxford University Press, pp. 1439–1444.

Hartshaw, E. (2024) 'European Union commitments and policies towards indigenous people's human rights: A case study of the Sámi people and the EU's Critical Raw Materials Act', *Australian and New Zealand Journal of European Studies*, 16(3), pp. 44–54; https://doi.org/10.30722/anzjes.vol16.iss3.20918.

Henrard, K. (2002) 'The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU: Another Aspect of Responsibility/Burden-Sharing?', *Maastricht Journal of European and Comparative Law*, 9(4), pp. 357–391; https://doi.org/10.1177/1023263X0200900403.

Hoch Jovanovic, N. (2013) 'Europeanisation' in Malloy, T.H. (ed.) *Minority Issues in Europe: Rights, Concepts, Policy*. Berlin: Frank & Timme, pp. 75–103.

Hofmann, R., Malkmus, M. (2022) 'The Treaties and minority rights' in Malloy, T.H., Vizi, B. (eds.) *Research Handbook on Minority Politics in the European Union*. Cheltenham–Northampton: Edward Elgar Publishing, pp. 16–37.

Howard, E. (2012) *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education*. London–New York: Routledge.

Klamert, M. (2019) 'Article 13 TFEU' in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.) *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. 1st edn. New York: Oxford University Press, pp. 389–390.

Laframboise, L. (2023) 'The Sámi Limbo: Outlining nearly Thirty Years of EU-Sápmi Relations', *The Arctic Institute*, 12 September 2023. [Online]. Available at: https://www.thearcticinstitute.org/sami-limbo-outlining-nearly-thirty-years-eu-sapmi-relations/ (Accessed: 3 July 2025).

Malloy, T.H. (2013) 'European International Law' in Malloy, T.H. (ed.) *Minority Issues in Europe: Rights, Concepts, Policy*. Berlin: Frank & Timme, pp. 51–73.

Martin, D. (2019a) 'Article 18 TFEU' in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.) *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. 1st edn. New York: Oxford University Press, pp. 413–423.

Martin, D. (2019b) 'Article 19 TFEU' in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.) *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. 1st edn. New York: Oxford University Press, pp. 424–432.

McCrea, R. (2014) 'Article 10 – Right to Freedom of Thought, Conscience and Religion' in Peers, S., Hervey, T., Kenner, J., Ward, A. (eds.) *The EU Charter of Fundamental Rights: A Commentary*. 1st edn. Oxford–Portland: Hart Publishing, pp. 291–309.

Peers S., Prechal, S. (2021) 'Article 52 – Scope and Interpretation of Rights and Principles' in Peers, S., Hervey, T., Kenner, J., Ward, A. (eds.) *The EU Charter of Fundamental Rights: A Commentary*. 2nd edn. Oxford: Beck–Nomos–Hart, pp. 1611–1674.

Protecting fundamental rights within the European Union, Part I (2024) *European Justice*, 9 July 2024. [Online]. Available at: https://e-justice.europa.eu/topics/your-rights/fundamental-rights/fundamental-rights-european-union/charter-tutorial/part-i-protecting-fundamental-rights-within-european-union_en (Accessed: 4 July 2025).

Radina, A. (2018) *Pravo djeteta na slobodu vjeroispovijedi*. Doctoral dissertation. Zagreb: Pravni fakultet Sveučilišta u Zagrebu.

Rorive, I. (2009) 'Religious Symbols in the Public Space: In Search of a European Answer', *Cardozo Law Review*, 30(6), pp. 2669–2698.

Rostas, I. (2020) 'Ethnic Identity and Policymaking: A Critical Analysis of the EU Framework for National Roma Integration Strategies' in van Baar, H., Kóczé, A. (eds.) *The Roma and Their Struggle for Identity in Contemporary Europe*. New York–Oxford: Berghahn, pp. 179–202.

States Parties to the European Charter for Regional or Minority Languages and their regional or minority languages (no date) [Online]. Available at: https://rm.coe.int/november-2022-revised-table-languages-covered-english-/1680a8fef4 (Accessed: 5 July 2025).

The Role of the HCNM in OSCE Conflict Prevention (1997) Hague: Foundation on Inter-Ethnic Relations.

Wattier, S. (2022) 'Ritual Slaughter Case: The Court of Justice and the Belgian Constitutional Court Put Animal Welfare First', *European Constitutional Law Review*, 18(2), pp. 264–285; https://doi.org/10.1017/S1574019622000189.

Weber, A. (2013) 'Article 5 [Principles on the Distribution and Limits of Competences]' in Blanke, H.J., Mangiameli, S. (eds.) *The Treaty on European Union (TEU): A Commentary*. Berlin–Heidelberg: Springer, pp. 255–286; https://doi.org/10.1007/978-3-642-31706-4_6.

Wladasch, K. (2015) 'The sanctions regime in discrimination cases and its effects', *European Network of Equality Bodies* [Online]. Available at: https://equineteurope.org/publications/the-sanctions-regime-in-discrimination-cases-and-its-effects/ (Accessed: 5 July 2025).

Legal Sources

Charter of Fundamental Rights of the European Union, OJ C 202, 7 June 2016, pp. 389–405.

Commission of the European Communities, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, Brussels, 2 July 2008.

Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC, OJ L, 2024/1499, 29 May 2024.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, pp. 22–26.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, pp. 16–22.

Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation, OJ C 93, 19 March 2021, pp. 1–14.

Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States, OJ C 378, 24 December 2013, pp. 1–7.

Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU, OJ L, 2024/1500, 29 May 2024.

European Charter for Regional or Minority Languages (ETS No. 148), Council of Europe, 5 November 1992.

European Commission against Racism and Intolerance (ECRI) (2018) ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (adopted on 13 December 2002 and revised on 7 December 2017, CRI(2003)8 REV. Strasbourg: Council of Europe [Online]. Available at: http://rm.coe.int/ecri-general-policy-recommendation-no-7-revised-on-national-legislatio/16808b5aae (Accessed: 5 July 2025).

European Commission, Assessment report of the Member States' national Roma strategic frameworks, COM/2023/7 final, Brussels, 9 January 2023. [Online]. Available at: https://commission.europa.eu/system/files/2023-01/1_3_50157_swd_fiches_roma_strat_pt1_en.pdf (Accessed: 5 July 2025).

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of equality: EU anti-racism action plan 2020-2025, COM/2020/565 final, Brussels, 18 September 2020.

European Commission, Communication from the Commission to the European Parliament and the Council, A Union of Equality: EU Roma strategic framework for equality, inclusion and participation, COM(2020) 620 final, Brussels, 7 October 2020.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, COM(2011) 173 final, Brussels, 5 April 2011.

European Commission, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A stronger EU engagement for a peaceful, sustainable and prosperous Arctic, JOIN(2021) 27 final, Brussels, 13 October 2021.

European Commission, Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final, Brussels, 19 March 2021.

European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the national Roma strategic frameworks in light of the EU Roma strategic framework for equality, inclusion and participation and the Council Recommendation on Roma equality, inclusion and participation, COM(2024) 422 final, Brussels, 25 September 2024.

European Commission, Report on the evaluation of the EU Framework for National Roma Integration Strategies up to 2020, COM(2018) 785 final, Brussels, 4 December 2018.

European Commission, Report on the implementation of the EU anti-racism action plan 2020-2025 and on national action plans against racism and discrimination, COM(2024) 419 final, Brussels, 25 September 2024.

European Parliament resolution of 11 September 2013 on endangered European languages and linguistic diversity in the European Union, OJ C 93, 9 March 2016, pp. 52–58.

European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015, OJ C 238, 6 July 2018, pp. 2–27.

European Parliament resolution of 18 April 2023 on the institutional relations between the EU and the Council of Europe, OJ C, C/2023/442, 1 December 2023.

European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, OJ C, C/2024/4216, 24 July 2024.

European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, OJ C 215, 19 June 2018, pp. 162–177.

European Parliament resolution of 3 May 2022 on the persecution of minorities on the grounds of belief or religion, OJ C 465, 6 December 2022, pp. 33–43.

European Parliament resolution of 7 February 2018 on protection and non-discrimination with regard to minorities in the EU Member States, OJ C 463, 21 December 2018, pp. 21–25.

European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, OJ C 124E, 25 May 2006, pp. 405–415.

Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007, pp. 17–35.

Explanatory Report to the Framework Convention for the Protection of National Minorities, Council of Europe, 1 February 1995.

Framework Convention for the Protection of National Minorities (ETS No. 157), 1 February 1995, Council of Europe.

Protocol No 3 - on the Sami people, OJ C 241, 29 August 1994, p. 352.

Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, OJ L, 2024/1252, 3 May 2024.

The Treaty of Nice amending the EU Treaty, the Treaties establishing the European Communities and certain related acts, OJ C 80, 10 March 2001, pp. 1–87.

Treaty establishing the European Economic Community (EEC) (1957) [Online]. Available at: https://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf (Accessed: 5 July 2025).

Treaty of Accession of Austria, Finland and Sweden, OJ C 241, 29 August 1994.

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10 November 1997.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17 December 2007, pp. 1–229.
Treaty on European Union (Consolidated version), OJ C 202, 7 June 2016.
Treaty on European Union, OJ C 191, 29 July 1992.
Treaty on the Functioning of the European Union (Consolidated version), OJ C 202, 7 June 2016, pp. 47–390.
United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, 2 October 2007. [Online]. Available at: https://docs.un.org/en/A/RES/61/295 (Accessed: 5 July 2025).

Case-Law

C-130-75, *Vivien Prais v Council of the European Communities*, 27 October 1976.
C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV,* 14 March 2017.
C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA,* 14 March 2017.
C-190/16, *Werner Fries v Lufthansa CityLine GmbH,* 21 March 2017.
C-336/19, *Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering*, 17 December 2020.
C-356/12, *Wolfgang Glatzel v Freistaat Bayern*, 22 May 2014.
C-406/15, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, 9 March 2017.
C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, 17 April 2018.
C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others v Vlaams Gewest*, 29 May 2018.
C-443/15, David *L. Parris v Trinity College Dublin and Others*, 24 November 2016.
C-497/17, *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others*, 26 February 2019.
C-566/10 P, *Italy v. Commission*, 27 November 2012.
C-644/19, *FT v Universitatea 'Lucian Blaga' Sibiu, GS and Others, HS, Ministerul Educației Naționale*, 8 October 2020.
C-668/15, *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic*, 6 April 2017.
C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia*, 16 July 2015.
C-899/19 P, *Romania v European Commission*, 20 January 2022.
C-98/91, *A.A. Herbrink v Minister van Landbouw*, 27 January 1994.

Part VI
Refugees

| Chapter 16 |

The International Protection of Refugees: The United Nations Framework

Lucia Bakošová

ABSTRACT

Refugees represent one of the vulnerable groups of people that have their own protection under international law. The chapter explains what constitutes a refugee under international law and introduces the concept of refugees' rights and the significance of international protection from a historical perspective. Particular focus is on the international treaties and documents adopted under the auspices of the League of Nations, dedicated to a selected groups of refugees, which ultimately influenced the legal framework adopted by the United Nations (UN). Most notably the 1933 Convention Relating to the International Status of Refugees and the work of several institutions established to ensure the international protection of refugees' rights, during the League of Nations period (1921–1946). The subchapter dedicated to the legislative history and protection of refugees under the auspices of the UN highlights the importance of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Particular focus is on the drafting and adoption of the 1951 Convention, including the historical context post-World War II and the refugee rights that contractual states are obliged to adhere to. Furthermore, the subchapter highlights the newest steps towards the better international protection of refugees and their rights. Lastly, the chapter explores organisations that were established for the improvement of international protection of refugees under the UN. Most notably, the legal basis and scope of the UN High Commissioner for Refugees' work, including its protection activities, advocacy, and partnerships with states.

KEYWORDS

United Nations, Convention Relating to the Status of Refugees, Refugees' Rights, UN High Commissioner for Refugees, League of Nations

1. Introduction

Refugees represent one of the vulnerable groups of people that have their specific protection under international law. The act of seeking refuge in another country, due to the fear of persecution in one´s own country, is not a new concept. The origin of the term "*regufee*" comes from the French word "*réfugié*" which refers to Protestants who fled France following the revocation in 1685 of the Edict of Nantes, the law that

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granted religious liberty and civil rights to the Protestant Huguenots for nearly a century. While the process of seeking refuge and granting shelter to asylum seekers can be traced and it is present in almost every nation's and the world's history, the act of legislating such a process began only in the 20th century.[1] Before we turn to the legislative history and the history of refugees' rights, it is important to determine which person can be attributed the refugee status with its correlated rights and obligations. According to Hathaway, a refugee is usually thought of as a person compelled to flee his state of origin or residence due to political troubles, persecution, famine or natural disaster. The refugee is perceived as an involuntary migrant, a victim of circumstances which force him to seek sanctuary in a foreign country.[2] The legally binding definition of this term, however, can be found in the Article 1 A (2) of the Convention Relating to the Status of Refugees (1951)(1951 Refugee Convention) and its subsequent Protocol from 1967, under which a "refugee" is a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of their nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. The main feature of the refugee status is that refugees do not enjoy the protection of any government, either because they are, as stateless persons, unable or, having a nationality, unwilling for political reasons to avail themselves of the protection of their country of origin.[3] The origins of refugee rights are closely intertwined with the emergence of the general system of international human rights law. Its contemporary codification by the United Nations took place just after the adoption of the Universal Declaration of Human Rights, and was strongly influenced by the Declaration´s normative structure. In a more fundamental sense, the refugee rights regime draws heavily on the earlier precedents of the law of responsibility for injuries to aliens and international efforts to protect national minorities.[4] Alien law was the first legal system to deny the absolute right of states to treat persons within their jurisdiction in whatever manner they deemed appropriate. It recognised the special vulnerabilities of persons outside their national state, and established a combination of absolute and contingent duties owed to aliens.[5]

1 Bhusal, 2019, p. 194.
2 Hathaway, 1984, p. 348.
3 Weis, 1982, p. 27.
4 Hathaway, 2005, p. 75.
5 Ibid., p. 83.

2. Historical Background on Refugees' Rights, The Legislative History and Protection of Refugees Before the Establishment of the United Nations

The history of the protection of refugees dates back to at least a few centuries, not to mention refugee situations in Antiquity, however, the history of international protection starts with the League of Nations[6] and further evolves under the auspices of the United Nations (UN), as well as regional organisations, such as the European Union, Organizations of American States, or the African Union (previously Organization of African Unity). During a period of more than four centuries preceding 1920, there was little concern to delimit the scope of the definition of refugees. Groups of refugees tended to be relatively small and many of them chose to migrate to the Americas and other newly-discovered lands.[7] Moreover, the reign of liberalism with its individualistic orientation and respect for self-determination led most European powers to permit essentially uncontrolled and unrestricted immigration.[8] Refugees were viewed as potential taxpayers, soldiers, businessmen, productive to the society in general. This freedom of international movement accorded to persons broadly defined as refugees came to an abrupt halt after the First World War. The existence of massive groups of refugees who had been dislocated during the war coincided with the rise of political and economic nationalism throughout the Western world.[9] Governments began regulating significant aspects of economic and social life, aiming to protect key entitlements for the benefit of their citizens. This focus on enhancing investment in the well-being of their populations led states to emphasise clear distinctions between citizens and non-citizens, most notably through the tightening of passport and visa controls at their borders. Equally important, access to such important social goods as the right to work and public housing was often limited to persons able to prove citizenship.[10] The effects of this shift in European social organisation were softened by a network of bilateral treaties on friendship, commerce, and navigation, established under international alien law. These treaties guaranteed foreign nationals access to many of the benefits typically reserved for citizens while abroad. However, this arrangement hinged on reciprocity: the citizens of one state could expect benefits in another state only if their own government reciprocated by ensuring similar rights for the partner state's citizens.[11] The main refugee crises that had a significant impact on international refugee law in the 20th century were associated with the Bolshevik Revolution in Russia, the Balkan Wars, and wars in the Caucasus and the Greco-Turkish War. Without documentation to establish their eligibility for entry and residence, refugees were either turned away or, if able to avoid border controls, barred from

6 Jaeger, 2001, p. 727.
7 Nathan-Chapotot, 1949, p. 33.
8 Hathaway, 1984, p. 348.
9 Holborn, 1938, pp. 680–681.
10 Hathaway, 2005, p. 83.
11 Ibid., p. 84.

work or other regulated sectors. Lacking valid travel documents, they were not able to move onward from first asylum state in search for better living conditions.[12]

2.1. The League of Nations

The international legal protection of refugees and recognition of their rights began to develop during the presence of the League of Nations. As observed by the League of Nations Advisory Commission on Refugees, 'the characteristic and essential feature of the problem was that persons classified as 'refugees' have no regular nationality and are therefore deprived of the normal protection accorded to the regular citizens of a state.'[13] Like all aliens, refugees were essentially at the mercy of the institutions of a foreign state. In contrast to other foreigners, however, refugees clearly could not seek the traditional remedy of diplomatic protection from their country of nationality.[14] The Covenant of the League of Nations did not mandate the League of Nations with protection of refugees *per se*. However, under Article 23 of the Covenant the Member States would endeavour to improve social conditions in a number of fields. The League of Nations showed significant activity in this area. However, it did not create a universal convention or bodies with a general scope and authority in the field of refugee rights. The most pressing interwar exodus of refugees from Russia, Turkey, Germany, and Austria were resolved contractually, through the Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees (1926)[15], the Arrangement Relating to the Legal Status of Russian and Armenian Refugees (1928),[16] the Convention Relating to the International Status of Refugees (1933)[17] relating to Russian and Refugees Assimilated by them, the Convention concerning the Status of Refugees Coming From Germany (1938)[18] supplemented by the Additional Protocol (1939)[19] concerning refugees from the Czech Sudetenland and Austria. These first refugee agreements did not set specific responsibilities for states, other than cooperation in the recognition of League of Nations documentation. There was generally no need for greater precision, as most European states continued to afford relatively generous benefits to the nationals of "most-favoured states" to whom refugees were effectively assimilated. The mentioned treaties dealt with the rights of refugees to

12 Ibid.
13 *Report by the Secretary-General on the Future Organisation of Refugee Work*. League of Nations Doc. 1930.XIII.2, p. 3.
14 Hathaway, 2005, p. 84.
15 Arrangement of 12 May 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees. *League of Nations, Treaty Series*, Vol. 89, No. 2004.
16 Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees. *League of Nations Treaty Series*, Vol. 89, No. 2005.
17 Convention of 28 October, 1933 relating to the International Status of Refugees. *League of Nations, Treaty Series*, Vol. 159, No. 3663.
18 Convention concerning the Status of Refugees coming from Germany. *League of Nations, Treaty Series*, Vol. 192, No. 4461.
19 Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees Coming from Germany. *League of Nations, Treaty Series*, Vol. 198, No. 4634.

work and to receive welfare and relief payments, the personal status of refugees, freedom from expulsion, rights to education, the fiscal regime of refugees, and exemptions from reciprocity provisions. Unfortunately, the treaties applied only to specific categories of refugees and were ratified, frequently with reservations, by only a few states.[20] Regarding the issue of institutionalisation of the international protection of refugees' rights, during the League of Nations period (1921–1946) several institutions were created to perform some or all of the tasks of the High Commissioner for Refugees: the Nansen International Office for Refugees (1931–1938), the Office of the High Commissioner for Refugees coming from Germany (1933–1938), the Office of the High Commissioner of the League of Nations for Refugees (1939–1946) and the Intergovernmental Committee on Refugees (1938–1947).[21]

The first step in the protection of refugees is associated with the situation of Russian refugees in 1920. After consultation with other important organisations, Gustave Ador, President of the International Committee of the Red Cross in a letter dated 20 February 1921, proposed to the Council of the League of Nations that it should appoint a commissioner for Russian refugees. He called the League the 'only supernational political authority capable of solving a problem which is beyond the power of purely humanitarian organisations'. In making this bold proposal, Ador, a well-known Swiss politician, called refugee assistance both 'a humanitarian duty' and an 'obligation of international justice'. Inspired by the success of international collaboration to assist prisoners-of-war during the First World War, Ador believed that similar efforts could diminish refugee problems.[22] The Council of the League of Nations decided to adopt this proposal on 27 June 1921 and on 15 August 1921, the Norwegian explorer, scientist, and statesman Fridtjof Nansen was appointed High Commissioner for Russian Refugees. The Russian refugees under the High Commissioner´s protection had been deprived of their nationality by the Soviet Government and lacked passports. Hitherto refugees had been treated like ordinary aliens; the law made no provision for persons who lacked travel documents. The earliest international instruments dealing with refugees, the Arrangement of 5 July 1922 with regard to the Issue of Certificates of Identity to Russian Refugees,[23] provided for the issuance of a travel document to refugees which has become known as the "Nansen passport",[24] in order to grant Russian refugees a minimum legal status and minimum freedoms. When the Armenian and Greek refugee problem became urgent in 1923, the word "Russian" was deleted from this title.[25] The High Commissioner for Refugees had to fulfil highly complex tasks, including the legal protection of refugees, support repatriation, settlement, and integration into labour markets. This was done by the adoption of Arrangements of 5

20 Weis, 1982, p. 28.
21 Jaeger, 2001, p. 729.
22 Skran, 2018, p. 2.
23 Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees, 5 July 1922, 355 L.N.T.S. 238.
24 Weis, 1982, p. 28.
25 Kugelmann, 2012, p. 718.

July 1922, 31 May 1924 and 12 May 1926. There was generally no need for greater precision, as most European states continued to afford relatively generous benefits to the nationals of "most favoured states: to whom refugees were effectively assimilated.[26] Between 1925 and 1929, there was close co-operation with the International Labour Organization (ILO) in this matter. This co-operation resulted from an organisational split. In 1925 the staff of the High Commissioner for Refugees were transferred to the ILO where it became the Refugee Service, responsible for the technical matters of employment, settlement, and migration. The practical problems of this division of competences were so serious that the functions assigned to the ILO were transferred back to the High Commissioner for Refugees by the end of 1929.[27]

Increasing political and economic instability, coupled with the persistence of the "temporary" refugee problem, had led some states to refuse to assimilate refugees to most-favoured foreigners. As generosity subsided, the League of Nations shifted towards standardising the range of rights that should be extended to refugees.[28] The establishment of this new pattern can be seen in the 1928 Arrangement Relating to the Status of Russian and Armenian Refugees. The governments that adopted the Arrangement agreed that it was necessary to define more clearly the legal status of Russian and Armenian refugees, and recommended the appointment of representatives of the High Commissioner for Refugees 'in the greatest possible number of countries'. They also made a number of recommendations to governments of countries of residence (the term "asylum" was not used) regarding personal status, divorce, exemption from reciprocity, from the *cautio judicatum solvi* and from restrictive labour regulations, expulsion, taxation, and travel visas.[29]

The Assembly of the League of Nations in May 1930 decided to incorporate the legal and political protection of refugees into its own legal framework by attributing it to the Secretary-General. Following Nansen's death in 1930, the League of Nations opted to establish the Nansen International Office for Refugees to take charge of the protection of refugees under the League's mandate rather than appoint a new High Commissioner.[30] The Nansen International Office for Refugees, however, was established only for a limited period, subsequently fixed to terminate by the end of 1938. According to Article 24 of the Covenant of the League of Nations, the Nansen International Office for Refugees was an autonomous institution acting under the authority of the League of Nations. It consisted of an administrative council comprising 10 members, including a Russian and an Armenian, and a president. The administrative council was appointed by the Secretary-General of the League of Nations, the ILO, and private charity organisations. Under the responsibility of the Nansen International Office for Refugees, the 1933 Convention relating to the International Status of Refugees was

26 Hathaway, 2005, p. 86.
27 Kugelmann, 2012, p. 719.
28 Hathaway, 2005, p. 86.
29 Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees. *League of Nations, Treaty Series*, Vol. 89, No. 2005.
30 Labman, 2010, p. 6.

adopted and constituted the first legally binding instrument concerning refugees in international law. Unlike the previously enacted arrangements which constituted mere recommendations to governments, the proposed convention would impose a series of obligations upon signatory States.[31] By adhering to the Convention, States Parties for the first time undertook real obligations on behalf Russian, Armenian and assimilated refugees.[32] Many rights set by the 1933 Convention simply formalised and amplified the recommendations set out in the 1928 Arrangement.[33] It dealt with administrative measures (the issuance of "Nansen certificates"), refoulement, legal questions, labour conditions, industrial accidents, welfare and relief, education, fiscal regime and exemption from reciprocity, and provided for the 'creation of committees for refugees'. The Convention of 1933 is regarded as a milestone in the protection of refugees, due to the fact that it is one of the earliest examples of states agreeing to codify human rights as matters of binding international law.[34] An important addition was the explicit obligation of states

> 'not to remove or keep from its territory, by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.'[35]

Furthermore, the Convention grants key socio-economic rights. The Convention granted refugees some relief from the stringency of foreign labour restrictions, and proscribed limitations of any kind after three years' residence, where the refugee was married to or the parent of a national, or was an ex-combatant of the First World War. Refugees were also granted access to the host state's welfare and relief system, including medical care and workers' compensation. Lastly, the access to education was to be facilitated, including by the remission of fees.[36] In practice, the 1933 Convention did not significantly expand refugee rights. Only eight states ratified the treaty, several with major reservations. The assimilation of refugees to most-favoured foreigners in any event proved an inadequate guarantee of reasonable treatment, as the intensifications of the unemployment crisis led states to deny critical social benefits, including the right to work, even to established foreigners.[37] Despite this fact, the 1933 Convention served as a model for the subsequent 1951 Convention.

31 Hathaway, 1984, p. 357.
32 Assimilated refugees were Assyrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks.
33 Hathaway, 2005, p. 87.
34 Ibid.
35 Convention of 28 October, 1933 relating to the International Status of Refugees. *League of Nations, Treaty Series*, Vol. 159, No. 3663, art. 3.
36 Ibid., arts. 7–12.
37 Hathaway, 2005, p. 88.

Hitler's rise to power in 1933, however, sparked an outpouring of new refugees, mostly Jews, from Germany. This new crisis pushed the League of Nations to direct the focus of its refugee protection and appoint an independent "High Commissioner for Refugees coming from Germany". The High Commissioner's task was therefore two-fold: to coordinate relief and settlement efforts and to negotiate and facilitate refugee travel and resettlement in third countries.[38] During this time period, two treaties were concluded to provide protection for refugees coming from Germany: the Provisional Arrangement concerning the Status of Refugees coming from Germany, signed in Geneva on 4 July 1936, and the Convention concerning the Status of Refugees coming from Germany, signed in Geneva on 10 February 1938. An Additional Protocol to these treaties extended them to include refugees from Austria. As refugees from Germany were not entitled to Nansen certificates, these treaties provided for a separate identity certificate.[39] While continuing the approach of stipulating legally binding duties of states, no attempt was made to guarantee refugees more than identity certificates, protection from expulsion, recognition of personal status, and access to the courts.[40] In 1938 Franklin D. Roosevelt, the President of the United States, encouraged the creation of an Intergovernmental Committee on Refugees (IGCR) as an activity involving democratic states independent from the League of Nations. It was established by 31 states in order to aid potential and actual refugees from Germany and Austria.[41] For the first time protection was extended to would-be refugees inside the country of potential departure.[42] Due to growing political conflicts, the Nansen International Office for Refugees effectively merged with the High Commissioner for German Refugees on 1 January 1939 leading to the creation of a new High Commissioner for All Refugees.[43] It was assigned the responsibility to oversee the application of the 1933 and 1938 Conventions, assist governments and "to coordinate in general humanitarian assistance along with resettlement and other solutions.[44] The Office of the High Commissioner for All Refugees and the IGCR were essentially amalgamated in February 1939 when Sir Herbert Emerson, the "High Commissioner for Refugees for All Refugees" simultaneously became Director of the IGCR.[45]

During World War II, the IGCR's extended mandate made it the main vehicle for aid to refugees. It worked beside the allied armed forces and the United Nations Relief and Rehabilitation Administration, which was created in 1943, in order to protect, and repatriate the displaced persons of Europe following the war.[46] In 1946 the IGCR created the "London Travel Document" which was an identity certificate granting

38 Labman, 2010, pp. 6–7.
39 Jaeger, 2001, p. 731.
40 Hathaway, 2005, p. 89.
41 Kugelmann, 2012, p. 719.
42 Jaeger, 2001, p. 732.
43 Kugelmann, 2012, p. 719.
44 Roversi, 2003, p. 28.
45 Ibid., p. 29.
46 Torpey, 2000, p. 143.

free movement to refugees. The London Travel Document was issued by 21 states and acknowledged by 12 additional states. The Office of the High Commissioner for All Refugees formally ceased to exist on 31 December 1946 as a result of the dissolution of the League of Nations. The functions of the IGCR, which involved refugee protection in times of war, were transferred to the Preparatory Commission for the International Refugee Organization on 1 July 1947.[47]

3. Development of International Refugee Law under the United Nations

The establishment of the United Nations in 1945 marked a pivotal moment in international cooperation, particularly in addressing global humanitarian crises. Among the foremost challenges facing the UN was the plight of millions displaced by war, persecution, and conflict. As a result, international refugee law emerged as a critical component of the UN's mission to protect human rights and uphold international peace and security. This chapter traces the development of international refugee law under the UN, highlighting the key legal instruments, agencies, and principles that have shaped its evolution. From the adoption of the 1951 Refugee Convention to the creation of the UNHCR, the UN has played a central role in defining refugee protection, responding to emerging crises, and adapting to new challenges.

3.1. Legal Documents Improving the International Protection of Refugees and Their Rights

Proceeding chronologically, the first document that was adopted for the needs of international protection of refugees, although not exclusively, was the Universal Declaration of Human Rights (1948). As such, the Universal Declaration enshrines the rights and freedoms of all human beings, for instance the right to life, liberty and the security of a person, the right to freedom of movement and residence, the right to a nationality, the right to own property, the right to freedom of thought, conscience and religion, and others. With regard to refugees, Article 14 is particularly important, since it states that

> 'everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'

As referred to earlier, key documents providing international protection to refugees and their rights are the 1951 Convention and the 1967 Protocol. Due to their particular importance in this area, the aforementioned treaties are discussed in detail in the following subchapter.

47 Kugelmann, 2012, p. 720.

Apart from the efforts associated with the cited treaties, the UN also focused on the issue of territorial asylum. In 1967, the UN General Assembly adopted the Declaration on Territorial Asylum, urging states to follow key principles without undermining existing asylum and refugee laws. These principles include:

a) Asylum granted to individuals entitled to invoke Article 14 of the Universal Declaration of Human Rights, including those fighting colonialism, must be respected by all states;
b) States facing difficulties in granting asylum should receive support from other nations or the UN in the spirit of international solidarity;
c) Asylum seekers should not be rejected at borders, expelled, or returned to a place where they face persecution, except for national security reasons or during mass influx situations. States should offer alternatives like provisional asylum when making such exceptions.
d) States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the UN.[48]

Subsequently in 1977, the UN Conference on Territorial Asylum took place in Geneva pursuant to General Assembly resolution 3456 (XXX) of 9 December 1975. However, it did not finalise its work and recommended that the UN General Assembly, at its 32nd session, consider the possibility of convening another session of the Conference at a suitable time. By the end of the Conference, only five articles had been adopted by the Commission of the Whole. The Draft Convention on Territorial Asylum is written with the objective, among others, of disposing of several of the foregoing limitations on the 1951 Convention and 1967 Protocol. Of the five articles, only Article 1 (Grant of asylum) had been fully considered by the Drafting Committee.[49] The article is couched in tentative language: '[e]ach Contracting State, acting in the exercise of its sovereignty, shall endeavour in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention.'[50] At the Conference, delegates voted to effect a slight change of wording in that sentence and to add a new paragraph stating that asylum should not be refused merely on the grounds that it could be sought in another state. The new paragraph was, however, qualified by a proviso stating that the fugitive may be required first to seek asylum in another state with which he or she has connections, if it appears fair to do so.[51] Article 2 of the Draft Convention sets out the circumstances in which a person is eligible for the benefits of the instrument. It is to be noted that in revising the Draft, the Group of Experts substituted the word "eligible" in this context with the word "entitled". Subject to two exceptions, and to an immaterial change of syntax, Draft Article 2(1) corresponds with the definition of refugee in the Convention of 1951, as modified by the Protocol of 1967.

48 UN General Assembly Resolution 2312 (XXII) from 19 December 1967, arts. 1–4.
49 Report of the United Nations Conference on Territorial Asylum, UN Document A/CONF.78/12 of 4 February 1977.
50 Ibid., art. 1.
51 Plender, 1977, p. 57.

As Plender points out, the first exception is that in the Draft there is to be inserted after the words 'persecution for reasons of [...] political opinion' the phrase 'including the struggle against colonialisation and apartheid.' The second is that under the Draft Convention a fugitive is to be eligible if he or she is unable or unwilling to return to his or her country owing to a well-founded fear of 'persecution, prosecution or punishment for acts directly related to the persecution as set forth' in the preceding subparagraph. The Draft thus envisages that a fugitive will qualify as a refugee if he or she has fled to escape prosecution for an act undertaken in pursuance of a political opinion, including opposition to colonialism and apartheid.[52] In contrast, under Article 2 (2) of the Draft Convention, paragraph 1 does not apply to any individual for whom there are substantial reasons to believe that they have committed: (a) a crime against peace, a war crime, or a crime against humanity, as defined in relevant international instruments; (b) a serious common offense under the laws and regulations of the state granting asylum; or (c) acts contrary to the purposes and principles of the UN. Furthermore, the provisions of paragraph 1 also do not apply to any person requesting territorial asylum for purely economic reasons. The Draft Convention adheres to the principle of non-refoulement, one of the key provisions of the 1951 Convention and international refugee law as a whole. In accordance with Article 3, Contracting States would agree not to return an individual entitled to the benefits of the Draft Convention to a country where he or she would be persecuted. The provision cannot be claimed by anyone deemed a security threat to the host country, those convicted of a serious crime, or in exceptional cases, by a large group whose mass influx may pose a security risk to the state. During the Conference, new articles on the questions of the activities of asylees and of family reunion were added to the Draft Convention. After the Conference, the Draft Convention faced significant challenges and was never adopted. Its goal was to establish clear international standards for granting asylum, but negotiations stalled due to disagreements among Member States, particularly concerning issues like state sovereignty, non-intervention, and the mandatory acceptance of refugees. Therefore, states left the idea of a legally binding convention on territorial asylum unresolved, and no further attempts to adopt a binding convention on the subject have been made since then.

In recent history, there were several non-binding documents adopted within the UN concerning the protection of refugees and their rights. In 2016, during the UN Summit for Refugees and Migrants, Member States adopted the New York Declaration for Refugees and Migrants[53] in order to address the question of large movements of refugees and migrants. The New York Declaration marked a 'significant detachment from previous UN policy deliberations' insofar as it sought to address the movements of refugees and migrants under the same umbrella.[54] Member States made commitments to protect the human rights of all refugees and migrants, regardless of status;

52 Ibid., pp. 57–58.
53 Adopted by the UN General Assembly Resolution 71/1 of 19 September 2016.
54 Thouez, 2019, p. 4.

to support those countries rescuing, receiving and hosting large numbers of refugees and migrants; to strengthen and facilitate emergency responses to refugee movements and a smooth transition to sustainable approaches that invest in the resilience of both refugees and the communities that host them; or to implement a comprehensive refugee response, based on a new framework that sets out the responsibility of Member States, civil society partners and the UN system, whenever there is a large movement of refugees or a protracted refugee situation.[55] The Declaration in its Annex I outlines the comprehensive refugee response framework, which is based on the principles of international cooperation and on burden-and responsibility-sharing. It presents a comprehensive response designed to ensure (a) rapid and well-supported reception and admission measures; (b) support for immediate and ongoing needs (e.g., protection, health, education); (c) assistance to national/local institutions and communities receiving refugees; and (d) expanded opportunities for durable solutions. Another significant milestone was the decision made at the UN Summit to integrate the International Organization for Migration (IOM) into the UN system as a related organisation to strengthen cooperation with the UN and enhance the ability of the two organisations to fulfil their respective mandates in the interest of migrants and their Member States.[56] For more on the role of the IOM regarding refugee protection see Subchapter 2.2 Organizations Established for the Improvement of International Protection of Refugees.

Based on the provisions of the New York Declaration, two other non-binding documents were later adopted, namely the Global Compact on Refugees[57] and Global Compact for Safe, Orderly and Regular Migration,[58] adopted in 2018. This initiative, endorsed by the UN General Assembly, provides a framework to ease pressures on host countries; enhance refugee self-reliance; expand access to third country solutions; and support conditions in countries of origin for return in safety and dignity.[59] Furthermore, it encompasses the already mentioned Comprehensive refugee response framework. The New York Declaration and the Global Compact on Refugees reaffirm the already existing framework for the protection of refugees and their rights.

3.2. The Convention Relating to the Status of Refugees (1951) and the Protocol Relating to the Status of Refugees (1967)

Due to persistent problems and challenges arising from refugee crises after the World War II, the 1951 Convention was adopted. It presents a cornerstone of the contemporary international refugee law. Most of the treaties discussed above have been expressly superseded by the 1951 Convention. From the drafting process, it should be

55 See New York Declaration for Refugees and Migrants, points 22–40 and 64–87.
56 Agreement concerning the Relationship between the United Nations and the International Organization For Migration, adopted by the UN General Assembly Resolution 70/296 of 25 July 2016, art. 1.
57 Adopted by the UN General Assembly Resolution 73/151 of 17 December 2018.
58 Adopted by the UN General Assembly Resolution 73/195 of 19 December 2018.
59 Global Compact on Refugees, para. 7.

noted that this convention was completed at a conference of authorised representatives of the states convened on the basis of the UN General Assembly resolution no. 429 (V) of December 14, 1950. The text of the Convention was adopted on 28 July 1951.[60] In 1967 the main caveat attached to the Universalist character of this definition – a geographical and time limitation[61] – was lifted comprehensively through the sanctioning of a protocol. The aim of the Convention, as expressed in the Protocol, is to address the definition of the term "refugee", regulate the processes for acquiring and losing refugee status, guarantee the fundamental rights of refugees under various foreign regimes, establish the obligation of states to protect refugees – particularly the principle of non-refoulement – and outline the responsibilities and authority of the UN High Commissioner for Refugees in overseeing the implementation of the Convention's provisions.

The 1951 Convention did put in place the enduring foundations of refugee protection by setting out baseline principles on which the international protection of refugees was to be built. These principles according to Feller are:

1. refugees should not be returned to face persecution or the threat of persecution–the principle of non-refoulement;
2. protection must be extended to all refugees without discrimination;
3. the problem of refugees is social and humanitarian in nature, and therefore should not become a cause of tension between states;
4. since the grant of asylum may place unduly heavy burdens on certain countries, a satisfactory solution to the problems of refugees can only be achieved through international cooperation;
5. persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner, and accordingly should not be penalised for having entered into, or for being illegally in, the country where they seek asylum;
6. given the very serious consequences the expulsion of refugees may have, such a measure should only be adopted in exceptional circumstances directly impacting national security or public order; and
7. co-operation of states with the UNHCR is essential to ensure the effective coordination of measures taken to deal with the problem of refugees.[62]

The Convention further established a relatively comprehensive catalogue of the rights and obligations of an individual resulting from refugee status, as well as the obligations and rights of states in relation to persons to whom they grant refugee status. In accordance with Article 2, every refugee has duties to the country in which he finds

60 Convention Relating to the Status of Refugees, 28 July 1951. United Nations, Treaty Series, Vol. 189, p. 137.
61 Originally, the Convention applied only to individuals who became refugees as a result of events that took place in Europe before January 1, 1951.
62 Feller, 2001, pp. 131–132.

himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

The substantive rights set by the Convention have their origins in two main sources, namely the 1933 Refugee Convention and the 1948 Universal Declaration of Human Rights. The human rights of refugees are relatively haphazardly scattered across different parts of the Convention. Of the four rights with no obvious predecessor, the right to "administrative assistance" essentially codifies the assumption by States Parties of the consular role previously played by the high commissioners for refugees of the League of Nations. Three provisions, namely protection against penalisation for illegal entry, exemption from exceptional measures applied against co-nationals, and the right to transfer externally acquired assets to a country of resettlement, represent net additions to the conceptualisation of refugee rights.[63] The Convention stipulates that, except where the Convention contains more favourable provisions, Contracting States shall accord to refugees the same treatment as is accorded to aliens generally – by no means a self-evident rule, considering the precarious status of unprotected persons in international and frequently also in national law.[64] As to specific rights of refugees, the Convention establishes three standards of treatment: (1) national treatment, which is the same treatment as is accorded to nationals of the Contracting States; (2) most-favoured-nation treatment, the most favourable treatment accorded to nationals of a foreign country; and (3) treatment as favourable as possible, and in any event not less favourable than that accorded to aliens generally in the same circumstances.[65] Contracting States are to grant refugees national treatment with respect to freedom to practice religious belief, copyright and industrial rights, the right to free access to court, the right to basic education, the right to public support and assistance, the right to the benefits of labour legislation and social security, the right to the same tax and social security burden. The second group of rights is represented by rights granted in the most-favoured-nation treatment. The right to association and the right to employment can be included in this group. Treatment as favourable as possible, an in any event not less favourable than that accorded to aliens generally, is to be granted to refugees with respect to the right to acquire movable and immovable property, the right to self-employment, the right to accommodation, the right to higher education and freedom of movement. The inability of states to make any reservations to their obligation to guarantee protection against discrimination, religious freedom, and access to the courts entrenches a universal minimum guarantee of basic liberties for refugees. Furthermore, states are unable to make any reservations concerning the prohibition of expulsion or return (refoulement).[66] As stated by Hathaway, there are important parallels between key socioeconomic rights stated in the Convention and

63 Hathaway, 2005, p. 94.
64 Weis, 1982, p. 29.
65 Ibid., pp. 29–30.
66 See art. 42 (1) of the 1951 Convention: 'At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than to arts. 1, 3, 4, 16(1), 33, 36–46 inclusive.'.

those rights negotiated under the 1939 and 1949 migrant labour conventions of the ILO. The ILO pioneered international legal protections against economic vulnerability, challenging the assumption of aliens' law that persons outside their own country require only guarantees of basic civil rights. Recognising that refugees, like migrant workers, face the risk of economic marginalisation and exploitation, the 1951 Refugee Convention goes a substantial distance toward enfranchising refugees within the structures of the social welfare state.[67]

From the rights referred to, the question of adjustment of the personal status of a refugee is singled out, which according to Article 12, paragraph 1 should be governed by the law of the country of origin, or in the case of an apolite by the law of the state of his residence. According to Article 12, paragraph 2, the refugees' previously acquired rights regarding personal status are also respected, especially as it relates to marriage.[68]

As refugees are normally unable to obtain administrative assistance, documents, or certifications of facts from the authorities of their country of origin, the Contracting States undertake to arrange for such assistance to be made available by their own authorities or by an international authority. The Convention furthermore provides for the issuance of travel documents to refugees by the state of residence of the refugee. This travel document entitles the holder to return within the period of its validity to the country that issued it. This so-called "Convention travel document", in passport form, has largely superseded the Nansen passport.[69]

As far as the obligations of the states in relation to the persons granted refugee status are concerned, these are also relatively unevenly scattered within the various sections. The first group of obligations consists of obligations related to the method of application of the provisions of the Convention. This is about the obligation to apply the provisions of the Convention without discrimination against refugees regardless of race, religion or country of origin.[70] Furthermore, the obligation to guarantee refugees exemption from reciprocity according to the principles set out in Article 7, i.e. to guarantee refugees relevant foreign rights regardless of reciprocity from their mother state, as well as the obligation to exempt refugees from the framework of exceptional measures introduced against the persons, property and interests of foreign nationals, if such measures apply in the given state.[71] The second group of obligations is represented by certain restrictions on the freedom of states in the implementation of administrative and criminal law measures in relation to refugees on their territory. The most important limitation is the principle of non-refoulement contained in Article 33, paragraph 1, which stipulates that:

67 Ibid., p. 95.
68 Jankuv, 2020, p. 53.
69 Weis, 1982, p. 31.
70 Convention Relating to the Status of Refugees, 28 July 1951. United Nations, Treaty Series, Vol. 189, p. 137, art. 3.
71 Ibid., art. 8.

> 'No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

However, under paragraph 2 of the same article,

> 'the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'

The last group of obligations concerns the cooperation of states and their bodies with the relevant UN bodies. On the basis of Article 35, Contracting States undertake to cooperate with UNHCR, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention. In order to enable UNHCR or any other agency of the UN which may succeed it, to make reports to the competent organs of the UN, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning: (a) the condition of refugees; (b) the implementation of this Convention; and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees. In addition to obligations, the convention enshrines the right of states to take temporary measures in Article 9.[72] In accordance with the mentioned article,

> 'nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.'

As for the Protocol Relating to the Status of Refugees (1967) (1967 Protocol), it is a treaty which incorporates the Refugee Convention´s rights regime by reference (see Article I(1)), and extends those protections to all refugees by prospectively eliminating the Convention´s temporal and geographical limitations for those countries which choose to be bound by it. On the other hand, the substantive criteria for refugee status – a well-founded fear of persecution based on one of five specific civil or political grounds – remained unchanged by the Protocol. As a result, it raises concerns that individuals fleeing natural disasters, war, or widespread political or economic instability, which

72 Jankuv, 2020, pp. 54–55.

are arguably the primary drivers of displacement in much of the developing world today, may fall outside the scope of internationally recognised refugee protection.[73] The Protocol is not, as is commonly believed, an amendment to the 1951 Convention, instead, the international refugee regime operates through two treaties that deal with the same subject matter.[74] The Full Federal Court of Australia has reached the same conclusion, noting that states may accede to the Protocol without first becoming a party to the Convention, and that those which do so are immediately bound to grant rights described in the Convention to a broader class of persons – that is, to modern refugees from all parts of the world – than would have been the case by accession to the Convention itself.[75]

3.3. Organisations Established for the Improvement of International Protection of Refugees

As for the establishment of relevant institutions and organisations in the area, the first organisation that was established under the auspices of the UN, was the International Refugee Organization (IRO),[76] which operated between 1947 and 1952 and its main goal was the resettlement of refugees from Central Europe, in the United States, Australia, Western Europe, Israel, Canada and Latin America. In accordance with Article 2 of the Constitution of the International Refugee Organization, the IRO was

> 'entrusted with the repatriation; the identification, registration and classification; the care and assistance; the legal and political protection; the transport; and the re-settlement and re-establishment, in countries able and willing to receive them, of persons who are the concern of the Organization.'[77]

By mid-1947, the IRO had assumed the responsibilities of the United Nations Relief and Rehabilitation Administration, the IGCR and, indirectly the League of Nations' High Commissioner for All Refugees. The IRO was originally meant to complete its operational activities on 30 June 1950. However, due to new wave of refugees coming

73 Hathaway, 2021, p. 173.
74 Hathaway, 2005, p. 111.
75 *Minister for Immigration and Multicultural Affairs v. Savvin, (2000)* 171 ALR 483, paras. 13, 30, 117, 120–125.
76 Established by the UN General Assembly Resolution 62 (I) of 15 December 1946.
77 Under the Constitution of the IRO, the term "refugee" applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories: (a) victims of the Nazi or fascist regimes or of regimes which took part on their side in the Second World War, or of the Quisling or similar regimes which assisted them against the UN, whether enjoying international status as refugees or not; (b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not; (c) persons who were considered refugees before the outbreak of the Second World War, for reasons of race, religion, nationality or political opinion. See Part I of the Annex I to the Constitution of the International Refugee Organization, 20 August 1948. *United Nations, Treaty Series*, Vol. 18, p. 3.

from Central and East Europe, a new permanent organ for ensuring the protection of refugees was needed.

Eventually, UNHCR was established at the end of 1949, though it only started its mandate from 1 January 1951. The main purpose of UNHCR is the institutional supervision of the application of international refugee law. The formation, mandate and key operations of the UNHCR are elaborated in the following subchapter. Apart from UNHCR, in December 1949, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) was also established. The main role of the Agency was to carry out direct relief and works programmes for Palestine refugees and their descendants who fled their homes after the so-called Palestine War in 1948 and after the so-called Six Day War in 1967.[78] In the absence of a resolution to the Palestine refugee issue, the UN General Assembly has consistently renewed UNRWA's mandate, with the most recent extension lasting until 30 June 2026.[79]

Lastly, we should mention the existence of the IOM, firstly known as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME) and then as the Intergovernmental Committee for European Migration (ICEM). Although IOM was established in 1951, it was not until 2016 when it became part of the UN system based on the agreement between the UN Secretary General and the Director General of the IOM. Even after the adoption of the Agreement concerning the Relationship between the United Nations and the International Organization for Migration, IOM functions as an independent, autonomous and non-normative international organisation in the working relationship with the United Nations.[80] The adoption of the Global Compacts of 2018 and the entry of IOM into the UN system were supposed to bring clarity and predictability regarding the response of the international community to situations that are somewhat at the crossroads between refugee protection and migration management. These include mixed movements as well as population movements where people have been compelled to flee and are in obvious need of protection, but for various reasons are not recognised as refugees.[81] The main role of IOM regarding the protection of refugees is associated with repatriation and resettlement of refugees.[82] To prepare refugees for resettlement and to prepare states to receive them, IOM works with governments on the design and implementation of their resettlement programmes. Particular attention should be paid to refugees' health and well-being, while proper arrangements must be made for safe travel and effective integration in the host and receiving communities.

78 Established by the UN General Assembly Resolution 302 (IV) from 8 December 1949.
79 See UN General Assembly Resolution 77/123 from 15 December 2022.
80 Agreement concerning the Relationship between the United Nations and the International Organization for Migration, art. 2.
81 Moretti, 2021, p. 35.
82 International Organization for Migration Constitution, art. 1 (b), (d).

3.4. The Office of the United Nations High Commissioner for Refugees

The Office of the United Nations High Commissioner for Refugees (UNHCR) is one of the world body's chief humanitarian organisations. UNHCR was established by the UN General Assembly under the Resolution 319 (IV) in December 1949, as a subsidiary organ of the General Assembly, consistent with Article 22 of the Charter of the United Nations.[83] It came into being on 1 January 1951, initially for three years, primarily to deal with the remaining refugee problems in Europe in the aftermath of World War II. The temporal limitation on its mandate was removed in 2003, when the UN General Assembly adopted Resolution 58/153, which authorised UNHCR to continue its work until the refugee problem is solved.[84] UNHCR receives policy directives from the UN General Assembly and the UN Economic and Social Council (ECOSOC). The General Assembly elects the High Commissioner, upon proposal of the UN Secretary-General, normally for a five-year term, and reviews UNHCR's annual reports.[85] Originally, the term of office of the High Commissioner was three years.

The mandate of UNHCR, laid down in the Statute of the Office of the UNHCR as adopted under UN General Assembly Resolution 428 (V) of 14 December 1950, was tied to a generic refugee definition,[86] which also integrated the specific groups hitherto protected by the IRO and earlier arrangements. Its mandate has, though, evolved to include other forcibly displaced, and stateless people.[87] These include: asylum seekers and recognised refugees, persons who have fled their country of origin due to armed conflict or events seriously disturbing public order, returnees, so-called internally displaced persons or former refugees who voluntarily returned to their country of origin, and stateless persons.[88] UNHCR, acting under the authority of the UN General Assembly, was given the main task to provide international protection to refugees and work with states to seek permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organisations to facilitate the voluntary repatriation of such refugees, or their

83 The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

84 UN General Assembly Resolution 58/153 of 22 December 2003, A/RES/58/153, para. 9.

85 Feller and Klug, 2012, p. 723.

86 Para. 6 of the Statute of the Office of the UNHCR: 'A. (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
(II) Any person who, as a result of events occurring before 1 January 1951 and owing to the well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.'.

87 Feller and Klug, 2012, p. 721.

88 Čepelka et al., 2003, pp. 45–46.

assimilation within new national communities.[89] In accordance with Article 8 of the Statute, the High Commissioner ensures the protection of refugees who fall under the competence of the Office, as follows:

a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
b) Promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of states;
e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
f) Obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
g) Keeping in close touch with the governments and inter-governmental organisations concerned;
h) Establishing contact in such a manner as he may think best with private organisations dealing with refugee questions;
i) Facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees.

In addition to the mentioned tasks, the High Commissioner performs other tasks assigned to him by the UN General Assembly or the UN ECOSOC.

An important role within UNHCR is played by the Executive Committee of the High Commissioner´s Programme (ExCom), which was established under the ECOSOC Resolution 672 (XXV) of 30 April 1958. It serves as the advisory committee for seen in paragraph 4 of the UNHCR Statute. The task of ExCom is to assess and approve UNHCR's individual programmes and budget, make recommendations in the field of international refugee protection, and discuss related issues between UNHCR and its intergovernmental and non-governmental partner organisations.[90] ExCom is also the only global inter-governmental forum to be involved in the development of international refugee protection standards. Since 1963, results of ExCom´s deliberations have been formally presented as Conclusions on the International Protection of Refugees (CIPR). CIPR address pertinent protection questions, of a general or group

89 Statute of the Office of the UNHCR, UN General Assembly Resolution 428 (V) of 14 December 1950, para. 1.
90 See UN General Assembly Resolution 1166 (XII) from 26 November 1957, para. 5.

specific nature.[91] They not only provide policy guidance to UNHCR, but are also directly addressed to states. Each year, CIPR are annexed to the High Commissioner's annual report and endorsed by the UN General Assembly.[92] From a legal point of view, CIPR are not legally binding on UNHCR, or the states. They nevertheless influence the way UNHCR exercises its protection mandate and its advocacy activities with governments. They serve to interpret and develop principles and provisions of international refugee law, and provide evidence of an already established rule of customary international law, or lead to law creation.[93]

From a financial point of view, UNHCR is financed under the budget of the UN. Unless the UN General Assembly subsequently decides otherwise, no expenditure, other than administrative expenditures relating to the functioning of the Office of the High Commissioner, shall be borne by the budget of the UN, and all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions. The administration of the Office of the High Commissioner is subject to the Financial Regulations of the UN and to the financial rules promulgated thereunder by the Secretary-General.[94] Most voluntary funding comes from governments, but private donors, including foundations, corporations and individuals, have become an increasingly important part of the funding base. UNHCR's budget is not set in advance each year, but is determined by the anticipated needs, which can fluctuate significantly depending on global crises and refugee flows. This reliance on voluntary contributions poses a challenge to long-term planning and operational predictability, as funding is often allocated for specific purposes or regions. To enhance transparency and accountability, UNHCR publishes detailed annual financial reports and is subject to oversight by the UN Board of Auditors. However, persistent funding gaps often limit the organisation's ability to fully respond to urgent humanitarian needs or invest in durable solutions for protracted refugee situations.

4. Conclusion

The historical development of legislation concerning refugees and their rights has proven that refugees are not merely passive victims of displacement, but rights-bearing individuals whose protection has been progressively integrated into international law and multilateral cooperation. Historically, the League of Nations laid the foundations for the human rights of refugees and for international refugee law

91 CIPR have addressed such matters as non-refoulement, conditions of detention, family unity, physical security, the provision of identification documents, the right to education or the right to undertake employment. An effort has also been made to interpret rights to respond to the special vulnerabilities of refugees who are children, women, elderly, or caught up in a large-scale influx. See Hathaway, 2005, p. 113.
92 Feller and Klug, 2012, pp. 723–724.
93 Ibid., p. 724.
94 Statute of the Office of the UNHCR, paras. 20–21.

in general. The 1933 Convention and the establishment of the Nansen International Office for Refugees are meaningful milestones in this regard, although initial efforts to provide rights to refugees were partial and limited in scope and ratification. These early initiatives, although pioneering, lacked universality and enforceability, as they applied only to specific groups and relied heavily on the goodwill of a limited number of states. Nonetheless, they set important precedents, such as the issuance of the Nansen passport and the acknowledgment of refugees' need for legal identity and mobility.

The turning point came after World War II with the establishment of the UN, which addressed the crisis of mass displacement by adopting the 1951 Refugee Convention and the 1967 Protocol. These documents established a comprehensive legal framework for defining refugees, protecting them from expulsion, and defining a wide range of civil, political, and socio-economic rights. Unlike previous treaties, the 1951 Convention introduced binding obligations for states, including the obligation to cooperate with the UNHCR and the prohibition of discrimination against refugees. It also enshrined the principle of non-refoulement, which became a cornerstone of international refugee law and a non-derogable norm of customary international law. UNHCR's establishment and mandate signal a long-standing commitment to the protection of refugees and their rights. Its evolving mandate now includes not only refugees but also internally displaced persons and stateless persons, adapting to current global challenges. Through its advocacy, operational support, and coordination role, UNHCR has significantly contributed to both the development of international legal standards and the delivery of humanitarian aid to persons under its agenda. Its partnerships with governments, civil society, and international agencies have been crucial in implementing durable solutions such as voluntary repatriation, local integration, and third-country resettlement.

Moreover, recent soft law instruments, such as the New York Declaration (2016) and the Global Compact on Refugees (2018), reaffirm state obligations and emphasise international cooperation and burden-sharing. These instruments signal a shift toward a more holistic and collaborative response to refugee crises, recognising that no single state can address forced displacement alone. They also highlight the need for preventive measures, enhanced refugee self-reliance, and the strengthening of host community resilience. In essence, the evolution of refugee protection reflects a significant shift from fragmented humanitarian responses to a comprehensive and multidimensional legal and institutional regime. While challenges remain – such as ensuring compliance and adapting to new forms of displacement – the international community has built a lasting foundation for protecting the dignity and rights of displaced people around the world. Persistent armed conflicts, climate change and protracted displacement highlight the need for continuous innovation in protection mechanisms and equitable burden-sharing among states.

Bibliography

Bhusal, B.M. (2019) 'Origin and Development of International Refugees Law', *Nepal Law Review*, 28(1–2), pp. 194–205; https://doi.org/10.3126/nlr.v28i1-2.57529.

Čepelka, Č., Šturma, P., Bílková, V., Fáberová, A., Skalková, M., Honusková, V. (2003) *Teorie a praxe azylu a uprchlictví*. Praha: Univerzita Karlova a UNHCR.

Feller, E. (2001) 'The Evolution of the International Refugee Protection Regime', *Washington University Journal of Law and Policy*, 5, pp. 129–139 [Online]. Available at: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1555&context=law_journal_law_policy (Accessed: 30 September 2024).

Feller, E., Klug, A. (2012) 'Refugees, United Nations High Commissioner (UNHCR)' in Wolfrum, R. (ed.) *The Max Planck Encyclopedia of Public International Law. Vol. VIII*. Oxford: Oxford University Press, pp. 720–737.

Hathaway, J. (1984) 'The Evolution of Refugee Status in International Law: 1920–1950', *International and Comparative Law Quarterly*, 33(2), pp. 348–380; https://doi.org/10.1093/iclqaj/33.2.348.

Hathaway, J. (2005) *The Rights of Refugees under International Law*. Cambridge: Cambridge University Press.

Hathaway, J. (2021) 'The Architecture of the UN Refugee Convention and Protocol' in Costello, C., Foster, M., McAdam, J. (eds.) *Oxford Handbook of International Refugee Law*. Oxford: Oxford University Press, pp. 171–185 [Online]. Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1265&context=book_chapters (Accessed: 30 September 2024).

Holborn, L. (1938) 'The Legal Status of Political Refugees, 1920-1938', *American Journal of International Law*, 32(4), pp. 680–703.

Jaeger, G., (2001) 'On the history of the international protection of refugees', *International Review of the Red Cross*, 83(843), pp. 727–737; https://doi.org/10.1017/S1560775500119285.

Jankuv, J. (2020) *Medzinárodnoprávna úprava v oblasti azylu a utečenectva*. Praha: Nakladatelství Leges.

Kugelmann, D. (2012) 'Refugees, League of Nations Offices' in Wolfrum, R. (ed.) *The Max Planck Encyclopedia of Public International Law. Vol. VIII*. Oxford: Oxford University Press, pp. 718–720.

Labman, S. (2010) 'Looking Back, Moving Forward: The History and Future of Refugee Protection', *Chicago-Kent Journal of International and Comparative Law*,10(1), pp. 1–22 [Online]. Available at: https://scholarship.kentlaw.iit.edu/ckjicl/vol10/iss1/2 (Accessed: 30 September 2024).

Moretti, S. (2021) 'Between refugee protection and migration management: the quest for coordination between UNHCR and IOM in the Asia-Pacific region', *Third World Quarterly*, 42(1), pp. 34–51; https://doi.org/10.1080/01436597.2020.1780910.

Nathan-Chapotot, R. (1949) *La qualification internationale des réfugiés et personnes déplacées dans le cadre des Nations Unies*. Paris: A. Pedone.

Plender, R. (1977) 'Admission of Refugees: Draft Convention on Territorial Asylum', *San Diego Law Review*, 15(1), pp. 45–62.

Roversi, A. (2003) 'The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period', *Refugee Survey Quarterly*, 22(1), pp. 21–35; https://doi.org/10.1093/rsq/22.1.21.

Skran, M.C. (2018) *Gustave Ador, the ICRC, and leadership on refugee and migration policy* [Online]. Available at: https://www.cambridge.org/core/blog/2018/12/03/gustave-ador-the-icrc-and-leadership-on-refugee-and-migrationpolicy/#:~:text=In%20early%201921,%20at%20least (Accessed: 30 September 2024).

Thouez, C. (2019) 'Strengthening Migration Governance: The UN as 'Wingman'', *Journal of Ethnic and Migration Studies*, 45(8), pp. 1242–1216; https://doi.org/10.1080/1369183X.2018.1441604.

Torpey, J. (2000) *The Invention of the Passport: Surveillance, Citizenship and the State*. Cambridge: Cambridge University Press.

Weis, P. (1982) 'The Development of Refugee Law', *Michigan Journal of International Law*, 3(1), pp. 27–42.

| Chapter 17 |

Refugee Protection in the Jurisprudence of the European Court of Human Rights

Aleksandra Syryt

ABSTRACT

The European Convention on Human Rights (ECHR), established by the Council of Europe in 1950, plays a significant role in protecting the rights of refugees and asylum seekers, even though it does not explicitly address the issue of refugees. This study explores how the ECHR, through its provisions and the case law of the European Court of Human Rights (ECtHR), protects refugees and other individuals seeking international protection, including those without formal refugee status.

The legal definition of a refugee under international refugee law, as provided by the Refugee Convention, does not directly align with human rights law. Nevertheless, the ECHR offers protection to all individuals, including asylum seekers, rejected claimants, and refugees denied protection for national security or public order reasons. The ECtHR's case law has evolved to recognise two broad categories of rights: those protecting refugees from expulsion and those ensuring fundamental rights for refugees residing within a state.

While expulsion-related protections are well-established, broader protections concerning the right to residence and standard of living remain less developed. However, the ECHR, interpreted as a "living instrument", provides opportunities to extend such protections, demonstrating the dynamic nature of human rights law. The study also takes into account specific cases from Central and Eastern Europe, highlighting the challenges and developments in this field. Ultimately, the findings contribute to formulating broader standards for refugee protection under the ECHR.

KEYWORDS

refugees, European Court of Human Rights, European Convention of Human Rights, non-refoulment, asylum seekers

1. Introduction

The European Convention on Human Rights (ECHR, Convention)), established by the Council of Europe in 1950, is a fundamental legal instrument aimed at protecting human rights and fundamental freedoms in Europe. Although the convention does

Aleksandra Syryt (2026) 'Refugee Protection in the Jurisprudence of the European Court of Human Rights' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 709–756. https://doi.org/10.71009/2026.nj.hrpovg_17

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not explicitly address the issue of refugees, its provisions are relevant for the protection of refugees and asylum seekers.[1]

This chapter discusses how the ECHR protects the rights of refugees, examines the relevant case law of the European Court of Human Rights (ECtHR, Court), and explores the challenges and developments in this field. Some topics will be presented in the broader context of the convention-based protection of foreigners (aliens). These findings may however, serve as a starting point for formulating standards for the protection of refugees, or more broadly, for those seeking international protection. The study will also consider issues related to the right of asylum and the situation of migrants who do not formally have refugee status but arrive in another country seeking assistance due to various circumstances.

The study takes into account cases from Central and Eastern Europe.

According to international refugee law, a refugee is a person who,

> 'owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality and is unable or, due to such fear, unwilling to avail themselves of the protection of that country.'

Individuals recognised as refugees under Article 1A(2) of the Refugee Convention[2] do not need to seek protection under the ECHR. They are protected from expulsion and granted refugee status under national law.

The Refugee Convention specifically provides that refugees should be treated "as far as possible" on equal terms with the citizens of the host country. However, the privileges granted by the Refugee Convention are excluded for individuals who do not fall under the definition provided in Article 1A(2). This applies to those whose claim for protection is based on grounds other than persecution under the Refugee Convention.

Additionally, the benefits of the Refugee Convention are entirely excluded for individuals who there are strong reasons to believe are serious criminals, and who as a result, do not deserve subsidiary protection. Finally, the privilege arising from the principle of non-refoulement is lost for refugees who have been deemed a threat to the security or community of the country that granted them refugee status.[3]

The legal definition of a refugee does not have an equivalent in human rights law. The ECHR applies to everyone, including refugees in the broadest sense of the term (particularly asylum seekers, individuals whose asylum claims have been denied, and refugees who have been refused protection due to national security or public order concerns). The case law of the ECtHR based on the ECHR is evolving and grants fundamental rights to a broad category of refugees.

1 Papaderaki, 2017.
2 The Convention on the Status of Refugees was signed in Geneva on July 28th 1951.
3 Lambert, 2005, p. 39.

Fundamental rights can be divided into two categories. Firstly, there are rights that are essential for protecting refugees from expulsion. This concept is broadly interpreted and covers various cases.[4] Secondly, there are rights necessary to protect the fundamental rights of refugees residing within the territory of a state party to the Convention. The first category of rights is now well-established in the case law of the ECtHR.[5] In cases concerning expulsion, not only persecution is considered, but also humanitarian factors.

The protection of the second category of refugee rights is not as developed, particularly in relation to the right to residence and standard of living. Nonetheless, the ECHR offers opportunities to expand the protection of these individuals. Case law concerning rights not specifically related to refugees can also be used to extend protection to refugees.[6]

This reflects the view that the ECHR is a "living instrument", with its interpretation extending beyond the aspirations of its drafters. In the third paragraph of the ECHR's preamble, the concept that states created the Convention to establish appropriate guarantees for the respect of fundamental rights by member states is expressed. In other words, they aim not only to maintain the existing rights but also to develop and enrich their content.[7] This justifies analysing the Convention's provisions and the ECtHR's case law that interprets them in the context of the broader group of refugees.

2. Legal Framework

In the context of protecting the rights of foreigners (aliens), including refugees, asylum seekers, and broader migration issues, the ECHR contains relatively few specific provisions. These are limited to Article 16 (prohibition of restricting the public activities of aliens), Article 4 of Protocol No. 4 to the ECHR, and Article 1 of Protocol No. 7 to the ECHR.[8]

The case-law of the ECtHR in the field of the protection of aliens' rights and the broadly understood issue of migration is widely developed. The following issues can be identified in this area: the collective expulsion of aliens; the so-called "Dublin" cases

4 Lambert, 1999, pp. 515–544.

5 *Chahal v. The United Kingdom*. In case of *D. v. United Kingdom*, the ECtHR held that the lack of medical care in the country of return can, in exceptional circumstances, prevent deportation. Court noticed that proposed removal of an alien drug courier dying of AIDS to his country of origin (St Kitts) where he has no accommodation, family, moral or financial support and no access to adequate medical treatment would constitute a violation.

6 Mole and Meredith, 2000.

7 3rd subparagraph of the ECHR Preamble, '[c]onsidering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms'.

8 Karska et al., 2023, p. 24.

and interim measures. The Court has also addressed the issue of detention of migrants and the detention of migrant minors, both accompanied and unaccompanied.[9]

Although the ECHR itself does not contain provisions explicitly addressing refugee rights, the interpretation of both the Convention and its additional Protocols allow for their application to foreigners (aliens) and refugees residing in the territories of the state parties to the Convention.

According to the first sentence of Article 1 of the ECHR, the right to life of every person is protected by law. Furthermore, Article 14, which prohibits discrimination, states that the enjoyment of the rights and freedoms set forth in the Convention must be secured without discrimination on grounds such as sex, race, skin colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth, or any other status (reasons).

Article 4 of Protocol No. 4 to the ECHR, which explicitly states that collective expulsion of foreigners (aliens) is prohibited, can be regarded as the most specific provision directly applicable to the situation of refugees (or, more broadly, to foreigners/aliens). In the legal literature, it is emphasised that no other provision more directly address the protection of foreigners (aliens) residing in the territories of the States Parties than this regulation in Protocol No. 4. Despite calls for the inclusion of provisions specifically addressing these issues, such regulations have ultimately not been incorporated.[10] At the same time, it is worth mentioning the activity of the ECtHR in the context of the right to refugee protection. In its extensive case law on this matter, the Court frequently applies the interpretation of Article 3 of the ECHR, which concerns the prohibition of torture, as well as inhuman or degrading treatment or punishment.[11]

In addition, the provisions of the Convention concerning the right to a fair trial and the right to an effective remedy (Articles 6 and 13 of the ECHR) are significant. Their role is crucial for the effective enforcement of guaranteed rights through appropriate legal procedures.[12]

Although the individual provisions of the ECHR are not explicitly designed for refugees, they establish specific standards of protection against expulsion, extradition, or other forms of deportation. They also aim to ensure that refugees are provided with decent living conditions, including respect for their privacy and family life.

2.1. The ECHR

Among the provisions of the ECHR that may hold particular significance for refugees are Articles 2, 3, 5, 6, 8, 9, 13, and 14 of the ECHR. It is important to remember that, in accordance with Article 1 of the ECHR, the States Parties to the Convention are obligated to secure the rights and freedoms defined in the ECHR to everyone within

9 Ibid., p. 25.
10 Iwiński, 2002, p. 140.
11 Cf. *Sufi and Elmi v. the United Kingdom and M.S.S. v. Belgium and Greece*.
12 Mole and Meredith, 2000.

their jurisdiction. The status of being a foreigner (an alien) or a refugee cannot serve as a basis for exclusion from this protection.

This is confirmed by the case law of the ECtHR, which analyses the general provisions of the Convention in cases concerning migrants, including refugees and other foreigners (aliens). Importantly, these reference standards are often interrelated and are analysed collectively by the Court to establish the standards of protection for this particular group of people, who are in need of protection. Therefore, this section of the chapter will present the foundations of the aforementioned protection, along with selected ECtHR case law, including cases where violations were alleged against Central and Eastern European states.

2.1.1. The Recognition of Individuals Seeking International Protection as Vulnerable (Vulnerable Groups) by ECtHR

Refugees and other persons in need of international protection are recognised as vulnerable (vulnerable groups) – it is one of the central elements of human rights protection. This is not a construction that stems directly from the Convention but rather a product of the ECtHR's interpretation.[13] The ECtHR has consistently underlined that asylum seekers, refugees and other types of migrants, because of their vulnerable situations, must be seen as a vulnerable group in need of special protection. This vulnerability is rooted in factors such as displacement, danger of persecution, lack of access to basic rights and the psychological and physical toll that they face. The ECtHR has emphasised in its case law that the vulnerability of these persons should be taken into account when deploying state obligations under the ECHR. It highlights that the rights and protections that apply to refugees and asylum seekers must be in line with international standards, especially the state obligations set out in Articles 3 and 8 of the ECHR concerning inhuman or degrading treatment and respect for private and family life respectively.

By recognising individuals seeking international protection as vulnerable, the ECtHR sets higher expectations for states in terms of providing adequate living conditions, fair asylum procedures, and protection against expulsion to unsafe countries.

In the judgment in the case of *M.S.S. v. Belgium and Greece*, the ECtHR recognised the applicant as a vulnerable person 'due to everything he had gone through during migration and the traumatic experiences he likely suffered earlier.' The Court further added that vulnerability was inseparably linked to his status as a foreigner (an alien) seeking asylum. On the other hand, it stated that:

> 'the situation the applicant complains about has persisted since his transfer to Greece in June 2009. It is connected to his status as an asylum seeker and the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that had the Greek

13 Gałka, 2020, pp. 69–70.

> authorities swiftly examined the applicant's asylum application, they could have significantly alleviated his suffering.'[14]

The ECtHR) links vulnerability, among other factors, to the status of an asylum seeker. This means that the Court recognises asylum seekers as a particularly vulnerable group that requires special protection. Such vulnerability is assessed both ex-ante (before the threat materialises) and ex-post (after harm has occurred), indicating that this group must be seen as especially susceptible to risks and harm at various stages of the asylum process. This encompasses the dangers they face before receiving protection, as well as the challenges they may encounter during and after their application is processed. The ECtHR's interpretation highlights the need for heightened safeguards to prevent further suffering and ensure their rights are effectively upheld.[15]

2.1.2. Article 2: Right to Life

According to the ECHR, the use of force is permissible only as a last resort, when it is necessary, proportionate, and justified in achieving a legitimate aim. States have an obligation to protect individuals from loss of life and from inhuman or degrading treatment or punishment. Disproportionate violence also falls within this category. Excessive use of force may result in a violation of Articles 2 and 3 of the ECHR. The case law of the ECtHR establishes that in every instance of a violation of these provisions, an effective official investigation must be conducted.[16]

For an investigation to be effective, it must be conducted promptly, thoroughly, and with the capacity to identify those responsible. Victims should have the opportunity to participate, and the close relatives of the victim must be sufficiently involved to protect their legitimate interests.[17]

According to the ECHR, states are prohibited from expelling individuals if such expulsion would result in the violation of their rights guaranteed under Article 2 (right to life) and Article 3 (prohibition of torture and inhuman or degrading treatment or punishment).[18] Article 15 of the ECHR further clarifies that these rights are absolute and cannot be derogated from, even in exceptional circumstances. In certain exceptional cases, states are also prohibited from expelling individuals who would face gross violations of Article 5 (right to liberty) or Article 6 (right to a fair trial) of the ECHR in the destination country.[19]

The connection between Article 2 of the ECHR which protects the right to life and the protection of refugees is especially clear when the removal or denial of refugees or any asylum seeker results in their loss of life. Article 2 of the ECHR requires states

14 *M.S.S. v. Belgium and Greece. Cf. Brandl and Czech*, 2017, p. 250.
15 *Z.A. and Others v. Russia*.
16 *Mocanu v. Romania*, paras. 315–326.
17 *Armani da Silva v. the United Kingdom*, paras. 229–239.
18 *Saadi v. Italy*.
19 See an overview of forms of "flagrant denial of justice" in *Harkins v. the United Kingdom*, paras. 62–65.

to take steps to protect individuals within their jurisdiction from threats of death, whether resulting from the actions of the state itself or from returning individuals to a country where their lives would be in serious danger. This is an important concept for refugees, as it safeguards them via non-refoulement, which is the unilateral determination to repatriate someone, even refugees, to their country of origin or a third country where there is a reasonable risk that they will be persecuted, tortured or killed. Article 2 ECHR (the right to life) as well as Article 3 ECHR (the prohibition of torture and inhuman or degrading treatment), form a core part of the legal basis that underpins the refugee non-refoulement principle. In reality Article 2 prohibits states from expelling a refugee or asylum seeker on the basis of a risk of death from their return to a specific country (due to armed conflict, execution or other life threatening forms of persecution). The ECtHR has always held that there is a positive obligation on states not to deport or remove persons to a place where there is a real risk that their life would be endangered, in order to effectively protect the right to life. Article2 of the ECHR is therefore another important part of the "legal" landscape for refugees: It provides for the right to life for refugees and prevents refugees from being sent to countries where they will die in the name of war, persecution or other life-endangering conditions. This principle is also reflected in the wider international refugee protection regime, including the non-refoulement principle defined by the 1951 Refugee Convention.

2.1.3. Article 3: Article 5: Right to Liberty and Prohibition of Torture and Inhuman or Degrading Treatment or Punishment

In the context of expulsion, under the ECHR the most significant article for a refugee applicant's defence is Article 3, which is well known. This brings us to the section in the article that is aimed at quelling people from mistreatment. This clause is pertinent in its context of expulsion irrespective of a person's aspiration for refugee life. However, case law still applies to this group's current states. As established in Article 3 of the ECHR, states have been called on to ensure that steps are taken to support the most vulnerable groups in society, namely children, victims of torture, violence, humans trafficking, and those who are sick or in other situations of vulnerability. This includes the responsibility to take proactive measures to identify vulnerabilities as early as reasonably possible and to explain to people how this is done. In addition, states must not send individuals for deportation or expulsion if they would be at a real risk of suffering inhuman or degrading treatment if returned, which would breach Article 3 of the ECHR.[20]

Article 33 of the 1951 UN Convention relating to the Status of Refugees provides that no refugee or asylum seeker should be returned to a country where he or she would be subject to serious harm. It places a heavy burden on states not to expel refugees or asylum seekers to any country where they would have a well-founded fear of

20 *Cf. Rahimi v. Greece*; *Thimothawes v. Belgium*; *Abdi Mahamud v. Malta*.

being expelled, and it urges that special attention be paid to vulnerabilities existing amongst these populations.

Article 3 of the ECHR obliges States to adopt positive measures to duly protect the most vulnerable, such as children, victims of torture, violence or trafficking in human beings, people with health problems and people in other difficult situations. Such a responsibility includes the obligation to act in a timely manner to identify vulnerabilities and inform such persons of the procedures that are applicable. The ECtHR has accumulated a wealth of case law on the expulsion of foreigners (aliens) on the basis of Article 3 ECHR. This is part of the so-called ricochet protection under the Convention. The idea behind it is, in certain situations, that areas not traditionally regulated might be given the same rights as those that are covered. The applicable prohibition of torture and inhuman or degrading treatment in the framework of the expulsion of foreigners (aliens) from the territory of an ECHR member state is particularly being referred to here. This protection states that a foreigner (alien) cannot be removed to a country where their life or freedom would be threatened by torture, or inhuman or degrading treatment or punishment.[21] This is in line with the principle of non-refoulement, which prohibits the return of individuals to a country where they would face a serious risk of such treatment. This is an all-too-familiar concept in international law, under which an "alien scourge" could not be extruded from the envelope of a nation if has a person returned – they would be sent to a state in which they would be tortured, or somewhere where they would be tortured. The principle of non-refoulement is a key principle because it prohibits people from being sent back to places where they would be subjected to violations of their basic human rights once they have been granted refugee status or asylum.[22]

In 1965 we read in the Recommendation of the Parliamentary Assembly of the Council of Europe:

> 'Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in prohibiting inhuman treatment, lays upon the states parties to this Convention an obligation not to have recourse to the expulsion of a refugee to the territory of a State where his life or freedom would be endangered.'

That view has been supported by the case law of the European Court of Human Rights (ECtHR). Thus no one, no matter how loathsome or dangerous, can be transferred to a country in which he or she would be put at risk of torture. This ban also includes situations when state security is concerned.[23]

21 It is accepted that the first case in which the ECtHR addressed the issue of non-refoulement was the judgment *Soering v. the United Kingdom*. See also *Chahal v. United Kingdomi*; Cf. Furramani and Bushati, 2022, pp. 107–120; Ristic, 2017, No.28.

22 Wojnowska-Radzińska, 2013, p. 101.

23 *Chahal v. the United Kingdom*; *A. v. the Netherlands*.

In the judgment from *Chahal v. the United Kingdom*,[24] the ECtHR explicitly stated that 'the protection under Article 3 of the Convention is broader than that provided under Articles 32 and 33 of the 1951 UN Convention relating to the Status of Refugees.' According to Article 15(2) of the ECHR, a state cannot derogate from its obligation to uphold Article 3, even in cases of war or other public emergencies threatening the life of the nation.[25] The ECtHR emphasised that Article 3 of the ECHR justifies providing protection to a foreigner (an alien), regardless of their individual characteristics, their past, or even their most reprehensible or dangerous conduct.

In the Chahal case, which marked a turning point in the protection of foreigners (aliens) – particularly those suspected of terrorist activities – against expulsion from their country of legal residence, the Court ruled that protection under Article 3 includes a prohibition on the expulsion of a foreigner (alien) to a country where there would be a risk of torture or inhuman or degrading treatment or punishment.[26]

In the recent case of *Ahmed v. Austria*,[27] the applicant claimed a violation of Article 3 ECHR in the event of expulsion to the unstable situation in Somalia. As an activist for an opposition party, he would be subject to arrest, torture and quite likely, to death. For the purposes of evaluating a potential violation of Article 3 of the ECHR, in assessing the situation in Somalia, the ECtHR relied upon findings of the Human Rights Commission. The Commission's report stated that Somalia was embroiled in a civil war, as different clans competed for dominance over the country. No evidence was identified to show that the risk to the applicant had disappeared or that any public authority would have been able to protect him. In this context, the ECtHR decided unanimously that to expel Ahmad would be in violation of Article 3 of the ECHR. The ECtHR followed a similar course of action in *Salah Sheekh v. the Netherlands*.[28] The Court held that the applicant, if returned to Somalia, would be at risk of treatment contrary to Article 3 of the ECHR, for the reason that he belonged to

24 The judgment *Chahal v. the United Kingdom* concerned an Indian national, a Sikh activist who had been living legally in the United Kingdom with his family since 1974. During his stay, he was twice charged in criminal cases related to his involvement in the Khalistan independence movement. He was accused of participating in Sikh terrorist activities. Ultimately, the conviction in the first case was overturned, and he was acquitted in the second case. However, in 1990, the UK authorities decided to deport Chahal, justifying the decision on the grounds that his continued presence in the country was against the public interest due to concerns about national security and combating terrorism. In the complaint to the ECtHR, Chahal argued that his deportation to India would expose him to the risk of torture or other inhuman or degrading treatment or punishment, particularly due to the actions of Indian security forces. The Court found that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 of the ECHR in India. Therefore, the deportation order, if carried out by the UK authorities, would have violated this provision.

25 Cf. '*European Court of Human Rights Chahal v. The United Kingdom*', 1997.

26 Cf. Sitaropoulos, 2007, p. 89.

27 The judgment *Ahmed v. Austria* involved an applicant who had been sentenced to 2.5 years in prison for attempting to commit robbery. Consequently, the Austrian authorities revoked his refugee status, declaring him a threat to public safety. This led to the decision to deport him.

28 *Salah Sheekh v. the Netherlands*.

an ethnic minority targeted by hostile tribal clans. As regards this, it should be kept in mind that in cases about expelling foreigners (aliens), the ECtHR does not usually use the expression torture either. It does not allege non-fulfilment of due process, and instead lays emphasis on the probable breach of the right against inhuman or degrading treatment.[29]

The ECtHR has ruled in cases where the risk of inhuman treatment was linked to the expulsion of a foreigner (alien) to a country where they would not have access to adequate medical care. In assessing this risk, the Court considered the applicant's health condition at the time of reviewing the case. In the judgment of *D. v. the United Kingdom*, the ECtHR emphasised that expulsion is prohibited if it could result in the interruption of life-saving treatment.[30]

Following the events of 11th September 2001, some states argued that the threat posed by terrorism required a fundamental change in the approach to the principle of *non-refoulement*. They advocated, in particular, for lifting its absolute application and suggested that this principle should be considered in the context of national security.[31] The primary advocate for challenging the existing ECtHR case law regarding the absolute prohibition of *refoulement* was the United Kingdom, which argued that the guarantees provided under Article 3 of the ECHR should not be considered absolute in cases where the state seeks to remove a person from its territory.[32]

In this regard, in the case of *Saadi v. Italy*, the ECtHR found that the applicant's possible deportation to his country of origin would infringe Article 3 of the ECHR, given that the risk of torture and inhuman treatment in Tunisia was substantial. The Court stated that there could be no exception of the non-refoulement principle, not even in the most difficult of cases, be it for the fight against terrorism or crime. The ECtHR reiterated that the prohibition against torture and inhuman or degrading treatment or punishment was absolute and had been firmly established in the Convention.[33] The ECtHR also looked at the protection against torture and other inhuman or degrading treatment of asylum seekers in relation to the application of the Dublin Regulation. The Court has eliminated the irrebuttable presumption of compliance with asylum procedures and expressly formalised vulnerable as an additional factor without denying the rights of asylum seekers. This change, which underscores the need for states to consider a given individual's personal situation, especially vulnerabilities, in enforcing asylum processes, is very important in the current context.

29 Lambert, 2007, p. 29.

30 *D. v. the United Kingdom*.

31 Cf. The positions of Lithuania, Portugal, Slovakia, and the United Kingdom in the case of *A. v. the Netherlands*, as well as in *Ramzy v. the Netherlands*.

32 Echeverria, 2006, p. 32; Wojnowska-Radzińska, 2013, p. 109.

33 *Saadi v. Italy* case concerned the expulsion of a Tunisian national who was legally residing in Italy and had been accused of terrorist activities. The case revolved around whether the applicant's deportation to Tunisia would expose him to the risk of torture or inhuman or degrading treatment, in violation of Article 3 of the ECHR.

In *T.I v the United Kingdom* case, the ECtHR noted that a member state should not go ahead with such a return unless it was not aware of a serious risk of it being a violation of the provisions of the ECHR, and could therefore find itself at risk of facing accountability for violation of the Convention. In the factual circumstances of the case, the applicant was a Sri Lankan national who had left Germany and applied for asylum in the United Kingdom. Germany was asked by the UK government to handle asylum applications on the basis of the Dublin Convention. The applicant submitted that by his return, he would be expelled and that the German authorities would send him to Sri Lanka, where he would run a real risk of treatment contrary to Article 3 of the ECHR.

The ECtHR noted that there was no evidence of a real risk that Germany would deport the applicant to Sri Lanka in violation of Article 3 of the ECHR. However, it held that the indirect removal to a third country, also a party to the Convention, did not absolve the United Kingdom from its responsibility to ensure that the applicant's rights under Article 3 would be protected. The ECtHR clarified that the UK could not automatically rely on the provisions of the Dublin Convention regarding the allocation of responsibility between European states for processing asylum applications.

The Court explained that when states establish international organisations or, by analogy, enter into international agreements for cooperation in specific areas, it can have implications for the protection of fundamental rights. It would be contrary to the purpose and object of the ECHR if Contracting States were to be relieved of their obligations under the Convention in areas of activity covered by such arrangements.[34]

In the judgment of *N.A. v. the United Kingdom*, the ECtHR emphasised that in cases concerning extradition or deportation, a full *ex nunc* assessment would be required, meaning that the situation in the destination country would have to be evaluated as it existed at the time of the decision, since conditions may change over time. While historical circumstances can provide a certain understanding of the current situation in a country from which a migrant originates, the present conditions are ultimately decisive. Thus, it is essential to take into account any information that has emerged after the national authorities' final decision.

In this context, the Court also highlighted the importance of protecting children. The ECtHR explained that the interpretation of Article 3 of the ECHR must consider the best interests of the child. This means that states must ensure special protection and care for children, including taking reasonable measures to prevent ill-treatment. For refugees, this entails that reception conditions should be appropriate and adapted to the child's age. Children should not be held in facilities unsuitable for their presence, and the conditions should not create situations of stress and anxiety with particularly traumatic consequences.[35] According to the ECHR, states would also be required to introduce special safeguards for unaccompanied and separated children, ensuring their protection and well-being.

34 *T.I. v. The United Kingdom*.
35 *Popov v. France*.

Even in instances where the children were only there for either not filing for asylum or intending to file for it in other parts of the federal jurisdiction then joining them with the family, the national authorities should have put a measure in place to get appropriate accommodation for the children. A guardian and/or legal representative must also be appointed. Failure or an omission to provide assistance and accommodation could constitute degrading treatment within the meaning of Article 3 of the ECHR. The ECtHR has also underlined the need for the protection of children in its other judgments dealing with family cases involving refugees. for example, the case of *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* can be considered, the context of which was the nearly two months during which a five-year-old Congolese girl remained at a transit centre for adult aliens run by Belgian Aliens Office near Brussels airport. The girl was traveling unaccompanied to join her mother in Canada, where she had been awarded refugee status before being deported to her home country. They (the applicants – read the mother and her child) alleged that the detention of the child amounted to inhuman or degrading treatment. In that judgment, the ECtHR concluded that the child's detention illustrated a lack of humanity, rising to the level of inhumane treatment, and ultimately ruled that the state had violated its obligations under Article 3 of the ECHR.

The Court observed that the unaccompanied child had been detained for two months in a facility designed for adults, without access to any advice or educational support from a qualified person specifically authorised for that purpose. The care provided was also insufficient to meet the child's needs. Furthermore, considering her very young age, her status as a foreigner (alien) illegally present in a foreign country, and the fact that she was without her family's care, the child was in an especially vulnerable position. Although there were no specific legal provisions regulating the situation of unaccompanied foreign minors, and although the authorities were obliged to prevent or remedy this situation, they had failed to take adequate steps to fulfil their duty of care towards the child.[36]

In 2008, the ECtHR in the judgment *K.R.S. v. the United Kingdom* stated that although there were some concerns regarding detention conditions in Greece, it should be assumed that Greece would comply with its obligations.[37] This case marked a shift from the "principle of loyalty to blind trust",[38] undermining the effectiveness

36 Cf. similarly in the case of *Mohamad v. Greece*. The case concerned the detention conditions of the applicant, an Iraqi national, who at the time of his arrest at the border post in Soufli was an unaccompanied minor awaiting deportation. The applicant alleged that his status as a minor was completely disregarded while he was detained at the Soufli border post, and he also challenged the conditions of his detention. The ECtHR found a violation of Article 3 of the ECHR, concluding that the applicant's detention conditions at the Soufli border post amounted to inhuman and degrading treatment. In particular, the Court noted that the applicant had been detained for over five months in unacceptable conditions. The applicant did not have an effective remedy to challenge his detention conditions. Cf. *Abdullahi Elmi and Aweys Abubakar v. Malta*; *S.F. and Others v. Bulgaria*.

37 *K.R.S. v. The United Kingdom*.

38 Costello, 2016, p. 261.

of human rights protection in light of the implementation of the Dublin Regulation concerning asylum seekers.

In this case, the ECtHR found that Greece had systemic problems in implementing its asylum procedure. Meanwhile, Belgium had sufficient information about this and could have rebutted the rebuttable presumption of compliance with the asylum procedure under the Dublin system and the ECHR. As a result, Belgium was held responsible for violating the Convention.[39]

The position presented in the judgment of *M.S.S. and Others v. Belgium and Greece* was reflected in the CJEU case N.S.,[40] where the irreversible nature of the presumption of compliance was abandoned in favour of protecting human rights within the Dublin system. According to that judgment,

> 'if there are substantial grounds for believing that in the responsible Member State there are systemic deficiencies in the asylum procedure and reception conditions for asylum seekers, resulting in inhuman or degrading treatment within the meaning of Article 4 of the Charter, the transfer would be incompatible with that provision.'

The dialogue between the ECtHR and the CJEU led to the adjustment of the conditions under which the responsible Member State would consider an asylum application. These conditions take into account systemic deficiencies on the one hand, and on the other, the responsible state's awareness of these deficiencies in order to assume responsibility accordingly.

This approach was confirmed in the case of *Tarakhel v. Switzerland*. The ECtHR noted that Article 3(2) of the Dublin Regulation provides that each Member State may examine an asylum application submitted to it by a third-country national based on the so-called "sovereignty clause." The Court reiterated the findings of the M.S.S. judgment and referred to the applicant's status as an asylum seeker belonging to a particularly disadvantaged and vulnerable group requiring special protection. The Court also emphasised the particular issue of the need for the protection of children. It recalled the Popov judgment,[41] stating that the Convention on the Rights of the Child encourages states to take appropriate measures to ensure that a minor seeking asylum, and who is trying to obtain refugee status, receives adequate protection.

The Court explained that it assessed the existence of a risk of violation by considering recommendations from the Office of the United Nations High Commissioner for Refugees (UNHCR) and reports from the Council of Europe's Commissioner for Human Rights. From these sources, the Court concluded that if the applicants were returned to Italy without the Swiss authorities obtaining individual assurances from

39 *M.S.S. v. Belgium and Greece*, paras. 358–359.
40 The CJEU Judgment of 21 December 2011, *N.S. v. Secretary of State for the Home Department*, No. C-411/10, paras. 94 and 106.
41 *Popov v. France*, paras.91 and 102.

the Italian authorities, the applicants receiving care appropriate to the children's ages and the family remaining together, then there would have been a violation of Article 3 of the ECHR.

This judgment reaffirmed the principle of non-refoulement by adding the criterion of vulnerability as an additional condition for enforcing the protection of the rights of asylum seekers.[42] Scholars acknowledge that this judgment reflects the fight against the arbitrary exercise of powers by Member States, based on individualising risk.[43] This aims to strengthen oversight of the individual situation of asylum seekers, which must be even more rigorous when the well-being of minors is at stake.

In conclusion, this section highlights that the protection of asylum seekers affected by physical or mental illness from deportation decisions is linked to the concept of positive obligations of the state. This concept illustrates the interpretive dynamics of the ECtHR's case law. The Court seeks to justify that an obligation inherent to the proclaimed right is essential for its effective protection.[44] This breakthrough, in the form of a positive obligation, expands upon the application of the ECHR by requiring states to take a more active role in protecting substantive rights; otherwise they may be held accountable for their inaction.

Since 1997, the ECtHR has indicated that foreigners subject to deportation generally cannot claim any right to remain in the expelling state's territory for the purpose of continuing to receive medical care provided by that state. However, in exceptional circumstances, where there is a serious risk of their health deteriorating in the country of origin, and considering significant humanitarian grounds, deportation would constitute a violation of Article 3 of the ECHR.[45]

In deportation cases, the Court has hesitated to grant direct protection against deportation for individuals suffering from physical or mental illness. It has invoked the margin of appreciation granted to states due to the burdens they assume. The Court has emphasised that the ECHR does not impose an obligation on the contracting states to compensate for the lack of medical care in countries of origin by providing free and unlimited healthcare to all foreigners (aliens) without the right to reside within their jurisdiction.[46] As a result, the Court's assessment was more evaluative, rather than granting a direct right to individuals requiring special treatment.

This position sparked controversy. The ECtHR's shift towards recognising a positive obligation inherently tied to substantive rights emerged from its interpretation of the ECHR in light of current conditions.[47]

In the case of *Paposhvili v. Belgium*, the ECtHR ruled that Member States have a positive obligation to assess the impact of deporting an applicant in light of the available information about their health condition and the existence of appropriate

42 Cf. Vicini, 2015, pp. 51–72.
43 Sudre, 2016, pp. 678, 917.
44 Sudre, 1995, pp. 366–367.
45 *D. v. The United Kingdom*, para. 54.
46 *N. v. The United Kingdom*, para. 44.
47 *Airey v. Ireland*, para. 24.

medical treatment in their country of origin. The absence of such information should not permit the authorities to conclude that the applicant would not face a real and substantial risk of treatment contrary to Article 3 of the ECHR in the event of deportation.

The Court reiterated the criteria established in Tarakhel case, ruling that when there are serious doubts about deportation, the state must obtain sufficient assurances to determine that the individual will indeed receive adequate treatment.[48] To this end, in addition to the state's negative obligation to refrain from deporting an individual in violation of Article 3 of the ECHR in relation to their right to health, it also had a positive obligation to assess the risk and secure sufficient guarantees when examining applications from illegal immigrants affected by physical or mental illness, as well as applications for the regularisation of status and in decisions regarding the enforcement of deportation measures.[49]

The so-called "Dublin cases" pertain to the legal system of the European Union, focusing on the determination of which EU Member State is responsible for handling an asylum application filed by a third-country national. The Dublin III Regulation 'sets out the criteria and procedures for identifying the Member State responsible for reviewing an international protection application lodged by a third-country national or stateless person in one of the Member States.' Under this regulation, only one Member State is tasked with examining the application. The goal of this framework is to prevent asylum seekers from being transferred between EU Member States and to avoid multiple applications from being submitted by the same individual. A common challenge in cases involving the Dublin Regulation that comes before the ECtHR is the repeated shifting of responsibility between Member States for processing refugee status applications.[50]

The case law of the ECtHR influenced European Union policy and led to the replacement of the Dublin II Regulation with the Dublin III Regulation.[51] In this sense, Article 3(2) of the ECHR strengthens the sovereignty clause by obliging a state not to return an asylum seeker to a Member State if there are substantial grounds for believing that the state is experiencing systemic deficiencies in its asylum system.[52]

48 *Tarakhel v. Switzerland*, para 120.

49 Juskevicius and Balsiene, 2010, pp. 101–102.

50 Cf. Czepek, 2016, pp. 89–103.

51 Regulation (Eu) No. 604/2013 Of The European Parliament and Of The Council of 26th 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. However, it is important to mention the case of *Muskhadzhiyeva and Others v. Belgium*. In October 2006, after fleeing from Grozny (Chechnya), a mother and her four children, Russian citizens of Chechen origin, arrived in Belgium, where they applied for asylum. Since they had spent some time in Poland, the Polish authorities agreed to take them back under the Dublin II Regulation. Consequently, the Belgian authorities issued a decision refusing them permission to stay in Belgium and ordering them to leave the country. In January 2007, they were placed in a closed detention centre. The ECtHR found that there had been a violation of the Convention in relation to the protection of the children.

52 Cf. Morgades-Gil, 2015, pp. 433–456.

To sum up, Article 3 of the ECHR holds significant importance for the status of refugees as it establishes an absolute prohibition on torture, inhuman, or degrading treatment or punishment. This provision is frequently invoked in cases involving the expulsion, deportation, or extradition of asylum seekers and refugees, as it ensures protection against removal to a country where they face a real risk of such treatment. For refugees, Article 3 ECHR plays a crucial role in the context of the principle of non-refoulement, which prohibits states from returning individuals to a country where they would be exposed to serious harm. This principle is at the core of international refugee law and is reinforced by Article 3 of the ECHR.

Where a person does not fall under the legal definition of a refugee contained in the 1951 Refugee Convention, he or she may still be eligible for protection under Article 3 of the ECHR if his or her deportation would expose him or her to the risk of torture or inhuman treatment. Furthermore, Article 3 of the ECHR has also been understood as placing positive obligations on the states, privy to who need to evaluate the risk of ill-treatment on the part of the destination state, before then deciding to deport the individual. Also in exceptional circumstances, this article applies where a refugee's medical condition can deteriorate drastically if he or she is returned to a country which lacks adequate healthcare. To summarise, article 3 of the ECHR needs to be analysed as a legal key for refugees in Section without cover due to this disposition-right to resist expulsion to the country, as long as it is defined as a torture country or countries where inhuman or degrading treatment or punishment will take place. It goes beyond refugee laws and gives a broader human rights infrastructure to those needing protection.

2.1.4. Article 5: Right to Liberty and Security

Article 5 of the ECHR establishes that everyone has the right to liberty and security of person. No one shall be deprived of their liberty. However, the ECHR introduces exceptions to this principle, which must be applied according to procedures established by law. This provision is often analysed in conjunction with Article 3 of the ECHR, as there are deep interconnections between them.

The right to liberty and security has been extensively discussed in the case law of the ECtHR. In the context of migration, it is worth noting that the Court has recognised that states have 'the undeniable sovereign right to control the entry of foreigners into their territory',[53] but it also emphasised that they must exercise this right in accordance with the provisions of the ECHR.

According to Article 5 of the ECHR, the detention of migrants and asylum seekers must be based on law and cannot be arbitrary. Additionally, it must provide certain safeguards. Specifically, detention must be: 1) prescribed by national law, 2) carried out in good faith, and 3) strictly related to a legitimate aim.

53 Cf. *Saadi v. United Kingdom; Chahal v. the United Kingdom*.

The conditions of detention should be appropriate, and the duration of detention should not exceed what is reasonably necessary. Proceedings must be conducted with due diligence, and there must be a realistic prospect of deportation.

According to ECtHR case law, the particular circumstances of detained individuals and their specific vulnerabilities (e.g., health conditions, age, special needs, etc.) may render detention unlawful. If the objective of detention can be achieved by other, less coercive measures, then detention is not lawful.[54]

In the case of children, authorities must demonstrate that detention is necessary and that alternative, less coercive measures cannot be applied instead. The preservation of family unity does not justify detention; the principle of the best interests of the child requires consideration of alternative solutions for the entire family.[55]

The exceptional vulnerability of children has implications not only in the context of protection against arbitrariness under Article 5(1)(f) of the ECHR but also with regard to Article 3 (prohibition of torture and other forms of ill-treatment) of the ECHR. Even if the conditions of detention are appropriate, detaining children may still violate Article 3 of the ECHR.[56]

The use of detention measures in the asylum process, whether *de jure* or *de facto*, is subject to strict legal limitations and safeguards.

The ECtHR has held that the detention of foreigners (aliens) must be assessed individually for each case. In *Amuur v. France*, the Court rejected the French government's argument that the detention of asylum seekers upon arrival for 20 days in the international transit zone and a nearby hotel under constant police supervision constituted a restriction on freedom of movement, rather than a deprivation of liberty. The government based its argument on the premise that the individuals could leave the transit zone and travel to any other country willing to accept them.[57]

In *Riad and Idiab v. Belgium*, since the applicants were confined in the transit zone for over a month after their arrival, with their detention ordered for an indefinite period and ultimately lasting fifteen and eleven days respectively, the ECtHR found that their confinement in the airport transit zone amounted to an actual deprivation of liberty.[58] The Court thus confirmed that the mere possibility of voluntarily leaving the country does not rule out a violation of the right to liberty and security, especially when individuals have been confined in the airport transit zone for some time.

In the case of *Ilias and Ahmed v. Hungary*, the ECtHR ruled that the two applicants were unlawfully detained in a transit zone at the land border with Serbia, since they had been held in a guarded complex for three weeks, with no access to the outside

54 Cf. *S.D. v. Greece*, paras. 57–67; *Rahimi v. Greece*, paras. 102–110; Yoh-Ekale *Mwanje v. Belgium*.
55 Cf. *Popov v. France; A.B. and Others v. France; R.K. and Others v. France; Bistieva and Others v. Poland*.
56 *R.M. Others v. France*.
57 *Amuur v. France*.
58 *Riad and Idiab v. Belgium*.

world, not even to their lawyer. This amounted to *de facto* detention, without a formal decision on their deprivation of liberty.[59]

In ECtHR case law, the distinction between restrictions on freedom of movement and detention is emphasised. In the Court's case law, particularly in "border cases", the duration and the degree of restrictions imposed on an individual are key factors in determining whether a measure constitutes detention (deprivation of liberty) or merely a restriction on freedom of movement.

In the case of *Guzzardi v. Italy*, which concerned a person accused of criminal offenses, the applicant was confined to a small island off the coast of Sardinia under strict supervision and a curfew. Although he was not placed in prison, he had to report to the authorities twice a day, was not allowed to leave the island, and could only communicate under supervision with the outside world. The ECtHR ruled that the applicant had been unlawfully deprived of liberty in violation of Article 5 of the ECHR.[60]

However, in the case of *Raimondo v. Italy*, police supervision measures, which required the person not to leave their home without informing the police, to report on specific days, and to remain at home from 9 p.m. to 7 a.m., were not considered deprivation of liberty but rather a restriction on freedom of movement.[61]

The assessment of whether a particular form of interference of freedom of movement constitutes a detention measure requires determining whether the individual has genuinely consented to the restriction of their liberty. In this regard, one issue worth noting is that while asylum seekers rarely agree to their detention, the situation in Greece may be seen as one where asylum seekers are living under conditions akin to detention. This is due to the requirement to stay in reception and identification centres on the islands where, although they can leave the centre, they are not permitted to leave the island. Similarly in Spain, asylum seekers face comparable conditions, as are unable to freely exit the enclave territory and are housed in overcrowded Temporary Stay Centres for Immigrants (CETI).

ECtHR case law indicates that, in assessing the legality of state practices, it is important to consider how asylum seekers perceive the places where they are held, which are often viewed as prisons or detention facilities. This is especially relevant in de facto detention situations.

Asylum seekers' detention is regulated by Article 5 of the ECHR, under the interpretation of the Court. The régime of detention must comply with stringent standards lest it be considered unlawful and arbitrary, given that it entails a substantial limitation on the right to liberty. The Quality of Law under which Liberty Might be Restricted: Any deprivation of liberty could take place and it has to be done properly under law; that means we are required to check if the law is of the required quality or not, and whether this law gives certainty or whether it's up to the standards put forth under national legislation. The legality of asylum seekers' detention is determined

59 *Ilias and Ahmed v. Hungary.*
60 *Guzzardi v. Italy.*
61 *Raimondo v. Italy.*

on the basis of various considerations, including the length of the detention, whether less restrictive measures could have been adopted, access to effective remedies, living conditions during detention, and whether the detention serves a lawful aim. These are set out in Article 5(1) of the ECHR: As such, they are exceptions to the general right to freedom, which must be interpreted strictly in order to prevent a situation where a person can be detained arbitrarily and as such would need to have their individual rights protected. When it comes to foreigners (aliens), especially asylum seekers, the majority of states usually seek to justify detention under Article 5(1)(f), which allows for the deprivation of liberty to prevent the unauthorised entry into the state and/or to secure the removal or deportation of a person from the state's territory. States often cite this provision to justify detaining individuals who lack legal status or are pending deportation. The ECtHR has consistently pointed out that although states enjoy the sovereign right to control immigration and manage borders, the detention of individuals under Article 5(1)(f) must be subject to the legal protection mechanism and prove neither excessive nor arbitrary. Article 5(1)(b) also provides that states may detain individuals to ensure compliance with legal obligations. This is often applied in situations where individuals are incarcerated to ensure that they fulfil specific responsibilities under the law, including responding to legal requests or completing procedural tasks. The ECtHR has set a strict standard that requires both provisions to be meta-examined according to whether they are necessary, proportionate, and regulated by law – aspects that must be judiciously balanced against the state's need to control immigration and enforce the rule of law. Article 5 contains terms that Republican jurisdictions are concerned with in reference to superior state power. To limit the importation of refugees as an expression of Article 5, the law states that both liberty and security may not be encroached upon in such a way that protects an individual from exclusion based on how far away that individual is from being a native born citizen.[62]

Article 5 does create exceptions to depriving people of liberty, for instance, to prevent illegal entry, or to allow for deportation, but these exceptions should be narrowly interpreted to avoid forward-looking arbitrariness. For refugees and asylum seekers, detention is frequently justified under Article 5(1)(f) for the purposes of preventing illegal entry or effecting deportation. Nevertheless, the ECtHR has repeatedly underlined the importance of establishing that such detention is lawful, necessary and proportionate. States must pursue less restrictive options, provide assurances that detention is not excessive in time, and provide effective legal remedies.

Thus, Article 5 of the ECHR serves as a legal framework for balancing state interests in immigration control with the protection of the fundamental rights of refugees and asylum seekers, ensuring that any deprivation of liberty is subject to strict legal safeguards.

62 Cf. Kotzeva et al., 2008, pp. 159–163.

2.1.5. Article 8: Right to Respect for Private and Family Life

The protection provided under Article 3 of the ECHR is closely linked to the protection granted under Article 8 of the Convention. Additionally, it has been recognised that Article 8 applies in cases where deportation would violate family unity.

The initial approach of the ECtHR regarding the admission of third-country nationals into a host state for the purpose of family reunification (under Article 8 of the ECHR) has evolved since the Abdulaziz judgment of 1985.[63] This approach involved the application of the so-called "elsewhere test", which assessed whether family life could reasonably be expected to continue in a country other than the host state, usually the applicant's country of origin, rather than requiring the host state to facilitate family reunification.

In its recent jurisprudence, the ECtHR has increasingly emphasised the principle of the best interests of the child in cases concerning the right to family life. This shift is notably evident in the judgments delivered in *Neulinger and Shuruk v. Switzerland* and *Jeunesse v. the Netherlands* (as well as in cases related to refugees, such as *Mugenzi v. France* and *Tanda-Muzinga v. France*. These judgments have progressively curtailed the margin of appreciation granted to Contracting States in matters of immigration, particularly concerning entry and residence rights.

In the Jeunesse judgment, the ECtHR, for the first time, found a breach of Article 8 of the ECHR in a case concerning spousal family reunification. The ECtHR noted that the refusal by the Netherlands to grant a residence permit to a Surinamese national failed to adequately consider the consequences of relocating her children to Suriname, particularly given their deep integration in the host country where they were born, raised, and educated.[64]

Moreover, the ECtHR reaffirmed the centrality of family reunification to social cohesion and integration in the host state in its decision of *M.A. v. Denmark*. In this case, the Danish authorities had denied family reunification to a Syrian refugee under temporary protection with his wife, due to the requirement in Article 7(3) of the Danish Aliens Act, which imposed a three-year waiting period before a reunification request could be submitted. The Court held that this action violated Article 8 of the ECHR, emphasising that the authorities had failed to conduct an individualised assessment of the applicants' circumstances, and had not sufficiently balanced the applicant's interest in reuniting with his spouse with Denmark's interest in immigration control and effective integration.

The concept of integration has also been analysed in the context of protection against expulsion. The ECtHR has taken into account that any expulsion decision regarding third-country nationals who are well-integrated in a Contracting State may

63 The case *Abdulaziz, Cabales and Balkandali v. the United Kingdom* concerned the refusal of the UK authorities to allow the applicants' husbands to join them in the UK, raising issues under Article 8 (right to respect for family life) and Article 14 (prohibition of discrimination) of the ECHR. The ECtHR found a violation of Article 14 in conjunction with Article 8, as the immigration rules were deemed discriminatory based on sex.

64 *Jeunesse v. the Netherlands*.

interfere with their private or family life. This argument was first raised in the *Berrehab v. the Netherlands* case, where the Court held that the expulsion of a Moroccan national, who had lived in the Netherlands for several years and established a family there, violated Article 8 of the ECHR due to the interference with his family life with his young daughter.

This jurisprudence established a precedent whereby the ECtHR protects third-country nationals with long-term resident status, particularly so-called second-generation immigrants, due to their high level of integration into the host state. In practice, this imposes negative obligations on host states under Article 8 of the ECHR, preventing the expulsion of well-integrated immigrants. This standard has also been applied to the situation of refugees, especially in relation to differentiating their circumstances from those of other foreigners (aliens).

In assessing the reasoning behind such expulsion measures under Article 8 of the ECHR with regard to third-country nationals convicted of a criminal offense, the ECtHR has adopted a criticised individual assessment approach.[65] This individualised approach has given rise to a form of relativism, leading in practice, to an uncertainty and unpredictability on what the Court would hold in cases of alleged violations. This particularly weakens the protection of the private life of foreigners such as refugees. It is worthwhile noting at this point that the established jurisprudence has also set a new direction in which the ECtHR aims at granting protection to third-country nationals with a long-term resident status – notably so-called second-generation immigrants – solely on the grounds that their level of integration in their host country is significant. As it happens, the Court has found negative obligations under Article 8 of the ECHR in the context of well-integrated immigrants being protected against expulsion from host states. This standard could also be applied to refugees or displaced persons, being able to separate them from other foreigners (aliens). This protection reflects the Court's acknowledgement that the integration of long-term residents or second-generation immigrants manifests as long-standing ties to the host nation, and so must be weighed heavily in any deportation or expulsion-related decisions. This demonstrates a significant emphasis on protecting family life and private life, under

65 As a result, in the judgment in the Moustaquim case, the deportation of a Moroccan national from Belgium following the commission of several criminal offenses was deemed a violation of the applicant's right to respect for family life. The ECtHR took into account the applicant's strong ties to the host country, where he had spent his entire life, received education, and lived with his parents and siblings. Similarly, deep integration into the social fabric of the host country was a factor in the decisions to deny deportation in Beldjoudi and Mehemi, where the Algerian applicants, who were convicted criminals, had no significant ties to their country of origin, including no basic knowledge of the language, apart from their nationality. Conversely, in a number of cases, the ECtHR did not find a violation of Article 8 of the ECHR, despite a high degree of integration of the applicants in the host country, giving weight to the severity of the crimes committed. The Court made this determination in instances where it found strong ties to the country of origin, such as maintaining certain family connections, knowledge of the language, regular visits for vacations or other reasons, and when the applicants did not express a desire to acquire the nationality of the host country (*Moustaquim v. Belgium*).

Article 8 of the Convention, for those who are well integrated in their new communities, including refugees.

Since the *Boultif v. Switzerland* judgment of 2001, the ECtHR has developed a set of criteria to be considered in expulsion cases, evaluating, among other things, the degree of the applicants' integration in terms of social, cultural, and linguistic ties both with their country of origin and the host country. These criteria include the duration of the applicants' stay in the host country, their family situation, the difficulties faced by spouses in relocating to the applicant's country of origin, as well as the nature and seriousness of the offense, the time that has elapsed since the commission of the offense, and the applicants' behaviour during that time.

The case in question involved the Swiss authorities' refusal to extend the residence permit of an Algerian national married to a Swiss citizen. The ECtHR had to determine the appropriate balance between the applicant's right to respect for his family life and the preservation of public order. Applying the "elsewhere test", the Court ultimately found a violation of Article 8 of the ECHR, concluding that it was unreasonable to expect the applicant's wife to relocate to a country with which she had no ties.

In the *Üner v. the Netherlands* case, the ECtHR added two additional criteria to be considered when assessing the proportionality of deportation: the best interests of the child and the strength of social, cultural, and family ties both with the country of origin and the host country. The Court emphasised the importance of immigrants' social integration into the host society when considering protection under Article 8 of the ECHR. After clarifying that Article 8 does not grant long-term immigrants an absolute right to remain free from expulsion, the ECtHR ultimately found no violation in the deportation (along with a 10-year exclusion order) of a long-term Turkish immigrant from the Netherlands, where he had lived since the age of 12 and had started a family by having two children with his wife. In this case, the seriousness of the crimes committed by the applicant was decisive in the deportation decision.

In subsequent cases, the ECtHR has attached increasing importance to the integration of immigrants into the host society when determining whether protection under Article 8 of the ECHR could be provided, taking into account additional factors such as labour market integration, education, and language proficiency.[66]

The ECtHR has analysed not only various aspects of integration within the host state but also the existence of any connections with the country of origin, in order to

66 Cf. *The Slivenko v. Latvia* case concerned the expulsion of a former Soviet military officer and his family from Latvia following the re-establishment of independence of that state. On 9 January 2014 the ECtHR ruled that the forced removal of principled Tatjana Slivenko and daughter violated the right to respect for one's private and family life laid down in Article 8 of the ECHR. The Court found that the Latvian authorities had failed to strike a fair balance between consideration of the Slivenko family's long-standing integration in Latvian society and the expulsion of the family. The case underscored the importance of evaluating the social and personal ties of those threatened with deportation. A similar emphasis on the requirement of proportionality in expulsion cases can be found in *Radovanovic v. Austria* (ECtHR of 22nd April 2004, no. 42703/98), especially if the interested person had strong and lasting links to the host state.

identify potential reasons that would make the relocation of immigrants seem materially feasible. However, in this regard, the ECtHR has not always been consistent in its approach.[67]

All the aforementioned cases of expulsion highlight the arbitrary, unpredictable, and problematic approach often taken by the ECtHR. In particular, the Court sometimes fails to fully recognise frequent cases where long-term residents and second-generation immigrants retain their original nationality or maintain certain ties to their country of origin.

ECtHR has built up and employed the notion of integration as a key standard for the purposes of the allocation of rights to the individual and of duties to the state. This broadening of the way the Court has interpreted the right to private and family life under Article 8 of the ECHR by the Court over time gave weight to the degree of integration of immigrants in the host society, encompassing both social and cultural, and linguistic integration. Consequently, both positive obligations on Contracting States to ensure family reunification and a negative obligation to refrain from the deportation of highly integrated immigrants – especially long-term residents – have been recognised by the Court. These principles have a significant impact on the rights of refugees. However, the expanding the interpretation of Article 8 has gradually recognised more specific vulnerabilities of refugees, especially those who established deep social and familial ties in host countries. It appears however, that the Court would consider serious integration into the host society to further bolster protection from expulsion for refugees. Moreover, the ECtHR has ruled out discriminatory laws or practices restricting refugees' access to family reunification or access to education, seen as being protected by the provisions under article 14 of the ECHR.[68]

Specifically for refugees, this jurisprudence serves as a further safeguard against deportation in humanitarian contexts, but also as a manifestation of their right to integrate into the new society, core societal bonds and opportunities that are critical for long-term stability and wellbeing.

2.1.6. Article 13: Right to an Effective Remedy

The rights under the ECHR will only be protected in theory, including those which are relevant to refugees, if they are accompanied by the relevant procedure guarantees such as the right to a fair hearing and the right to an effective remedy. Within this context, the actions of the ECtHR serve as a pivotal actor in establishing whatever standard exists for such protection. Under the ECHR, Member States must carry out an independent and rigorous assessment of claims which reveal serious grounds for apprehending a real risk of torture, inhuman or degrading treatment or punishment if returned. It follows that, where a person has a "well-founded complaint" that his or

67 The case *Onur v. the United Kingdom* involved the deportation of a Turkish national who had lived in the UK for 19 years and had a British partner and three children. Despite his significant health issues and lack of ties to Turkey, the ECtHR found the deportation proportionate and "necessary in a democratic society" due to the applicant's violent criminal offenses.
68 Cf. Bottero, 2023, pp. 1741–1742.

her expulsion would expose him or her to treatment contrary to Articles 2 and/or 3 ECHR, he or she must be afforded an effective remedy permitting him or her to have his or her removal suspended.[69]

Among the judgments that have shaped the standard of protection for refugees, the *M.S.S. v. Belgium and Greece* judgment is particularly noteworthy. In this case, the ECtHR addressed the issue of access to a fair and effective asylum procedure. The Court clarified that, in cases concerning the expulsion of asylum seekers, it does not assess the substance of asylum claims nor scrutinise how states fulfil their obligations under the Geneva Convention. The Court's primary task is to determine whether effective safeguards exist to protect the applicant from arbitrary removal, either directly or indirectly, to the country from which they fled.

This case reflects the Court's emphasis on ensuring that states provide procedural mechanisms to protect individuals from being returned to situations where they face a real risk of serious harm, underscoring the importance of effective legal remedies and access to justice for refugees under the ECHR.

The ECHR does not explicitly provide a right to asylum. However, the return of an individual, thereby exposing them to torture or other forms of inhuman or degrading treatment or punishment, is prohibited under the principle of non-refoulement.

To be protected from arbitrary expulsion, individuals must have access to fair and effective asylum procedures and receive adequate information about the relevant processes in a language they understand, along with the right to legal counsel. The ECtHR has also emphasised the importance of interpretation services to ensure access to asylum procedures, underscoring the need for communication in a language the applicant comprehends to guarantee the fairness and effectiveness of the legal process.[70]

In *Abdolkhani and Karimnia v. Turkey* the ECtHR assessed whether an effective remedy was necessary in cases which concerned an axe of asylum and review of an expulsion order. The Court also noted that at the time of their arrest and charge, the applicants had in fact indicated that they wished to have a lawyer and that they had not been provided access to (one) by the police. They were kept at the Hasköy police headquarters where the police repeatedly prevented them from meeting a lawyer, and refusing to allow a lawyer to meet the applicants. The ECtHR stressed that to comply with the obligations of Article 13 of the ECHR, a remedy should be effective in law and in practice. By failing to take into account the applicants' requests for temporary asylum, by failing to inform them of the reasons for rejecting their asylum applications, and by denying them access to legal assistance while in police custody, the authorities had acted in violation of the ECHR.

This case demonstrates the necessity of access to legal representation and a right to protest decisions regarding deportation or asylum if ECHR procedural protections are to be respected and manifested. While it is clear that states must provide an

69 *M.S.S. v. Belgium and Greece*.
70 *M.S.S. v. Belgium and Greece*; *M.A. and Others v. Lithuania*. Cf. Gałka, 2020.

effective legal remedy and access to justice where peaceful people may have had their fundamental rights breached, such as the Article 3 ECHR prohibition of inhuman or degrading treatment, the Court's decision reinforces this notion.

The ECtHR dealt with the need for exhaustion of domestic remedies in *Bahaddar v. the Netherlands* and the single comparable standards for formal requirements and time limits. The ROCX is one of the mechanisms through which the prohibition of torture or inhuman or degrading treatment which is given effect to in Article 3 of the ECHR is absolute in circumstances of deportation (and other areas). Nevertheless, the party invoking that provision shall not be released from the obligation to exhaust effective domestic remedies that are available in the country whose the courts are being addressed. In particular, in circumstances where there is an alleged risk of ill-treatment in breach of Article 3 ECHR following deportation, the requirements and time limits established by domestic law must, in principle, be adhered to when the parameters of those rules exist to afford domestic courts the means to conduct their business in line with their own procedural rules.

Thus, determining whether there are exceptional circumstances that would exempt an applicant from their obligation to follow these rules depends on the factual circumstances of each case. In refugee status claims, it may be particularly challenging or even impossible for the applicant to present evidence within a short period, especially when such evidence must be obtained from the country from which they had fled. Consequently, deadlines should not be so short or applied so rigidly as to deprive the person seeking refugee status of a genuine opportunity to substantiate their claim.

This case highlights the need for a balance between procedural requirements and the protection of fundamental rights, ensuring that individuals at risk of ill-treatment are not unduly hindered by rigid formalities or deadlines when seeking protection under Article 3 of the ECHR.

2.2. Subsidiary Instruments and Protocols to ECHR

Several protocols to the ECHR, though not universally ratified, further enhance the protection of refugees. Protocol No. 4, for example, prohibits the collective expulsion of aliens, a key safeguard against mass deportations that could affect refugees.

Restrictions on the free movement of asylum seekers must also comply with Article 2 of Protocol No. 4 to the ECHR, which generally guarantees that anyone lawfully residing in a state has the right to move freely within the territory of that state and to choose their place of residence. Similar to detention measures, restrictions on the freedom of movement and the right to choose one's place of residence can only be imposed for a limited number of reasons, namely: for the maintenance of public order; the prevention of crime; the protection of health or public morals; and the protection of the rights and freedoms of others, provided such measures are lawful and necessary in a democratic society from the perspective of national or public security.

Furthermore, Article 2(4) of Protocol No. 4 to the ECHR allows states to impose restrictions on the right to freedom of movement and choice of residence in "specific areas", provided these are lawful and justified in the public interest in a democratic society.

In addition to the above, Article 4 of Protocol No. 4 to the ECHR is particularly significant as it stipulates that 'the collective expulsion of aliens is prohibited.' This article was opened for signature in 1965 and has since been ratified by all Contracting States except Greece, Turkey, Switzerland, and the United Kingdom.

Initially, the drafters intended for Article 4 of Protocol No. 4 to apply only to the expulsion of aliens lawfully residing in a state. Presently, such protection is covered by Article 1 of Protocol No. 7 to the ECHR. However, the drafters later decided to phrase the provision in a very broad manner, thereby extending its scope. Now this is covered by Article 1 of Protocol No. 7 to the ECHR, but the provision is formulated in a very broad manner.[71]

Non-citizens began invoking their rights under the prohibition of collective expulsions shortly after its initial ratifications. Some of these early cases already addressed the issue of access to protection at borders for foreigners (aliens). It was thus foreseeable that the intensification of European border externalisation policies would lead to an increased significance of the prohibition on collective expulsions before the Strasbourg Court. Over the past two decades, European states have attempted to evade their legal obligations toward refugees and migrants through widespread use of expedited readmission agreements.[72]

The first case invoking Article 4 of Protocol No. 4 to the ECHR was the European Commission of Human Rights' decision of 5th February 1973 in *X v. Sweden* (No. 5525/72). The applicant was a stateless person facing expulsion to the United States after being convicted of theft. In fact, from the early cases invoking this provision, the majority of complaints under Article 4 of Protocol No. 4 to the ECHR have involved immigration cases, with only a few concerning ethnic minorities facing forced displacement. The only such cases have been the ECtHR's judgment in the case of *Čonka v. Belgium* and the judgment in case *Georgia v. Russia* (No. 13255/07), followed by two cases applying the latter decision, namely the ECtHR judgments in the cases of *Shioshvili and Others v. Russia* and *Berdzenishvili and Others v. Russia*.[73]

This has led to the development of jurisprudence under Article 4 of Protocol No. 4 to the ECHR concerning a range of border situations, including accelerated (non-)

71 Riemer, 2020, pp. 8, 76.
72 Hakiki, 2022, p. 134.
73 Cf. ECtHR, 2020, para. 10.

admission procedures on islands,[74] denial of entry at land border points,[75] refusal to disembark at ports,[76] as well as pushbacks at land borders[77] and on the high seas.[78]

The prohibition of collective expulsion is formulated as an absolute ban under Protocol No. 4 of the ECHR. Based on the Convention's provisions, the ECtHR has defined the terms "expulsion", "alien', and "collective", as well as articulated the guarantees derived from this prohibition.

The first definition of "expulsion" in the context of Article 4 of Protocol No. 4 to the ECHR was provided by the European Commission of Human Rights, describing it as any measure compelling foreigners to leave a country. This definition was adopted by the ECtHR.[79]

This interpretation was further developed in the case *Hirsi Jamaa and Others v. Italy*.[80] In this case, a group of refugees and migrants was intercepted by Italian authorities on the high seas. They were forced to board an Italian military vessel, but instead of being brought to Italy and/or given access to the Italian asylum procedure, they were handed over to Libyan officials, who returned them to Libya. The Grand Chamber referred to the *travaux préparatoires*, in which the drafters of Protocol No. 4 clarified that "expulsion" should be interpreted 'in its general sense, in common usage (expulsion from any place).' Although this definition was originally intended by the drafters with respect to the prohibition of the expulsion of nationals (Article 3 of Protocol No. 4 to the ECHR), the Grand Chamber of the ECtHR ruled that it should be understood as applicable to all the articles of Protocol No. 4.

Thus, in *Hirsi Jamaa and Others v. Italy*, the ECtHR determined that collective expulsion or "expulsion" could occur not only from a country or territory but from any location where a state's jurisdiction is exercised.[81] This approach has been applied in subsequent judgments.[82]

In many cases, the ECtHR has reiterated that the formal label assigned by a Contracting State to an act is irrelevant. Consequently, regardless of whether an action is classified by national authorities as expulsion, removal, return, refusal of entry, or even a rescue operation, it will still constitute an expulsion within the meaning of Article 4(1)(a) of Protocol No. 4 to the ECHR.[83] As noted by the ECtHR's Grand Chamber

74 *Khlaifia and Others v. Italy*; *Moustahi v. France*.
75 *Asady and Others v. Slovakia*; *M.K. and others v. Poland*; *D.A. and others v. Poland*.
76 *Sharifi and Others v. Italy and Greece*.
77 *N.D. and N.T. v. Spain*; *Shahzad v. Hungary*.
78 *Hirsi Jamaa and Others v. Italy*.
79 *Becker v. Denmark*, No. 7011/75; The case *Andric v. Sweden* is the first claim under article 4 protocol 4 ECHR considered by the Court. The case *Čonka v. Belgium* is the first case considered on merits by the Court under article 4 Protocol 4 to the ECHR, resulting in a finding of violation. The case *Sultani v. Franceis* the second case considered on the merits but where the Court concluded there had been no violation.
80 *Hirsi Jamaa and Others v. Italy*.
81 Riemer, 2020, p. 81.
82 Cf. *Khlaifia and Others v. Italy*, para. 243; N.D. and *N.T. v. Spain*, para. 137.
83 Ibid.

in the judgment of 13th February 2020 in *N.D. and N.T. v. Spain*, this is consistent with the International Law Commission's draft articles on the expulsion of aliens.

The term "collective" under Article 4 of Protocol No. 4 does not require a quantitative approach but rather a procedural one. Both the Commission and the ECtHR have defined "collective" expulsion as any expulsion that is not based on an individualised assessment of the persons concerned.[84]

The provision prohibiting collective expulsions has been formulated very broadly. The term "aliens" here encompasses all individuals who do not hold actual citizenship of the state, regardless of whether they are merely passing through the territory, residing in it, or have permanent residence, whether they are refugees, stateless persons, or hold another nationality, and whether they entered the state of their own accord or through other means.[85]

In the *N.D. and N.T. v. Spain* case, the Grand Chamber of the ECtHR defined an exception to the prohibition of collective expulsions under Article 4 of Protocol No. 4 to the ECHR. The Court held that in certain circumstances, collective expulsion would not constitute a violation of Article 4 of Protocol No. 4. The Court claimed to base this exception on "well-established case law." However, this position has been challenged by many legal scholars, as the relevant case law is limited to two admissibility decisions: *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* and *Dritsas and Others v. Italy*.[86]

This exception should be considered in three stages.[87] First, it applies in certain situations outlined in the judgment. Second, in such cases, the Court will assess whether the state ensured 'genuine and effective access to means of legal entry, particularly border procedures.' Third, if such access was provided, the Court will then examine whether there were reasonable grounds that prevented the applicants from using these legal means of entry.[88]

This interpretation introduces a significant exception to the absolute nature of the prohibition on collective expulsions, raising debates regarding its implications and consistency with established principles of international protection.

The prohibition of collective expulsions, in line with the original intent of the drafters of Protocol No. 4 to the ECHR, ensures a very minimal yet fundamental right – the right to be treated as an individual, as a legal subject rather than merely an object of the law. By refusing to apply this protection to undocumented migrants who cross borders illegally, the Strasbourg Court risks denying their humanity.

84 *Becker v. Denmark*; *Andric v. Sweden*. See, *mutatis mutandi*, *Čonka v. Belgium*, para. 59; *Khlaifia and Others v. Italy*; *N.D. and N.T. v. Spain*, para. 193.

85 Cf. *N.D. and N.T. v. Spain*, para. 185 ff., where the ECtHR notes that 'expulsion' means 'any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border.' 51 Id., in particular paras. 184 ff. and 198 f.

86 Pichl and Schmalz, 2020; Riemer, 2020, p. 72; Ciliberto, 2021, p. 203.

87 *N.D. and N.T. v. Spain*, para. 201; *Shahzad v. Hungary*, para. 59.

88 Hakiki, 2022, pp. 143–144.

This undoubtedly places the Court's jurisprudence in interpretive dissonance with its American and African counterparts.

In a judgment concerning access to rights at borders, former ECtHR judge Pinto de Albuquerque pointedly remarked: '[a]llowing people to be turned away at land borders and sent back without assessing their individual claims is tantamount to treating them like animals. Migrants are not cattle to be driven away in such a manner.'

This critique highlights a broader issue: that failing to apply the prohibition of collective expulsions to undocumented migrants not only undermines their basic human rights but also challenges the universal principles of dignity and individual treatment that human rights law is meant to protect.[89]

According to Article 15 of the ECHR, states may derogate from various provisions of the Convention. However, any derogation must be lawful, necessary, and proportionate to the intended objective. Importantly, no derogation is allowed from Articles 2 and 3 of the ECHR. This means that derogations from the principle of non-refoulement are invalid. Member states cannot expose individuals to a real risk of death penalty, torture, inhuman or degrading treatment or punishment, persecution, or serious violations of other fundamental rights.

This principle also applies in cases where an asylum seeker is being returned to a transit country, which may be classified as a "safe third country", but does not itself provide adequate guarantees against expulsion. The expelling state cannot merely assume that the individual will be treated in accordance with ECHR standards in the receiving third country. Authorities must conduct a rigorous and up-to-date assessment, particularly regarding the availability and functioning of the asylum system in the receiving country and the protections actually in place.[90]

3. Selected Jurisprudence of the ECtHR in Cases Affecting Refugee Protection

The ECtHR has developed an extensive body of case law interpreting the ECHR in the context of migrant protection, including refugees. This jurisprudence addresses various perspectives related to the rights of migrants and the obligations of states. Below are some illustrative cases and lines of reasoning from the Court, demonstrating how it has applied the ECHR to ensure specific guarantees for vulnerable individuals, particularly to prevent the expulsion of those at risk of harm in their country of origin. The overview also includes cases brought against Central and Eastern European states.

89 *M.A. and Others v. Lithuania*, Dissenting Opinion, para. 54; Hakiki, 2022, p. 161.
90 *Ilias and Ahmed v. Hungary*, paras. 124–141.

3.1. Selected General Cases

3.1.1. Soering v. United Kingdom

The case of *Soering v. United Kingdom* is one of the landmark decisions of the ECtHR, particularly concerning the prohibition of inhuman or degrading treatment under Article 3 of the ECHR. In this case, Jens Soering, a German national, was wanted in the United States on charges of murder, for which he could potentially face the death penalty. The United Kingdom intended to extradite him to the U.S., but Soering argued that his extradition would expose him to inhumane treatment, particularly the so-called "death row phenomenon" – the prolonged and extreme psychological suffering experienced by those facing the death penalty.

The ECtHR found that extraditing Soering to face the U.S. justice system would breach Article 3 of the ECHR because there was a real risk that the applicant would be exposed to inhuman and degrading treatment as a result of the likely lengthy delay before execution and the brutal conditions on death row (which could be life-long in Soering's case).

The Court further emphasised that the prohibition of torture and of inhuman or degrading treatment is absolute, and that an individual may not be extradited to another country without there being a real risk that they will face such treatment, even if that country is a state governed by the rule of law such as the U.S. Finally, the Soering case established the critical principle that the non-refoulement principle applies to any case where an individual is at a real risk of inhuman or degrading treatment in the receiving state – not just to cases in which the individual has faced torture. It has since been referred to in numerous later judgments that touch on the protection of human rights in the context of extradition and deportation.[91]

3.1.2. M.S.S. v. Belgium and Greece

This leading case concerned the transfer of an asylum seeker under the Dublin II Regulation, and laid down fundamental safeguards against inhuman treatment. The ECtHR found that Belgium and Greece both breached Articles 3 and 13 of the ECHR. The Court highlighted the need to block the transfer of asylum seekers to states in which they may not be treated humanely, or to states with deficient asylum regimes. This case confirmed non-refoulement as a right of the absolute integrity and dignity of people and of humanity. Countries must not glide through and deportations must be carefully considered, with the real risk being assessed before executing such expulsion. The ECtHR held that Belgium had breached the ECHR by sending an asylum seeker back to Greece under the Dublin Regulation in light of the inadequate treatment in the Greek asylum system. The Court stressed the importance of state parties' responsibility to prevent asylum seekers from being subjected to inhuman or degrading treatment when moved. By informing the evidence duty placed on the

91 *Soering v. United Kingdom*.

Dublin Regulation states to not transfer an asylum seeker where he or she would be subject to treatment that breaches his or her fundamental rights, the judgment constitutes an effective protection of rights.[92]

3.1.3. Hirsi Jamaa and Others v. Italy

In the judgment of *Hirsi Jamaa and Others v. Italy* the Court broadened the scope of non-refoulement to non-refoulement in the case of disembarkation at sea. The applicants were intercepted by the Italian authorities in the high seas before being returned to Libya where they were in risk of inhumane treatment. The Court held Italy in violation of Article 3 and Article 4 of Protocol No. 4 ECHR (prohibition of collective expulsion) and emphasised that states could not return migrants without considering their cases on an individual basis, even if the actions occurred beyond their borders.[93]

3.1.4. Sharifi and Others v. Italy and Greece

The ECtHR ruled a significant decision regarding the treatment of migrants and refugees as well as understanding the obligations states have under the ECHR (*Sharifi and others v. Italy*). Here the applicants were Afghan, Sudanese and Eritrean nationals: they had entered Italy through Greece. The Italian authorities returned them summarily to Greece without any individual review of their situation and without any spacing out of asylum procedures. The applicants argued that if they were returned to Greece, they risked encountering inhumane or degrading treatment, due to conditions in Greek detention centres and the lack of a robust asylum process there. The ECtHR found the action of Italy and Greece as a breach of the ECHR. The Court held that Italy had breached Article 3 (prohibition of inhuman or degrading treatment) and Article 4 of Protocol No. 4 (prohibition of collective expulsion) by returning the applicants to Greece without taking due account of their individual circumstances. The court also held Greece in violation of Article 3 of the ECHR regarding the inhumane living condition in which it received asylum seekers at that time, a lack of essentials like food and shelter and the suspended Greek asylum system. On 8th October 2023, the ECtHR handed down judgment condemning France for returning a group of Syrian nationals who had sought asylum to their country of origin in the absence of a collective expulsion, and with treatment which amounted to inhuman and degrading treatment. The case also reiterated the duty of States to provide asylum seekers and migrants with treatment that meets ECHR-EU human rights standards irrespective of bilateral agreements like the Dublin Regulation.[94]

3.1.5. N.D. and N.T. v. Spain

N.D. and N.T. v. Spain dealt with the summary expulsion of migrants from Spanish enclaves in North Africa. Under Article 4 of Protocol No. 4, the Grand Chamber carved

92 *M.S.S. v. Belgium and Greece*.
93 *Hirsi Jamaa and Others v. Italy*.
94 *Sharifi and Others v. Italy and Greece*.

out an exception if migrants had deliberately avoided points of legal entry. But even in such contexts, the case highlighted that the state must still provide effective access to asylum procedures and protections against refoulement.[95]

The above-mentioned cases demonstrate how the ECtHR has interpreted the ECHR to provide robust protections for migrants, particularly in preventing refoulement and ensuring fair treatment of vulnerable groups. The jurisprudence emphasises the importance of individualised assessments and the need for states to uphold international standards when dealing with migrants, asylum seekers, and refugees.

3.2. Selected Cases From Central and Eastern Europe

3.2.1. Al Husin v. Bosnia and Herzegovina

Al Husin v. Bosnia and Herzegovina concerned a Syrian who remained in Bosnia and Herzegovina after the Bosnian conflict. Bosnian officials were concerned that al Husin would be deported from Bosnia to Syria. The applicant argued that his deportation to Syria would put him at real risk of being tortured and/or subjected to inhuman or degrading treatment in violation of Article 3 of the ECHR. He also alleged that article 5 (the right to liberty and security) had been violated in the context of his detention in Bosnia and Herzegovina. In a similar context, the ECtHR found that Al Husin's deportation to Syria would violate Article 3 of the ECHR, because he had to face the real risk of being subjected to ill-treatment in that country, taking account of the existing political circumstances at the relevant time. It also ruled that Bosnia and Herzegovina had violated Article 5 of the ECHR since it was holding the applicant in an unlawful manner. The case underscores the non-refoulement principle enshrined in Article 3 of the ECHR, which prohibits the deportation of individuals to countries where they are at real risk of torture, or inhuman or degrading treatment.[96]

3.2.2. B.A.C. v. Greece and Bulgaria

On 13th October 2016, the ECtHR ruled in the case of *B.A.C. v. Greece*, addressing the issue of the failure of the Greek authorities to proceed with an asylum application as well as the consequences of such failures on the right to family life of the individual in question. It concerned a Turkish citizen who had been waiting since 2002 for the Greek authorities to rule on his application for asylum. The applicant complained to the ECtHR, submitting that his uncertain legal status, 12 years of residence in Greece and the interference of it with his private life, constituted a violation of Article 8 of the ECHR. He also argued that there was a real risk that he would be ill-treated were he to be returned to Turkey, in breach of Article 3 of the ECHR. As for both allegations, he contended that he had no effective remedy to question the violations, thus invoking Article 13 of the ECHR.

95 *N.D. and N.T. v. Spain*.
96 *Al Husin v. Bosnia and Herzegovina*.

In terms of Article 8 of the ECHR, the ECtHR held that the Greek authorities had neglected their positive obligation under Article 8 to provide effective and accessible measures to safeguard the right to private life. This could have been ensured through adequate procedures, ensuring that the applicant's asylum application was addressed in a defined and reasonable time frame, to mitigate his state of uncertainty. In addition, the Court found a violation of Article 13 of the ECHR in conjunction with Article 8. As for Article 3 in relation to Article 13, the ECtHR found that there would have been a violation of both provisions if the applicant had been returned to Turkey without an assessment of his personal situation. On the merits, the Court found in favour of the evidence put forward by the applicant in relation to his asylum claim in Greece, especially due to past ill-treatment that he had suffered in Turkey. Moreover, the ECtHR observed that the applicant's legal status was still uncertain, given that the authorities had yet to reach a decision on his asylum application, and that he risked immediate expulsion to Turkey without a proper examination of his claim.[97]

3.2.3. R.R. and Others v. Hungary

In the case, the applicants, an Iranian-Afghan family of five, arrived in Hungary from Serbia and applied for asylum at the Röszke transit zone. During their stay, the family members experienced various medical issues and received treatment. Due to a hepatitis infection, they were placed in an isolation zone, where they complained about inadequate services, insufficient age-appropriate food, and frequent invasive checks by the police. Additionally, they expressed concerns about the lack of interpretation during medical appointments, the presence of police officers during medical examinations, and the fact that their youngest child had not been vaccinated.

Furthermore, as the father had previously applied for asylum in Hungary before entering the transit zone with his family, he was assigned accommodation but was not provided with free meals. Although he attempted to obtain food by paying other applicants or receiving assistance from an NGO, he complained that he was forced to eat his family's leftovers.

Ultimately, after an initial rejection of their asylum application, the applicants were granted subsidiary protection

Regarding the complaint under Article 5 § 1 (f), the ECtHR reiterated that any deprivation of liberty under this provision would be justified only as long as deportation or extradition proceedings were actively underway. The Court emphasised, based on its established case law, that for detention to avoid being deemed arbitrary, it must be carried out in good faith, be closely connected to the justification for the detention, and the place and conditions of detention must be appropriate. Additionally, the length of detention should not exceed what is reasonably necessary for the intended purpose. The Court noted that Article 3 had prevented the applicant's removal to Syria, and that by August 2014, thirty-eight countries had been contacted as potential destinations for the applicant. Consequently, the Court concluded that

97 *B.A.C. v. Greece and Bulgaria*.

the justification for the applicant's detention had ceased to be valid due to the absence of a realistic prospect of expulsion.

Regarding the alleged violation of Article 5 § 4, which concerns the right to an effective remedy, the Court referred to its jurisprudence, stressing that an applicant's right to procedural fairness under Article 5 § 4 must be balanced against significant public interest considerations. The Court found that during the appeal proceedings, the applicant had been granted access to the evidence against him, allowing him to effectively challenge its reasonableness. Therefore, the Court concluded that there had been no violation of Article 5 § 4.

This synthesis illustrates the balance the ECtHR seeks to maintain between individual rights and public interest, emphasising the need for procedural fairness and reasonable detention conditions in the context of deportation and extradition proceedings.[98]

3.2.4. M.A. and Others v. Lithuania

The applicants had previously resided in the Chechen Republic. According to their account, the circumstances leading to their departure were as follows:

In 2005-2006, the first applicant began experiencing issues with the Russian security services. He believed these problems stemmed from his relatives' involvement in the Second Chechen War. District police officers visited his home, took him for questioning at the police station, and his home was raided by armed individuals wearing masks. In 2009, he decided to leave Chechnya and sought international protection in Poland, later relocating to Austria. However, in 2010, he had to return to Chechnya. Upon his return, he began working in the State security system, participating in counter-terrorism operations and providing security for the highest-ranking officials in Chechnya. He left this job in October 2015, but before his departure, both he and his mother were questioned about whether he planned to join illegal armed groups in Syria. In February 2017, he was taken to the headquarters of his department and asked to become an informant, which he refused. In March 2017, two police officers came to his home and forcibly took him to the police station, where he was again asked to become an informant. When he refused, he was subjected to torture, including electric shocks and beatings on his kidneys, head, and other parts of his body. After this, he agreed to become an informant and was released after five days of detention. Following the abuse, the first applicant began suffering from health issues, such as kidney pain and memory problems.

In April 2017, the applicants left Chechnya and travelled to Belarus, intending to cross into Poland. They claimed that they attempted to submit asylum applications several times at the Polish border, but on each occasion, the border guards refused to accept their applications and sent them back to Belarus.

The ECtHR reiterated that although States have the right to control the entry, residence, and expulsion of aliens, the expulsion of an individual may raise an issue

98 *R.R. and Others v. Hungary.*

under Article 3 of the ECHR if there is a risk of ill-treatment. In this case, the key question was not whether the applicants faced a real risk of ill-treatment in Chechnya, but whether Lithuanian authorities had properly assessed that risk before returning them to Belarus on three occasions.

The government and the applicants disagreed on whether asylum applications had been submitted at the border. However, the ECtHR noted that the applicants openly admitted they lacked visas or documents, behaviour consistent with their intent to seek asylum. Additionally, during their first attempt to enter Lithuania, the applicants had written "azul", meaning asylum, on the decision forms they were asked to sign. The ECtHR emphasised that neither Lithuanian nor international law requires asylum applications to follow a specific form and highlighted the need for adequate interpretation services for asylum seekers at the border.

The ECtHR further noted concerns raised by the UNHCR regarding access to asylum procedures in Lithuania, supporting the applicants' claims. It found that the applicants did indeed submit asylum applications, but the Lithuanian border guards failed to forward these for examination, as required by law. Moreover, there was no assessment of whether returning the family (including five young children) to Belarus was safe, especially since Belarus is not a party to the ECHR and cannot be assumed to be a safe third country for Chechen asylum seekers.

Therefore, the ECtHR held that Lithuania's failure to process the asylum applications and the applicants' removal to Belarus without assessing their risk of return to Chechnya constituted a violation of Article 3 of the ECHR.

Regarding the complaint under Article 13, the ECtHR found that although the applicants did not appeal the decisions refusing them entry to Lithuania, such an appeal would not have had automatic suspensive effect, meaning it would not have prevented their return to Belarus. Thus, the appeal process could not be considered an effective remedy under the Court's established case law.[99]

3.2.5. M.K. and Others v. Poland

In the case of *M.K. and Others v. Poland*, three applicants from Chechnya had repeatedly attempted to enter Poland from Belarus over a period of time, in order to apply for asylum. Polish border guards turned them away twice, returning them to Belarus without processing their asylum claims. They claimed that Poland had infringed their rights under Article 3 (prohibition of inhuman or degrading treatment) and Article 4 of Protocol No. 4 (prohibition of collective expulsion) of the ECHR by not considering their applications for asylum and returning them to Belarus. They had also alleged a violation of article 13 (right to an effective remedy) for article 3 as well. The ECtHR found that Poland had breached its obligations under Article 3 of the ECHR, because the applicants were in danger of being subjected to inhuman or degrading treatment upon return to Belarus, as they lacked access to adequate asylum procedures there.

99 *M.A. and Others v. Lithuania*.

All the applicants had been summarily expelled without any individual consideration of their personal situation, so it found a rare violation of Article 4 of Protocol No. 4.

The Court also determined that there had been a breach of Article 13 in conjunction with Article 3 of the ECHR, as the applicants did not have access to an effective remedy by which to challenge their expulsion. Access to asylum procedures, and the non-collective expulsion of persons without an individual examination of their situation, are lessons in the particular context of this case.[100]

3.2.6. Bistieva and Others v. Poland

In the case of *Bistieva and Others v. Poland*, the applicants were members of a Russian family of Chechen origin detained in a detention centre in Poland, where they had requested asylum. The applicants – three of whom were children – alleged that their detention had been in violation of Article 5 (the right to liberty and security) and Article 8 (the right to respect for private and family life) of the ECHR. The ECtHR reasoned that the family, and most importantly the children, could not be justified under Article 5. However, the interference in the form of detention affected the family life of the applicants and the authorities, and in particular, the detention of the family was not proven to be a necessary measure, notably because sufficient attention had not been paid to the fact that the applicants were in a family situation. The Court stated that less invasive alternatives could have been implemented, particularly given the vulnerability of the children. While the detention was not designed as a punishment and the family therefore, had not been punished, but had been deprived of a set of their rights, the Court found that the Polish authorities had not set out sufficient reasons for its decision to detain the family for the entire period of their asylum procedure. The Court additionally held that the detention constituted a violation of Article 8 of the ECHR, as in failing to properly assess the impact of detention on the family, particularly the young children, and that the authorities had acted arbitrarily. The children's best interests, such as considering alternative and less restrictive methods, should have been considered, as should family unity. The case illustrated a need to protect the rights of persons seeking asylum, especially children, to avoid confinement as a last resort and only with an adequate justification and consideration of less restrictive alternatives.[101]

3.2.7. Auad v. Bulgaria

The case of *Auad v. Bulgaria* was about a national of Palestine who was to be deported from Bulgaria following the expiry of his temporary residence permit. He claimed that his deportation would expose him to a real risk of being subjected to inhuman or degrading treatment, in breach of Article 3 ECHR, in view of his statelessness and the fact that no country would accept him. He also asserted a violation of Article 5 (right to liberty and security) and Article 13 (right to an effective remedy) in relation

100 *M.K. and Others v. Poland*.
101 *Bistieva and Others v. Poland*.

to Articles 3 and 5, based on the length of his detention pending deportation. The ECtHR concluded that Bulgaria breached Article 3 of the ECHR. The deportation of the applicant would expose him to a real risk of inhuman or degrading treatment, since no country had agreed to accept him and he would be left in a precarious situation if deported, the Court concluded. There had also been a violation of Article 5, since the applicant's prolonged detention could not have been justified sufficiently and had exceeded the length of time needed for deportation to achieve its aim. The ECtHR further found that Bulgaria had violated Article 13, in relation to Article 3, as the applicant had no effective remedy to contest his deportation with the subsequent risk of ill-treatment. It stressed that the state should prevent deportation processes from violating human rights, especially in cases of incredibly vulnerable persons who would suffer an actual risk of torture. It also highlighted the need for effective remedies to contest deportation and lengthy detention.[102]

3.2.8. Ilias and Ahmed v. Hungary

In the case both applicants were nationals of Bangladesh. The first applicant, Ilias Ilias, was living in Germany as of December 2017; the second applicant, Ali Ahmed, was living in Barcelona (Spain). The applicants had entered Hungary from the territory of Serbia on 15th September 2015 through the transit zone in Röszke, on the territory of Hungary at the border of Hungary and Serbia. On the same day, they sought international protection from the immigration authorities. These applications for asylum were considered "inadmissible" within a matter of hours and an expulsion order was issued for them. While the proceedings were ongoing, the applicants were kept in the transit area of the airport for the entire duration of the appeal (23 days). The applicants were removed from the transit zone on 8th October 2015, after the final decision rejecting their asylum applications and ordering their expulsion had been rendered. They were returned to the territory of Serbia. In the case of *Ilias and Ahmed v. Hungary*, the ECtHR delivered the following key rulings: 1) violation of Article 3 (Prohibition of inhuman or degrading treatment): The Court found that Hungary had violated Article 3 of the ECHR by deporting the applicants to Serbia without adequately assessing whether Serbia was a safe third country for them. The Court highlighted that the Hungarian authorities had failed to consider the risks of onward deportation from Serbia to North Macedonia or Greece, where the applicants would not have received sufficient protection; 2) conditions in the Röszke transit zone: While the applicants argued that their detention in the Röszke transit zone amounted to inhuman or degrading treatment, the ECtHR ruled that the conditions of their 23-day stay in the transit zone did not breach Article 3. The Court concluded that the living conditions did not reach the threshold of inhuman or degrading treatment; 3) no violation of Article 5 (Right to liberty and security): The Court determined that Article 5 did not apply in this case because the applicants had the possibility of leaving the

102 *Auad v. Bulgaria*.

transit zone by returning to Serbia. Therefore, their stay in the transit zone did not constitute unlawful detention.[103]

3.2.9. Dabić v. Croatia

The case addressed the scope of the State's positive obligations under Article 1 of Protocol No. 1 to the ECHR, in a situation where the State had sequestered the applicant's house to accommodate a refugee. The refugee subsequently damaged the property and stole some items before the house was returned to the applicant.

ECtHR ruled that there had been a violation of Article 1 of Protocol No. 1 to the ECHR.[104]

3.2.10. Orlović and Others v. Bosnia and Herzegovina

The applicants, a family of 14 from Bosnia and Herzegovina, survived the Srebrenica genocide, in which the first applicant's husband and over 20 relatives were killed. During the 1992–1995 war, they were forced to flee their home in Konjević Polje, becoming "internally displaced persons". Their property, owned by the first applicant's husband and his brother, included agricultural buildings and land.

In 1998, a church was built on their land without their knowledge, following expropriation proceedings. After the war, the Dayton Peace Agreement, specifically Annex 7, guaranteed the return of displaced persons and the restitution of their property. The applicants were granted full restitution of their land in 1999 and 2001, except for the part where the church was built. Despite legal efforts, including proceedings against the Serbian Orthodox Church, the applicants were unable to regain full possession.

The ECtHR ruled that the authorities' long-standing failure to enforce the restitution decisions violated the applicants' property rights under Article 1 of Protocol No. 1, placing a disproportionate burden on them.[105]

3.2.11. S.E. v. Serbia

The case concerned Serbia's seven-year refusal to issue a travel document to the applicant, a Syrian national who had been granted refugee status in the country after his passport expired. This was due to the Ministry of the Interior's failure to adopt regulations governing the content and design of travel documents for refugees, as required by the Asylum Act. As a result, the applicant was unable to travel outside Serbia for several years.

The ECtHR found that this refusal severely restricted the applicant's right to freely leave Serbia, undermining the essence of this right and rendering it ineffective, thus constituting a violation of Article 2 of Protocol No. 4 of the ECHR.[106]

103 *Ilias and Ahmed v. Hungary*.
104 *Dabić v. Croatia*.
105 *Orlović and Others v. Bosnia and Herzegovina*.
106 *S.E. v. Serbia*.

3.2.12. Shahzad v. Hungary

In 2016, Shahzad, a national from Pakistan, tried to enter Hungary to seek asylum. He and others crossed the border irregularly before being apprehended by Hungarian authorities who were bent on pushing him back to Serbia, all without an official decision or assessment of his individual circumstances. Considering that Parliament had voted to set up a border fence, the only legal entry points into Hungary were two border transit zones that were out of reach to Shahzad because of the extreme restrictions applied to guide people on the other side of the border. Shahzad alleged that his removal was a collective measure, having been returned to the Serbian side on a mass basis without an individual review of his case.

The ECtHR held by a majority that there had been a violation of Article 4 of Protocol No. 4 to the ECHR (prohibition of collective expulsion of aliens) since the removal had been done without individualised assessment. It also found a violation of Article 13 (right to an effective remedy), noting that there was no way for Shahzad to challenge the expulsion. ECtHR re-emphasised the prohibition of collective expulsions, which is also accompanied by a duty to secure effective border procedures.[107]

3.2.13. Shiksaitov v. Slovakia

The case concerned the question whether or not the applicant's provisional arrest in Slovakia and subsequent detention pending his extradition to Russia were unlawful, given that prior to these events he had been granted refugee status in Sweden. Rustam Shiksaitov, an applicant for asylum, was a national of Chechnya and left Russia, and believed he would be persecuted for being involved in activities related to an insurgency. He fled to Slovakia where he sought political asylum but was eventually sent back to Russia despite his potential ill treatment. Slovakia's authorities had rejected his application for asylum and had moved forward with extradition, saying that the applicant had been unable to provide credible evidence that he would be at risk if he returned to Russia.

The ECtHR concluded that Slovakia was in breach of Article 5 (1) and (5) of the ECHR and did not duly assess the risk which Shiksaitov would face by returning to Russia. The Court noted that Slovakia had not properly examined the applicant's assertions as to the persecution he was likely to suffer in Russia. Such a failure left him at risk of danger, potentially a violation of his basic rights under the ECHR.[108]

3.2.14. Kebe and Others v. Ukraine

The case concerned a group of Eritrean asylum seekers who had been held by the Ukrainian authorities attempting to enter the country in a bid to seek asylum. The applicants claimed they were detained in degrading conditions and denied access to a process for claiming asylum in violation of their rights under ECHR.

107 *Shahzad v. Hungary.*
108 *Shiksaitov v. Slovakia*.

The ECtHR found a breach of Article 3 and Article 13 of the ECHR by Ukraine. The Court held that this detention was unlawful, as the applicants had been held without any legal basis in inhumane conditions. In addition, Ukraine did not offer them an effective remedy whereby to contest their detention or to apply for asylum, thus breaching their most fundamental rights.

The Court articulated that the procedures followed at the border that resulted in the decision affecting the applicants afforded insufficient safeguards, which could ensure the first applicant was not subject to arbitrary removal in circumstances where the risk existed that he could be returned to a country in which he allegedly faced treatment that would have been contrary to Article 3 of the ECHR.[109]

3.2.15. Abou Amer v. Romania

The applicants, born in 1969 and 1979, were living in Romania at the time of the events. The first applicant, along with his family, had been granted refugee status in Romania in 1998. In 2000, he married the second applicant, and their daughter was born in 2001, acquiring Romanian citizenship. The family was residing and working in Romania when, in March 2003, they travelled to Egypt to visit family.

Upon their return to Romania on April 6th 2003, the first applicant was denied entry and declared an "undesirable person" by the Romanian authorities, based on allegations of national security threats. He was placed in detention and subjected to poor conditions in the airport transit zone. His attempts to challenge the decision were unsuccessful, and the authorities sought to deport him to Egypt and Switzerland, but both countries refused to admit him. His detention continued in similar conditions at the Otopeni Centre.

On April 2003, despite ongoing legal proceedings, the Bucharest Court of Appeal extended his detention for three months, rejecting his claim that it violated his right to family life under Article 8 of the ECHR. On June 2003, the Court upheld the decision, stating that national security concerns justified the restrictions on his family life.

The applicants eventually left Romania for Sweden in June 2003, where they currently reside. The first applicant's extended family remains in Romania.

The ECtHR found Romania in violation of Article 8 of the ECHR. The Court reiterated that even if Article 8 of the ECHR did not contain an absolute right for any category of alien not to be expelled, its case-law amply demonstrated that there were circumstances where the expulsion of an alien would give rise to a violation of that provision. Taking that case-law into account, as well as the applicants' particular situation in the present case, the ECtHR considered that the forced departure from Romania as a result of the first applicant being declared an "undesirable person" and being banned from Romania by the prosecutor's order of 25th March 2003 constituted an interference with the applicants' family.[110]

109 *Kebe and Others v. Ukraine*.
110 *Abou Amer v. Romania*.

3.2.16. Ilaşcu and Others v. Moldova and Russia

The ECtHR found the Republic of Moldova and the Russian Federation in violation of the human rights of the Ilascu group. The Court also ordered the release of two political dissidents, Tudor Petrov-Popa and Andrei Ivantoc, who remained in prison in Transnistria, and awarded the group more than 750,000 euros in damages for the illegal detention, torture and inhuman treatment. Ilie Ilascu and three other Moldovans were arrested in 1992 by the Russian-backed authorities of the breakaway region of Transnistria, and were accused of terrorism in the wake of the 1991 war between Moldova and Transnistria. Ilascu, who was freed in 2001, later became a Romanian lawmaker. The Russian Federation called the verdict politically motivated. The justice minister of Moldova was dismissed on the same day, with no official reason given.[111]

The case law of the ECtHR is vital in defining asylum and migration standards in Central and Eastern European countries. The ECHR's case law, as interpreted by the Court, highlights a number of principles concerning migrants and refugees. The ECtHR established that 'states cannot send people to nations in which they are at serious probability of torture or inhumane treatment. Even irregular migrants are entitled to humane treatment, and their detention must be lawful and proportionate.' Especially for the migrants whose families are presented in the host country, the significant reason to prevent deportation can be the protecting family bonds, according to the ECtHR. Migrants must have access to effective remedies to contest deportation orders and other decisions that affect their rights. The restrictive asylum and migration policies of Central and Eastern European countries (including Poland, Hungary, Moldova, Slovakia, and the Czech Republic) have also drawn criticism. The region is notorious for human rights abuses involving detention, pushbacks (summary expulsions without due process), and severely limited access to asylum procedures. Council of Europe member states, including East-Central European states, are bound under ECtHR decisions. But how these judgements are enforced still takes place as per the political desires of governments and stalemate of Countries state system.

The implementation of standards derived from the ECHR and its case law often necessitates adjustments to national legislation. These changes must align with the constitutional framework of the respective country, which can sometimes present challenges. In some cases, certain ECHR standards may conflict with national laws, traditions, or constitutional principles, making the process of harmonisation more complex. Additionally, political, social, or institutional factors may also contribute to difficulties in fully adopting and enforcing ECtHR rulings at the national level.

4. Conclusion

The protection of refugees in Europe is governed by comprehensive legal frameworks, including the ECHR and the evolving jurisprudence of the ECtHR. Although these

111 *Ilaşcu and Others v. Moldova and Russia*.

frameworks are designed to ensure human rights for refugees and asylum seekers, significant challenges remain in their implementation, particularly concerning asylum procedures, "pushback" practices at borders, and detention.

However, refugees in many European states face significant obstacles to pursuing fair and effective asylum procedures under the existing legal principles the ECHR sets out. Such procedures are often expedited and decisions refusing asylum claims are made without adequate individual assessment, posing a grave threat to human rights, including the right to life, the prohibition of inhuman or degrading treatment (Article 3), as well as the right to an effective remedy (Article 13). The *Ilias and Ahmed v. Hungary* case, for example, tackled the issue of fast-tracking refusals of asylum applications on the grounds of the so-called safe third country notion. In this case, the Hungarian authorities had rejected the applicants' asylum claims as a whole in quick succession, on the sole basis that Serbia was a safe third country that could provide adequate protection, while it had not adequately engaged with the question of whether Serbia was indeed able to offer such protection.

There are strong indications that the abuse or inhumane treatment of asylum seekers can sometimes be worsened, as evidenced by the case of the ECtHR, that such abuses violate Article 3 because they risk the return of asylum seekers to the ordinal state. The ECtHR has consistently highlighted the necessity for states to offer effective remedies and procedural guarantees to ensure fairness in asylum processes (Article 13). This requires giving asylum seekers sufficient time and resources to challenge decisions that threaten their safety or clients' entitlement to protection under the ECHR.

Another is concern about the detention of asylum seekers, especially in poor or degrading conditions. Detention must not be arbitrary, which means it must be necessary, proportionate, and subject to periodic reviews by a judge, in line with Article 5 of ECHR. The conditions of detention in transit zones or camps have been the subject of a number of ECtHR cases. While the Court in the present case did not find a violation of Article 3 in respect of the conditions experienced by the applicants in the Röszke transit zone, it has stated in other judgments that prolonged or arbitrary detention under degrading conditions may amount to inhuman or degrading treatment. States must ensure humane conditions and access to fundamental services, such as health care, legal aid and communication with the outside world. These pushbacks and rigid border controls established by some European countries undermine the fundamental principle of non-refoulement. It prohibits returning people to a country where they might be tortured, persecuted or subjected to other serious harm. The ECtHR has often scrutinised state practices for the summary removal of migrants and refugees without individual legal proceedings and the individualised assessment of their particular cases. These practices, known as pushbacks, often infringe Articles 3 and 4 of Protocol No. 4 of the ECHR, which prohibits collective expulsion and provides for individuals to be protected from removal to areas where their lives or freedoms risk being endangered. Their decisions, especially those of the ECtHR, can be considered

a key standard for the protection of refugees and asylum seekers, which serves as an important source for this treaty law.

By way of interpretative and substantive application of the ECHR to asylum cases, the Court has also challenged states to ensure compliance with their international human rights obligations. In doing so, the ECtHR upholds the rights to fair asylum processes and protection from both arbitrary detention and non-refoulement. But what was happening – weak asylum procedures, poor detention conditions and push-backs – required the scrutiny and urgency of action. States must take tangible steps to bring practices not in compliance with the ECtHR's minimum standards in line with the Convention while organising the protection of vulnerable groups. In particular, refugees and asylum seekers should be able to effectively go about their lives under the protection that they are entitled to from the ECHR.

In conclusion, the establishment of legal principles for refugee protection by the ECHR is indispensable; on the other hand, the jurisprudence of the ECtHR faces real-life challenges that still exist in Europe. These include access to fair asylum procedures, humane treatment in detention, and protection against unlawful returns, all of which hinge on the robust and committed enforcement of international human rights standards.

Bibliography

Literature

Bottero, M. (2023) 'Integration (of Immigrants) in the European Courts' Jurisprudence: Supporting a Pluralist and Rights-Based Paradigm?', *Journal of International Migration and Integration*, 24, pp. 1719–1750; https://doi.org/10.1007/s12134-023-01027-7.

Brandl, P., Czech, P. (2017) 'General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?' in Ippolito, F., Iglesias Sanchez, S. (eds.) *Protecting Vulnerable Groups. The European Human Rights Framework*. Oxford–Portland: Hart Publishing, pp. 247–270.

Ciliberto, G. (2021) 'A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens: The Applicant's Own Conduct in N.D. and N.T. v. Spain', *Human Rights Law Review*, 21(1), pp. 203–220; https://doi.org/10.1093/hrlr/ngaa041.

Costello, C. (2016) *The Human Rights of Migrants in European Law*. Oxford: Oxford University Press.

Czepek, J. (2016) 'Problemy dotyczące rozpatrywania wniosków o azyl w systemie Unii Europejskiej na gruncie orzecznictwa Europejskiego Trybunału Praw człowieka. Analiza „spraw dublińskich"' in Golda-Sobczak, M., Sobczak, W. (eds.) *Dylematy Unii Europejskiej. Studia i Szkice*. Poznań: Silva Rerum, pp. 89–103.

Echeverria, G. (2006) 'National security cases: non-refoulement and the Jurisprudence of the European Court' in *Non-refoulement under threat. Proceeding of a seminar held by the Redress Trust (REDRESS) and The Immigration Law Practitioners' Association (ILPA)*. London: Matrix Chambers, pp. 32–39.

ECtHR (2020) *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights*, 31 August 2020. [Online]. Available at: https://www.refworld.org/jurisprudence/caselawcomp/echr/2020/119085 (Accessed: 20 August 2024).

'European Court of Human Rights Chahal v. The United Kingdom' (1997) International Journal of Refugee Law, 9(1), pp. 86–122.

Furramani, E., Bushati, R. (2022) 'The Principle of „Non-Refoulement" and its Evolution in the Jurisprudence of the European Court of Human Rights', *Academic Journal of Interdisciplinary Studie*s, 11(3), pp. 107–120; https://doi.org/10.36941/ajis-2022-0071.

Gałka, K. (2020) 'Cudzoziemcy poszukujący azylu jako grupa ludności szczególnie podatna na zagrożenia w orzecznictwie Europejskiego Trybunatu Praw Człowieka' in Karska, E. (ed.) *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego*. Warszawa: Uniwersytet Kardynała Stefana Wyszyńskiego w Warszawie, pp. 69–92.

Hakiki, H. (2022) 'The ECtHR's Jurisprudence on the Prohibition of Collective Expulsions in Cases of Pushbacks at European Borders: A Critical Perspective', *Theory and Practice of the European Convention on Human Rights*, 24, pp. 133–163; https://doi.org/10.5771/9783748923503-133.

Iwiński, T. (2002) 'Problematyka uchodźcza w działalności Rady Europy' in Mioduszewska, G. (ed.) *Ochrona uchodźców. Dziesiąta rocznica przystąpienia Polski do Konwencji genewskiej*. Warszawa: Ministerstwo Spraw Zagranicznych.

Juskevicius, J., Balsiene, J. (2010) 'Human Rights in Healthcare: Some Remarks on the Limits of the Right to Healthcare', *Jurisprudence*, 122(4), pp. 95–110.

Karska, E., Morawska, E.H., Czepek, J, Dąbrowski, Ł.D., Oręziak, B., Gałka, K. (2023) *Human Rights in the European Paradigm of the Protection of Aliens*. Warsaw: Cardinal Stefan Wyszyński University in Warsaw; https://doi.org/10.13166/hrQHLC7301.

Kotzeva, A., Murray, L., Tam, R., Burnett, I. (2008) *Asylum and Human Rights Appeals Handbook*. Oxford: Oxford University Press.

Lambert, H. (1999) 'Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue', *International & Comparative Law Quarterly*, 48(3), pp. 515–544; https://doi.org/10.1017/S0020589300063429.

Lambert, H. (2005) 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities', *Refugee Survey Quarterly*, 24(2), pp. 39–55; https://doi.org/10.1093/rsq/hdi025.

Lambert, H. (2007) *The position of aliens in relation to the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing.

Mole, N., Meredith, C. (2000) *Asylum and the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing.

Morgades-Gil, S. (2015) 'The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?', *International Journal of Refugee Law*, 27(3), pp. 433–456; https://doi.org/10.1093/ijrl/eev034.

Papaderaki, F. (2017) *Refugee and Migration crisis in the case law of the ECtHR and its impact to EU policies under article 3 of the European Convention on Human Rights* [Online]. Available at: https://www.govunet.eu/download/papers/paper_5/Refugee_and_Migration_crisis_in_the_case_law_of_the_ECtHR_and_its_impact_to_EU_policies_under_article_3_of_the_European_Convention_on_Human_RightsF_PapaderakiGovUnet2017.pdf (Accessed: 20 August 2024).

Pichl, M., Schmalz, D. (2020) '"Unlawful" may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.', *Verfassungsblog*, 14 February 2020. [Online]. Available at: https://verfassungsblog.de/unlawful-may-not-mean-rightless/ (Accessed: 20 August 2024).

Raisz, A. (2024) 'Migration Challenges – Differing Answers?' in Raisz, A. (ed.) *Migration and Central Europe: Challenges and Legal Responses. Studies of the Central European Professors' Network*. Miskolc–Budapest: Central European Academic Publishing, pp. 531–560; https://doi.org/10.54237/profnet.2024.armace_14.

Riemer, L. (2020) *The Prohibition of Collective Expulsion in Public International Law*. Berlin: Freie Universität Berlin.

Ristic, J. (2017) 'The Right to Asylum and the Principle of Non- Refoulement Under the European Convention on Human Rights', *European Scientific Journal,* 13(28), pp. 108–120; https://doi.org/10.19044/esj.2017.v13n28p108.

Sitaropoulos, N. (2007) 'The role and limits of the European Court of Human Rights in supervising state security and anti-terrorism measures affecting aliens' rights' in Guild, E., Baldaccini, A. (eds.) *Terrorism and the foreigner, a decade of tension around the rule of law in Europe*. Leiden–Boston: Martinus Nijhoff Publishers.

Sudre, F. (1995) 'Les « obligations positives » dans la jurisprudence européenne des droits de l'Homme', *Revue trimestrielle des droits de l'Homme,* 23, pp. 366–367.

Sudre, F. (2016) *Droit européen et international des droits de l'Homme*. 13th edn. Paris: Presses Universitaires de France.

Vicini, G. (2015) 'The Dublin Regulation system between Strasbourg and Luxembourg: Re-Shaping non-Refoulement in the Name of Mutual Trust', *European Journal of Legal Studies,* 8(2), pp. 51–72.

Wojnowska-Radzińska, J. (2013) 'Ochrona wydalanych cudzoziemców na podstawie art. 3 Konwencji o ochronie praw człowieka i podstawowych wolności', *Studia Europejskie,* pp. 101–112.

Case-Law

European Commission of Human Rights, Decision, 3 October 1975, *Becker v. Denmark,* No. 7011/75.

Judgment ECtHR of 9 October 1979, *Airey v. Ireland,* No 6289/73.

Judgment ECtHR of 6 November 1980, *Guzzardi v. Italy*, No. 7367/76.

Judgment ECtHR og 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Nos. 9214/80, 9473/81, and 9474/81.

Judgment ECtHR of 21 June 1988, *Berrehab v. the Netherlands*, No. 10730/84.

Judgment ECtHR of 7 July 1989, *Soering v. the United Kingdom,* No. 14038/88.

Judgment ECtHR of 18 February 1991, *Moustaquim v. Belgium,* No. 12313/86.

Judgment ECtHR of 22 February 1994, *Raimondo v. Italy,* No. 12954/87.

Judgment ECtHR of 25 June 1996, *Amuur v. France,* No. 19776/92.

Judgment ECtHR of 15 November 1996, *Chahal v. The United Kingdom,* No. 22414/93.

Judgment ECtHR of 17 December 1996, *Ahmed v. Austria*, No. 25964/94.

Judgment ECtHR of 2 May 1997, *D. v. the United Kingdom*, No. 30240/96.

Judgment ECtHR of 23 February 1999, *Andric v. Sweden*, No. 45917/99.

Decision ECtHR of 7 March 2000, *T.I. v. The United Kingdom,* No. 43844/98.

Judgment ECtHR of 2001 *Boultif v. Switzerland*, No. 54273/00.

Judgment ECtHR of 5 February 2002, *Conka v. Belgium*, No. 51564/99.

Judgment ECtHR of 7 July 2004, *Ilaşcu and Others v. Moldova and Russia,* No. 48787/99.

Decision of 16 June 2005, *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*, No. 18670/03.

Judgment ECtHR of 18 October 2006, *Üner v. the Netherlands*, No. 46410/99.

Judgment ECtHR of 11 January 2007, *Salah Sheekh v. the Netherlands*, No. 1948/04.

Judgment ECtHR of 20 September 2007, *Sultani v. France,* No. 45223/0.

Judgment ECtHR of January 2008, *Saadi v. United Kingdom*, No. 13229/03.
Judgment ECtHR of 24 January 2008, *Riad and Idiab v. Belgium*, Nos. 29787/03 and 29810/03.
Judgment ECtHR of 28 February 2008, *Saadi v. Italy*, No. 37201/06.
Decision ECtHR of 27 May 2008, *Ramzy v. the Netherlands*, No. 25424/05.
Judgment ECtHR of 27 May 2008, *N. v. The United Kingdom*, No. 26565/05.
Decision ECtHR of 2 December 2008, *K.R.S. v. The United Kingdom*, No. 32733/08.
Judgment ECtHR of 11 June 2009, *S.D. v. Greece*, No. 53541/07.
Judgment ECtHR of 17 July 2009, *NA v. the United Kingdom*, No. 25904/07.
Judgment ECtHR of 22 September 2009, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08.
Judgment ECtHR of 19 January 2010, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07.
Judgment ECtHR of 20 June 2010, *A. v. the Netherlands*, No. 4900/06.
Judgment ECtHR of 6 July 2010, *Neulinger and Shuruk v. Switzerland*, No. 41615/07.
Judgment ECtHR of 21 January 2011, *M.S.S. v. Belgium and Greece*, No. 30696/09.
Decision of 1 February 2011, *Dritsas and Others v. Italy*, No. 2344/02.
Judgment ECtHR of 5 April 2011, *Rahimi v. Greece*, No. 8687/08.
Judgment ECtHR of 28 June 2011, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07.
Judgment ECtHR of 24 August 2011, *Abou Amer v. Romania*, No. 14521/03.
Judgment ECtHR of 11 October 2011, *Auad v. Bulgaria*, No. 46390/10.
Judgment ECtHR of 20 December 2011, *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10.
Judgment ECtHR of 19 January 2012, *Popov v. France*, Nos. 39472/07 and 39474/07.
Judgment ECtHR of 7 February 2012, *Al Husin v. Bosnia and Herzegovina*, No. 3727/08.
Judgment ECtHR of 23 February 2012, *Hirsi Jamaa and Others v. Italy*, No. 27765/09.
Judgment ECtHR of 10 July 2014, *Mugenzi v. France*, No. 52701/09.
Judgment ECtHR of 10 July 2014, *Tanda-Muzinga v. France*, No. 2260/10.
Judgment ECtHR of 17 September 2014, *Mocanu v. Romania*, No. 10865/09.
Judgment ECtHR of 3 October 2014, *Jeunesse v. the Netherlands*, No. 12738/10.
Judgment ECtHR of 21 October 2014, *Sharifi and Others v. Italy and Greece*, No. 16643/09.
Judgment ECtHR of 4 November 2014, *Tarakhel v. Switzerland*, No. 29217/12.
Judgment ECtHR of 11 December 2014, *Mohamad v. Greece*, No. 70586/11.
Judgment ECtHR of 30 March 2016, *Armani da Silva v. the United Kingdom*, No. 5878/08.
Judgment ECtHR of 3 May 2016, Abdi *Mahamud v. Malta*, No. 56796/13.
Judgment ECtHR of 12 July 2016, *R.M. Others v. France*, No. 33201/11.
Judgment ECtHR of 13 October 2016, *B.A.C. v. Greece and Bulgaria*, No. 143/07.
Judgment ECtHR of 22 November 2016, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Nos. 25794/13 and 28151/13.
Judgment ECtHR of 13 December 2016, *Paposhvili v. Belgium*, No. 41738/10.
Judgement ECtHR of 15 December 2016, *Khlaifia and Others v. Italy*, No. 16483/12.

Judgment of ECtHR of 20 December 2016, *Shioshvili and Others v. Russia,* No. 19356/07.
Judgment of ECtHR of 20 December 2016, *Berdzenishvili and Others v. Russia,* No. 14594/07.
Judgment ECtHR of 12 January 2017, *Kebe and Others v. Ukraine,* No. 12552/12.
Judgment ECtHR of 4 April 2017, *Thimothawes v. Belgium,* No. 39061/11.
Judgment ECtHR of 7 December 2017, *S.F. and Others v. Bulgaria,* No. 8138/16.
Decision of 15 June 2017, *Harkins v. the United Kingdom,* No. 71537/14.
Judgment ECtHR of 10 April 2018, *Bistieva and Others v. Poland*, No. 75157/14.
Judgment ECtHR of 11 December 2018, *M.A. and Others v. Lithuania,* No. 59793/17.
Judgment ECtHR of 1 October 2019, *Orlović and Others v. Bosnia and Herzegovina*, No. 16332/18.
Judgment ECtHR of 21 November 2019, *Z.A. and Others v. Russia,* Nos. 61411/15, 61420/15, 61427/15, and 3028/16.
Judgment ECtHR of 21 November 2019, *Ilias and Ahmed v. Hungary,* No. 47287/15.
Judgment ECtHR of 13 February 2020, N.*D. and N.T. v. Spain,* Nos. 8675/15 and 8697/15.
Judgment ECtHR of 25 June 2020, *Moustahi v. France,* No. 9347/14.
Judgment ECtHR of 24 March 2020, *Asady and Others v. Slovakia*, No. 24917/15.
Judgment ECtHR of 23 July 2020, *M.K. and Others v. Poland,* Nos. 40503/17, 42902/17, and 43643/17.
Judgment ECtHR of 23 July 2020, *Shiksaitov v. Slovakia,* Nos. 56751/16 and 33762/17.
Judgment of 2 March 2021, *R.R. and Others v. Hungary,* No. 36037/17.
Judgment ECtHR of 18 March 2021, *Dabić v. Croatia,* No. 49001/14.
Judgment ECtHR of 8 July 2021, *Shahzad v. Hungary,* No. 12625/17.
Judgement ECtHR of 8 July 2021, *D.A. and others v. Poland*, No. 51246/17.
Judgment ECtHR of 9 July 2021, *M.A. v. Denmark,* No. 6697/18.
Judgment ECtHR of 1 July 2023, *S.E. v. Serbia*, No. 61365/16.

Chapter 18

The Protection of Refugees in European Union Law

Kateřina Frumarová

ABSTRACT

Migration and asylum policy is one of the most fundamental but also one of the most problematic areas within the EU. It is an area where it is very difficult to find a consensus between protecting the status and rights of refugees on the one hand and protecting the interests of the EU and individual Member States on the other. Although EU legislature has addressed this issue for many decades, it is still a process that is constantly evolving and which has both positive aspects and a number of shortcomings. This chapter initially provides a brief historical excursus into the development of EU migration and asylum policy, and then sheds light on basic concepts or institutes related to the issue of refugee protection, such as international protection and its forms, the principle of non-refoulement, asylum shopping, refugee in orbit or the concept of safe country. The main focus is on processes related to the granting of international protection (in the form of asylum or subsidiary protection). Given the breadth of the issue, the text focuses in particular on pre-accession screening and the asylum procedure itself, emphasising the institutions that serve to protect refugees and guarantee their rights. It reflects both the existing legislation and the newly adopted Pact on Migration and Asylum, which is due to enter into force in 2026. Finally, the issue of financial support from the EU in relation to refugees, through its funds (in particular AMIF), is not ignored.

KEYWORDS

refugee, international protection, asylum, subsidiary protection, Common European Asylum System, Pact on Migration and Asylum, asylum procedure, screening procedure

1. Introduction

The European Union and the EU Member States have traditionally and for a long time provided security and protection to persecuted persons. The guarantee and protection of fundamental human rights is at the very heart of European identity. That is why, as early as 1999, EU Member States committed themselves to the creation of a Common European Asylum System (CEAS) that would deal with asylum issues at a European level. That is to say, the purpose was to create uniform rules on asylum policy, to ensure equal access to refugees in all Member States, and to ensure the same standard of protection of their rights. This goal was not and is not simple. Why?

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Asylum and migration policy is, and always will be, a very sensitive area, as it is where the important rights and freedoms of individuals (especially those seeking international protection) clash with the interests of both the individual states, and the EU as a whole (economic,[1] security and other interests).

The Common European Asylum System plays a key role in regulating and coordinating refugee and asylum policy. There is no binding definition of this concept, but its definition is reflected in a number of acts of a political nature, or in the form of regulations and directives.[2] However, its cornerstone is the 1951 Geneva Convention relating to the Status of Refugees. The Common European Asylum System includes standards for fair and efficient asylum procedures in the Member States and, from 2024, rules leading to a common asylum procedure across the EU (see below – the Pact on Migration and Asylum). It also includes standards governing the granting of refugee status and its content, including measures on subsidiary forms of protection. Last but not least, it includes rules defining a clear and workable method for determining the Member State responsible for examining an asylum application. An essential feature of the CEAS and its key function is therefore the establishment of basic and functional rules in both substantive and procedural law.[3] The regulations and directives answer basic questions relating to the determination of the Member State responsible for examining an application for international protection, as well as to whom protection may be granted and by what procedural procedure. Ensuring a uniform standard of protection of the rights of refugees who find themselves in the position of applicants for international protection is an integral part of European regulation.

The refugee protection aspect will be the main focus of attention here. The introduction will explain the basic concepts, institutions or principles related to refugee protection within the EU, including a brief historical excursion into the development of EU migration and asylum policy. Subsequently, the text will focus in particular on the analysis of the process of granting international protection within the EU, with an emphasis on whether and by what legal instruments refugee protection is ensured in this process. This consists in particular in the guarantee of the procedural rights of asylum seekers, in the statutory obligations of the competent national authorities of the Member States in relation to refugees (information obligation, compulsory education, etc.), as well as in the monitoring roles of third independent bodies and organisations. At the same time, this is an area that is currently undergoing significant changes, with the adoption in 2024 of the new Pact on Migration and Asylum, which seeks to respond to the current not-so-functional EU migration and asylum system. With this in mind, both the positives it brings and the potential threats precisely in relation to refugee rights and status will be pointed out. This is a very broad subject, so the focus will particularly be on the pre-entry procedures and on the procedure

1 Trauner, 2016, pp. 311–325.
2 Chmelíčková, 2008, p. 11.
3 Jurníková, 2016, pp. 12–13.

for granting international protection itself, where particular attention must be paid to guaranteeing the protection of the rights and status of these persons. The issue of financial support for refugees from the EU and its funds will not be neglected.

2. Brief Historical Excursion

In order to understand the nature of the current European asylum system and its functions, it is necessary to shed at least a brief light on the circumstances and reasons for its creation and to outline its gradual evolution. Both its legal form and its content have changed over time, responding to the new needs of the European community as well as to the problems, threats and events concerning international migration and asylum law. It can therefore be concluded that it is a continuously evolving set of legal instruments and measures.

Since the beginning of European integration, asylum policy has been the exclusive competence of the individual Member States.[4] The issue of migration was dealt with by the individual states themselves within the framework of their national law, with restrictive approaches prevailing. The gradual liberalisation of the movement of persons in the European area, which began in the 1980s, had a number of positive consequences, but also problematic aspects, including in the area of asylum policy and the fight against illegal migration. It was in the 1980s that EU Member States began to face a significant increase in the number of refugees and asylum applications. At the same time, phenomena such as "asylum shopping" and "refugees in orbit" began to emerge (see more on these below).[5] All of this was reflected in an increased burden on decision-makers, delays in proceedings, overloaded asylum centres etc. This situation has also had an impact on the economic and security stability of individual states. In order to improve this situation, Member States have started to adopt individual restrictive measures. The whole situation has led to a kind of "race" to see which state would have the most restrictive policy, which began to require a Europe-wide response.[6] The intended transformation was primarily aimed at the convergence of national asylum policies.

One of the initial key documents adopted to coordinate and unify rules within the EU was the Convention on the determination of the State responsible for examining a request for asylum lodged in an EC Member State, the so-called Dublin Convention of 1990, which entered into force on 1st September 1997.[7] The Dublin Convention laid the foundations for the redistribution of responsibility for the examination of asylum claims in Europe, with the main idea being that the first European country an applicant entered would be the only country in which his or her claim would be

4 Judgment of the ECtHR, *Moustaquim v. Belgium*, application no. 12313/86, 8 February 1991.
5 Pazderová, 2012, p. 322.
6 Marinho and Heinonen, 1998, p. 1.
7 Jurman, 2005, pp. 42–45.

processed.[8] The Dublin Convention was intended to ensure that the jurisdiction of a Member State to examine an asylum application was determined as quickly as possible and to eliminate multiple asylum applications in different EU states, or conversely, cases where none of these states seemed competent.[9] It was thanks to the abolition of internal borders of the Schengen area states that applicants were able to move more easily between member states and choose the country whose asylum policy was most welcoming to them.[10] Other regulations have specified the criteria and procedures for determining the jurisdiction of the state for examining an asylum application, the rules for the reception of asylum seekers, the recognition of asylum status, the unification of procedures for recognising or withdrawing this status, and the guarantee of equality between asylum seekers, together with the enshrinement of the principle of non-refoulement.[11]

In 1992, the EU Treaty was adopted in Maastricht, which included justice and home affairs in the area of shared responsibility. These policies formed the so-called third pillar, which envisaged intergovernmental cooperation in these areas and the creation of instruments and procedures for international harmonisation. Initially, this form of cooperation seemed to be a good step, but over time it proved to be insufficient and also unsuccessful, as each Member State had a different view on such sensitive issues and no common compromise could be found. Therefore, the third pillar mainly adopted non-binding documents, such as recommendations - e.g. on a coordinated approach by Member States in implementing expulsions etc. The real communitarisation – the area of asylum and immigration policy – was incorporated into the so-called first pillar of the three-pillar structure of the then European Union.[12]

In the same year (1999), the Tampere European Council decided to work towards a common European asylum system based on the full and inclusive application of the Geneva Refugee Convention, as supplemented by the New York Protocol of 31st January 1967.[13] It can be said that since then the CEAS has been constantly evolving, consisting of a number of legal and other documents which are subject to change (in the light of the evolution of society, new problems and challenges in this area, etc.). Thus, at present (2024), the CEAS consists mainly of the following fundamental

8 Pikna, 2012, p. 132.
9 Battjes and Brouwer, 2015, p. 1.
10 Kosař et al., 2010, p. 62.
11 Svobodová, 2017, p. 1.
12 Větrovský, 2012, p. 308.
13 Pikna, 2012, pp. 131–155.

documents: Dublin Regulation (Dublin III),[14] Qualification Directive,[15] Procedural Directive,[16] Reception Directive,[17] and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26th June 2013, concerning the establishment of "Eurodac" for the comparison of fingerprints.

Although the CEAS has evolved over a long period of time and undergone many changes, it suffers from a number of shortcomings: the practice whereby the state of first arrival has most often been responsible for an asylum application has placed a burden on coastal states in particular (i.e. states at the EU's borders, notably Greece and Italy). As a result, these states have not only lacked sufficient facilities for the increased number of asylum seekers, but also prolonged decision-making procedures, leading to migrants trying to travel illegally within the EU. Many Member States provide only general information to applicants or even outdated information. As regards the criterion of family ties, it has been found that different Member States use substantially different evidence for these criteria. Different practices were also found in the case of detention practices. Although all Member States collectively introduced judicial remedies and set a reasonable time limit for lodging an appeal, the "reasonable time limit" varied considerably from one State to another.[18]

Years of long and difficult negotiations within the EU and the Member States on a new form of the Common Asylum Area followed, accompanied by a number of setbacks (e.g. the non-acceptance of the so-called Dublin IV proposal).[19] In September 2020 the European Commission presented a "new" Pact on Migration and Asylum. The Pact is a set of legislative and non-legislative measures relating to EU asylum and migration policies, primarily targeting the area of irregular migration.[20] Through a set of proposals, the main objective of this reform was to establish a common framework for a comprehensive and unified approach to migration and asylum management, to increase the efficiency of the system, and to achieve greater resilience to migration

14 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.

15 Directive 2011/95/EU of the European Parliament and of the Council of 13th December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

16 Directive 2013/32/EU of the European Parliament and of the Council of 26th June 2013 on common procedures for granting and withdrawing international protection.

17 Directive 2013/33/EU of the European Parliament and of the Council of 26th June 2013 laying down standards for the reception of applicants for international protection.

18 European Parliament, 2016.

19 Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). Brussels 4. 5. 2016 COM(2016) 270 final 2016/0133 (COD).

20 Komínková, 2020, pp. 1–5.

pressures. At the same time however, it seeks to guarantee a uniform standard of treatment of refugees across the EU and their equal rights and status during the processes related to the decision-making process for granting international protection. It also aims to remove or at least minimise the factors that encourage migration and consequently secondary movements. Last but not least, it aims to combat abuses of the current system and to better support the most affected EU Member States (solidarity principle). In 2024, all negotiations and reform efforts have resulted in the adoption of the Pact. On 10th April 2024, the European Parliament voted in favour of the new rules on migration, followed by their formal adoption by the Council of the EU, on 14th May 2024. The Pact on Migration and Asylum is a set of "new" rules managing migration and establishing a common asylum system at EU level (see subchapter IV. for details).

In particular, the Migration and Asylum Pact includes the following provisions: the Asylum and Migration Management Regulation (AMMR),[21] the Asylum Procedure Regulation,[22] the Return Border Procedure Regulation,[23] The Crisis and Force Majeure Regulation,[24] the Eurodac Regulation,[25] the Screening Regulation,[26] the Qualification

21 Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14th May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

22 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14th May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

23 Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14th May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148.

24 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14th May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

25 Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14th May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council.

26 Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14th May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

Regulation,[27] the Reception Conditions Directive,[28] and finally The Union Resettlement and Humanitarian Admission Framework (Union Framework) Regulation.[29]

The Pact is expected to take effect in June 2026. The entire legislative framework of the Pact has a two-year implementation period. Most of the changes that will need to be made will concern the states at the external borders. They will have to set up facilities (including detention facilities) because of the mandatory border procedure at external borders. These states will also have to conduct a mandatory fast-track return procedure. Legally, some migrants will not enter the EU at all, and should be returned from the external border facilities once the procedure is completed.

3. Basic Concepts and Principles of Asylum Policy and the EU's Approach to Refugees

3.1. International Protection and the EU

Anyone fleeing their country from persecution or serious harm has the right to apply for international protection. The right to asylum is a fundamental right and its granting to those who meet the criteria set out in the Geneva Convention is an international obligation for the Contracting Parties, which include EU Member States.[30] The EU has incorporated the criteria for international protection into its own body of law and has itself extended this concept by creating a category of persons who are beneficiaries of international protection but are not refugees, i.e. by extending it to include persons enjoying subsidiary protection. The legal basis for the European Union's activities in the field of asylum is Article 78 TFEU. According to that provision, the European Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to granting an adequate status to any third-country national in need of international protection and to ensuring respect for the principle of non-refoulement. This policy must be in accordance with the Geneva Convention and the New York Protocol.[31] Article 78 TFEU is also followed by some relevant provisions of the EU Charter of Fundamental Rights (Charter), of which Article 6(1) TEU, as amended by the Lisbon Treaty, has been made a part of EU primary law.

27 Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14th May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council.

28 Directive (EU) 2024/1346 of the European Parliament and of the Council of 14th May 2024 laying down standards for the reception of applicants for international protection.

29 Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14th May 2024 establishing a Union Resettlement and Humanitarian Admission Framework and amending Regulation (EU) 2021/1147.

30 Sandu, 2021, pp. 1–2.

31 Sehnálek, 2015, pp. 91–95.

According to Article 18 of the Charter, the right to asylum is guaranteed in compliance with the Geneva Convention and the New York Protocol and in accordance with the Treaties establishing the EU. According to Article 51(1) of the Charter, its provisions are addressed not only to the institutions, bodies, offices and agencies of the Union, but also to the Member States in areas where they apply Union law. This is also the case for international protection legislation contained in the national legal orders of EU Member States. Article 18 of the Charter is therefore a fundamental human rights provision which enshrines the right to asylum (a recognition of refugee status) in its classic form as defined by the Geneva Convention. Also relevant to the granting of international protection in Member States is Article 19(2) of the Charter, according to which no one may be expelled, deported or extradited to a State where he or she would be in serious danger of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[32] In this respect, the provision in question builds not only on Articles 2 and 4 of the Charter, which correspond to Articles 2 and 3 of the ECHR (and the Protocols to the ECHR abolishing the death penalty), but also on the "European" conception of the principle of non-refoulement, discussed below. The institution that primarily serves to secure this commitment in EU law is, alongside asylum (granting refugee status), a subsidiary protection.

It is on the basis of Article 78 TFEU that the EU has adopted and is adopting the various pieces of legislation that form the legal framework of the Common Asylum Area. Currently,[33] the second generation of basic directives and regulations are still in force, replacing the original rules adopted before the entry into force of the Lisbon Treaty. In the context of the so-called migration crisis, a third generation of EU asylum legislation, the Pact on Migration and Asylum, has been long in the preparation and finally adopted in 2024. The Pact is expected to take effect in June 2026. The entire legislative framework of the Pact has a two-year implementation period.

The Qualification Directive in Article 2, or in the future the new Qualification Regulation[34] in Article 3, adopts the definition of refugee under the Geneva Convention.[35] A refugee is defined as

> 'a third-country national who, owing to well-founded fear of being persecuted for reasons of race, religion or nationality, or on account of his or her political opinions or membership of a particular political or social group, is outside the country of his or her nationality and is unable or, owing to such fear, refuses

32 Husseini et al., 2020, pp. 1300–1303.
33 Year 2024.
34 The Regulation is intended to replace the existing Qualification Directive and is one of the regulations that changes very little from the status quo. The main objective of the Regulation is a more uniform application of the grounds for recognising individual asylum seekers as persons in need of international protection and the possible granting of one of the international protection statuses (i.e. either asylum or subsidiary protection). The Regulation also contains a section on the basic aspects of integration of beneficiaries of international protection.
35 Husseini et al., 2020, pp. 1300–1303.

> to avail himself or herself of the protection of the country concerned, or a stateless person who, for the same reasons, is outside the country of his or her former habitual residence and is unwilling or unable to return there owing to such fear'.[36]

These provisions then go on to define in detail the key concept of "persecution", which, for the purposes of the Geneva Convention under both the Directive and the new Regulation, is defined as conduct consisting of a serious violation of fundamental human rights, in particular rights that cannot be derogated from under Article 15(2) ECHR, or a combination of different measures, including human rights violations, that is sufficiently serious to affect an individual in a similar manner (so-called "cumulative persecution"). The following is a demonstrative list of examples of persecution. The grounds for persecution may be race, nationality, membership of a particular social group, religion, political opinion, etc., and there must always be a link between the ground of persecution and the persecution or failure to provide protection.[37]

EU legislation also characterises the perpetrator of persecution or serious harm (which is then linked to subsidiary protection). Those responsible for persecution or serious harm include the state, parties or organisations controlling the state or a substantial part of the territory of the state (quasi-state actors), or non-state actors if it can be shown that the state or quasi-state actors are unable or unwilling to provide protection from persecution or serious harm. The definition of non-State actors of persecution is very important, as in a large number of cases, applicants for international protection claim that it is the non-State actors that they fear for persecution or serious harm, and consequently it is necessary to assess whether the State or quasi-State actors are able and willing to provide them with the necessary protection.[38] The legislation in question - inspired by the judgment of the Grand Chamber of the ECJ in Abdulla and Others, C-175/08, C-176/08, C-178/08 and C-179/08 – provides that such protection must be effective and not merely temporary.

Similarly to the Geneva Convention, the above-mentioned EU regulations contain an exclusion clause, i.e. they define persons who are excluded from the possibility of obtaining refugee status. Mandatory or optional grounds for withdrawal, termination or refusal to extend refugee status are also mentioned. The optional grounds for withdrawal or even non-acceptance of refugee status include situations where the refugee is considered to be a danger to the security of the Member State in which he or she is present, or a danger to the society of that Member State on the grounds that

36 On the interpretation of the concept of refugee, cf. e.g. the judgment of the CJEU in Joined Cases C-391/16, C-77/17 and C-78/17.

37 The courts of the Member States emphasize the individual assessment of each situation and each applicant – see e.g. Judgment of the Supreme Administrative Court of the Czech Republic of 30th September 2008, No. 5 Azs 66/2008-70, Judgment of the Supreme Administrative Court of the Czech Republic of 23rd August 2018, No. 1 Azs 137/2018-50.

38 Husseini et al., 2020, p. 1303.

he or she has been convicted by a final judgment of a particularly serious crime.[39] However, such a refugee is also entitled to certain rights under the Geneva Convention, provided that he or she remains in the Member State concerned. The validity of that legislation, i.e. its compatibility with Article 18 of the Charter and Article 78 TFEU, which must be interpreted in accordance with the Geneva Convention, was confirmed by the Grand Chamber of the CJEU in the judgment of M and Others.[40] However, the Grand Chamber of the CJEU has emphasised that even a person who has been deprived of refugee status, or who has not been granted refugee status at all, remains a refugee in the material sense, provided that he or she fulfils all the elements of the definition of a refugee, and cannot be returned to his or her country of origin if he or she would be at risk of ill-treatment there within the meaning of Articles 4 and 19(2) of the Charter.[41]

The Qualification Directives/Qualification Regulations also provide for a second form of international protection which is subsidiary to the granting of refugee status, namely subsidiary protection. A person who is entitled to subsidiary protection is

> 'a third-country national or a stateless person who does not qualify as a refugee but who has substantial grounds for believing that, if he or she were to return to his or her country of origin or, in the case of a stateless person, to the country of his or her former habitual residence, he or she would be in real danger of suffering serious harm,[42] and who is unable or, because of the aforementioned danger, refuses to avail himself or herself of the protection of that country.'

Serious harm is understood by the relevant provisions to mean the death penalty or execution; torture, inhuman or degrading treatment or punishment of the applicant in the country of origin; or a serious individual threat to the life or integrity of a civilian as a result of arbitrary violence during an international or national armed conflict. As already mentioned, this regulation goes beyond the Geneva Convention, but on the other hand, represents the implementation of the ECtHR case-law on the principle of *non-refoulement* in its European sense.[43] Even in relation to subsidiary protection, an exclusion clause very similar to that relating to refugees and asylum applies.

3.2. The Principle of Non-Refoulement and the Concept of a Frictionless Country

A key principle governing the granting of international protection and one of the building stones of refugee protection is the principle of *non-refoulement* contained in

39 For more details on the exclusion clause, see Janků, 2018.
40 Husseini et al., 2020, pp. 1303–1304.
41 Judgment of the Grand Chamber of the CJEU from 14 May 2019 in the case of *M and Others v. Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17.
42 On the distinction between persecution and threat of serious harm, see e.g. CJEU judgment of 24th April 2018, *MP v. Secretary of State for the Home Department*, C-353/16.
43 Husseini et al., 2020, p. 1304.

Article 33 of the Geneva Convention, according to which no State Party shall expel by any means, or return a refugee to the frontiers of countries where his or her life or personal freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social class or political opinion.[44] This does not only apply to a refugee who for serious reasons, may be considered dangerous for the country concerned or who, having been convicted of a particularly serious crime, poses a danger to the society of the country concerned. It is generally accepted that the principle of *non-refoulement* is one of the mandatory rules of international law and therefore binds not only States Parties to the Geneva Convention but all subjects of international law.[45]

As far as the States that have acceded to the ECHR are concerned, i.e. also EU Member States, these States must respect the case law of the ECtHR, which based in particular on Article 3 or Article 2 of the ECHR, has developed a parallel concept of the principle of *non-refoulement* as prohibiting the return of any alien, not only a refugee, to a country where he or she would be exposed to the risk of death penalty, execution or torture or other inhuman or degrading treatment. Thus, it is not necessarily the case that a person is persecuted on asylum grounds; on the other hand, ill-treatment within the meaning of Article 2 or 3 ECHR is generally interpreted as a narrower concept than persecution under the Geneva Convention.[46] However, the principle of *non-refoulement* in the "European" sense, unlike its definition in Article 33 of the Geneva Convention, is entirely unexceptional; both European courts (the ECtHR and the CJEU) have repeatedly held that even persons posing a danger to the society of a given country cannot be expelled, extradited or otherwise returned to countries where they would be at risk of ill-treatment within the meaning of Article 33 of the Geneva Convention. 2 and 3 of the ECHR (cf. e.g. ECtHR Grand Chamber judgments 22414/93, *Chahal v. the United Kingdom*, or the aforementioned judgment of the Grand Chamber of the CJEU in M and others). Here, too, a high standard of European protection of refugees and their basic rights can be seen.

Closely related to the principle of *non-refoulement* is the concept of a safe country. In the most general sense, the concept of a "safe country" can be defined as a legal construction where a state does not grant international protection to a person and then move them to another state that is safe for them. When applying this concept, states start from the premise that a person fleeing persecution or the threat of serious harm could already enjoy protection in that state. A distinction is made between "safe country of origin" and "safe third country". If possible, the refugee is primarily returned to his or her country of origin if it can be judged as safe. If it is not possible to proceed in this way, the states strive to return the refugee to a so-called safe third country.[47] The return of a refugee to a safe country must not contradict the principle

44 For more details, see Wouters, 2009, p. 47.
45 Husseini et al., 2020, p. 1299.
46 Ibid.
47 Gil-Bazo, 2015, pp. 49–64.

of *non-refoulement*. This concept is used all over the world, including Europe and the European Union. The application of the concept of safe countries is very closely dependent on the fact whether the applicant has the possibility to find really "effective protection" in another state.[48]

Article 57 and the following of the Asylum Procedure Regulation (establishing a common procedure for international protection in the Union) deal with the more detailed characteristics of these concepts. A third country can only be described as safe[49] if the life and freedom of foreign nationals are not threatened in it because of race, religion, citizenship, belonging to a certain social class, or political opinion; if these persons do not face a real risk of serious harm, they are protected from return in accordance with the Geneva Convention, and there is a possibility to apply for effective protection, or receive this protection. A third country can be designated as a safe country of origin only if it can be demonstrated that, on the basis of the legal situation there, the application of law in a democratic system and the general political circumstances, that there is no persecution and there is no real risk of serious harm. The assessment of whether a third country is a safe country of origin, or a safe third country, must be supported by information from many relevant and available sources, including information from Member States, the Asylum Agency, the European External Action Service, the Office of the United Nations High Commissioner for Refugees and others relevant international organisations.

3.3. Asylum Shopping and Refugees in Orbit

For the time being, the so-called Dublin system[50] is an integral part of the European asylum system, as it sets the rules for determining which member state is competent for assessing applications for international protection. The Dublin system, the core of which is currently still the Dublin III regulation, and will subsequently be the AMMR regulation, represents a legal mechanism used to determine the state responsible for assessing an application for international protection submitted by a third-country national in one of the EU member states.[51] It is based on the principle that only one Member State is competent to assess the application, namely the Member State that played the biggest role in the entry and stay of the applicant in the territory of the Member States (with certain exceptions, of course). And it is with this system that other key institutes of asylum law and refugee protection within the EU are connected.

The essence of the Dublin system, and the new AMMR, is to rationalise the assessment of applications for the granting of international protection and to prevent

48 Legomsky, 2003, pp. 52–81.

49 On the interpretation of the concept, cf. e.g. Judgment of the CJEU of 17th March 2016, *Shiraz Baig Mirza vs. Bevándorlási és Állampolgársági Hivatal*, C-695/15.

50 Judgment of the CJEU of 17th March 2016, *Shiraz Baig Mirza vs. Bevándorlási és Állampolgársági Hivatal*, C-695/15.

51 Judgment of the Constitutional Court of the Czech Republic, no. II. ÚS 3505/18 of 3rd June 2019.

the system of state authorities from being overwhelmed by multiple applications submitted by the same applicant, but also to increase the legal certainty of applicants for international protection in terms of determining the state responsible for assessing their application.[52] In this way, this system aims to limit or even eliminate the phenomenon called "*forum shopping*", or "*asylum shopping*" (cf. e.g. judgment of the Grand Chamber of the Court of Justice of 21/12/2011, N.S., C-411/10 and others, Sb. decision, p. I-13905, point [79]). *Asylum shopping* consists in the fact that a foreigner conducts proceedings for the granting of international protection simultaneously or successively in several states with the aim of being successful in at least one state. The applicant thus tries to take advantage of the differences in the asylum legislation of individual member states and obtain asylum in the country he or she considers to be the most benevolent.[53] It must be admitted that the search for the most favourable conditions is a natural human characteristic, and it is no different in the case of migration, whether legal or illegal.[54]

At the same time, this system is supposed to prevent a situation known as "*refugee in orbit*", when on the other hand, no state considers itself competent to assess the merits of an application for the granting of international protection. It should prevent applicants from being left for an unreasonable length of time in uncertainty about the outcome of their application and from being transferred from one State to another, with no State willing to recognise its jurisdiction to consider their application.[55] For these situations, the applicant for international protection is guaranteed that his or her application will always be properly reviewed by one (only one) of the member states. This system therefore assumes that the applicant has submitted at least one application that the Member State is obliged to review, is reviewing it, or has already decided on it (judgment of the Court of Justice of 3/5/2012, Kastrati, C-620/10).

In summary, the definition of the meaning is to "expeditiously" designate a Member State in such a way that asylum seekers are guaranteed effective access to the procedure for granting international protection and that the assessment of the application for international protection is properly, fairly and quickly "completed" (cf. the judgment of the CJEU in the case of C- 695/15 PPU Shiraz Baig Mirza). The aim is therefore to 'accelerate the assessment of applications in the interests of both asylum seekers and participating states'.[56]

52 Judgment of the Supreme Administrative Court of the Czech Republic, 8 Azs 123/2016 of 5th October 2016.

53 Kosař et al., 2010, p. 58.

54 Boccardi, 2002, p. 43.

55 Pazderová, 2012, p. 322.

56 '*The aim of the Dublin system […] is, as is clear from recitals 4 and 5 of this Regulation, in particular to enable a rapid determination of the Member State responsible so as to guarantee effective access to the procedure for granting international protection and not to jeopardise the objective of a rapid processing of applications for international protection.*' Judgment of the CJEU of 16 February 2017, *C.K. and Others v. Republic of Slovenia*, C-578/16 PPU.

4. Granting International Protection Within the EU and Protecting the Rights of Refugees

Refugees heading to the EU seek protection in Member States from various threats and persecution in their own countries. The main instrument that both international law and EU law provides for these purposes is the provision of international protection. It has been emphasised above that the EU provides this protection in a "broader" form than the Geneva Convention. In addition to asylum, it also introduces so-called supplementary protection for persons who do not meet the requirements for granting asylum.

As already mentioned, the key legislative framework for regulating the granting of international protection is the Pact on Migration and Asylum adopted in 2024. The Pact is a complex set consisting of legislative instruments, other non-legislative documents, operative and financial measures, and forms of international cooperation. Legislative acts are mostly amendments to existing legislation and rules. However, some areas are newly regulated.

In the case of refugees seeking international protection within the EU, it is possible to identify several areas or phases of the process where, on the one hand, it is necessary to guarantee the highest possible protection of the rights of refugees and, on the other hand, it is also necessary to take into account the protection of key interests of the EU and the Member States (such as security, public order, crime prevention etc.). At the same time, it is also essential that a comparable or uniform standard of protection and status of refugees is ensured across all Member States, and that their applications, and therefore their rights, are decided in a unified procedure, regardless of which Member State makes the decision.

This is an extremely large and complex area, and the main focus of the text will therefore be on the main elements or procedures of the process which may most significantly affect the rights and status of applicants for international protection, i.e. the pre-accession procedures and the procedure for granting international protection (refugee status or subsidiary protection status).

4.1. Pre-Entry Procedures and Protection of Refugee Rights

The first stage that the European Union must regulate in the framework of migration legislation and related measures is the very entry of refugees into a Member State and their "initial screening". Already at this stage, the protection of the rights of refugees, who can be very vulnerable in these situations, must be rigorously ensured. The new Pact addresses this area in particular in the Regulation on the

screening of third-country nationals at the external borders[57] and the amended Eurodac Regulation.[58]

The aim of pre-entry screening is to ensure the fast identification of third-country nationals crossing the external border without authorisation, and to detect health and particularly security risks. The persons concerned will then be quickly directed to the relevant procedures (asylum or return). It is this regulation, which aims, among other things, to reduce the number of asylum applications in the EU and generally deter irregular migrants from travelling to Europe, that has generated the most controversy in its preparation.[59] As the regulation states,

> 'border control should contribute to reducing irregular migration, to combating smuggling and trafficking in human beings and to preventing any threat to internal security, public policy, public health and the international relations of the Member States [...]. In particular, the screening of third-country nationals should contribute to ensuring that they are directed to the appropriate procedures as soon as possible and that these procedures continue without interruption or delay.'

Already from these objectives of the regulation, we can see quite clearly the conflict between the above-mentioned interests of Member States versus the highest possible protection of refugees and their rights. It is undoubtedly not easy to find the optimal level of "screening" of refugees which, on the one hand, minimises interference with their rights and status and on the other, safeguards national interests such as security, public order and others.

Under the Regulation, the obligation to undergo pre-entry screening applies to all third-country nationals, regardless of whether they have lodged an application for international protection, who do not fulfil the entry conditions set out in Article 6 of Regulation (EU) 2016/399 and who are apprehended in connection with the unauthorised crossing of the external border of a Member State by land, sea or air, or who land on the territory of a Member State following a search and rescue operation. Detection checks shall also apply to all third-country nationals who have lodged an application for international protection at external border crossing points

57 Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14th May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.
58 Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14th May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council.
59 Bauerová, 2024, pp. 14–17.

or in transit zones and who do not fulfil the entry conditions laid down in Article 6 of Regulation (EU) 2016/399. Screening can be carried out not only at external borders but also directly within the territory of a Member State for third-country nationals who are staying illegally on its territory, if these nationals have crossed the external border in an irregular manner and have not yet been subject to screening in a Member State. Checks shall be carried out within seven days, or within three days in the case of checks within the territory. Excluding checks in the territory, these are carried out in detection facilities at external borders. Detection checks in particular include preliminary health and vulnerability checks, identification of the person, including the taking of biometric data, and security checks. Persons subject to screening are obliged to provide appropriate cooperation in this respect and to undergo the various screening procedures.

It is clear that the above activities can significantly interfere with the rights of refugees. It is therefore essential to guarantee their protection throughout this process. This is to be ensured both by guaranteeing certain rights to refugees (throughout the whole screening procedure) and by third entities (who will supervise the procedures or provide assistance and advice to refugees).

The Regulation stipulates that all persons subject to screening must be provided with a standard of living that guarantees their subsistence, protects their physical and mental health, and respects their rights under the EU Charter of Rights. Refugees must be properly informed about the framework of the pre-accession process, in particular regarding the purpose, duration and termination of the process, as well as about the possibility to apply for international protection and their rights in the screening process. They are also entitled to information on the conditions of entry and stay, and the rules of return or possible relocation. The information provided during the screening process shall be provided in a language that the third-country national understands. The information shall be provided in writing, on paper or in electronic form, and if necessary, orally using interpretation services. In the case of minors, the information shall be provided in a manner appropriate to the child and his/her age and in the presence of a representative.

Special attention is paid to the protection of refugee minors. In the initial examination, the best interests of the child are always the primary consideration, in accordance with Article 24(2) of the Charter. During the screening process, the minor shall be accompanied, if present, by an adult family member. At the same time, Member States are obliged to take measures to ensure that the unaccompanied minor is accompanied during the screening by an appointed representative or, where no representative has been appointed, by a person trained to protect the interests and general welfare of the minor. The representative must have the necessary skills and expertise, including those relating to the treatment and specific needs of minors. The representative shall act in such a way as to protect the best interests and general welfare of the minor and to enable the minor to enjoy all his or her rights. The person responsible for accompanying and assisting the minor shall act independently and shall not take orders even from persons responsible for screening. In order for the

representative to be able to carry out this function properly and responsibly, it is stipulated that the representative may represent a maximum of 30 minors at any one time.

Furthermore, Member States are required to ensure that the personnel carrying out the screening checks are properly trained and have adequate knowledge in the field. At the same time, there is an obligation to ensure the protection of refugees' personal data. Organisations and persons providing advice must have effective access to third-country nationals during screening. Perhaps most importantly however, is the obligation for Member States to ensure and establish an independent monitoring mechanism to monitor compliance with EU and international law in the screening procedures, and where appropriate, to ensure that substantiated allegations of non-compliance with fundamental rights are dealt with effectively and without undue delay and, where necessary, to initiate and monitor the progress of investigations into such allegations.[60] This is undoubtedly a good idea, but the problem is that this mechanism will be provided by each Member State independently. This may lead to considerable inconsistency in the form of these mechanisms and to different sets of powers of the authority in different Member States. The fact that the EU Fundamental Rights Agency is to issue only "unspecified and non-binding guidance" on the establishment of these bodies and their powers does not inspire too much optimism either.

What are the options for defending refugees at this stage? Professor Peers says:

> '[d]espite the absence of any express procedural rights in the Regulation, it is arguable that in light of the right to effective remedies and access to court set out in Article 47 of the Charter, it should at least be possible to challenge the application of the screening procedure on the basis that (for example) there is no legal ground for the screening at all, or that the screening has exceeded its permitted duration. In any event, the absence of express procedural rights should be seen in the context of the screening process not determining the merits of an asylum application.'[61]

To summarise, the aim of pre-accession screening is to quickly establish the identity of third country nationals, as well as any health and security risks, and to quickly determine the appropriate course of action for those entering the EU who do not meet the entry conditions. Applicants for international protection who arrive at a land external border or disembark after a maritime rescue operation can still be returned to the border of a safe country of origin or to a third safe country, or if eligible, an asylum procedure can be initiated. The initial screening should take place quickly, within seven days, and classify irregular migrants seeking asylum into two main groups. The first group is subject to the standard asylum procedure, with a basic time limit of six months. But then there is a second option – an accelerated asylum procedure

60 Fundamental Rights Agency, 2022.
61 Peers, 2024a.

implemented directly at the external borders (lasting 12 weeks). This will apply to those migrants who clearly do not meet the conditions for international protection, have given false information or carry a significant security risk. This procedure will (also) apply if the average acceptance rate of an asylum claim by an applicant of that nationality is below 20%.[62] Those who fail will face a return procedure (deportation), which should also be completed within 12 weeks. Both the new screening process and the new accelerated asylum procedure are to take place close to the external borders using a method known as the "*fiction of non-entry*".[63] This fiction and its "legality" has been the subject of expert criticism.[64] At the same time, other question marks arise – will states really be able to properly assess each case in this summary procedure? Will there not be significant interference and restrictions on the rights of refugees to the detriment of national interests?[65] Will the facilities at the external borders be able to carry out these procedures properly (in terms of capacity, expertise, time, etc.)? These questions highlight the potential risks and threats to refugee rights at this stage of the procedure.

On the contrary, the benefits can be seen in the uniformity of the system. The introduction of an independent monitoring system in the Member States to ensure that refugees' rights are respected also seems to be a positive feature, but the regulation of this system is very vague and largely left to national specification, which can lead to large differences between countries. Furthermore, mandatory health and vulnerability checks can be seen as a positive for refugee protection, ensuring early identification of those in need of immediate care.[66] Efforts to increase care for minors and vulnerable groups can also be appreciated.

However, it remains to be seen whether and how all the above rules and guarantees will work in practice. It is clear that the pre-screening system will be particularly challenging for states with external borders. Human rights organisations are particularly critical. Amnesty International, for example, points to the risks associated with respecting human rights when applicants are detained in detention facilities at the border.[67] NGOs also point out, that the fast-track procedures will not be sufficient for a truly thorough assessment of asylum applications, and that even people who are eligible for protection may not pass through the net.[68] It is also unclear whether the time limits mentioned are too ambitious (procedures today often take months or years) or whether the capacity of the camps/reception centres where the screening and accelerated procedure will take place is underestimated.

62 Plevák, 2024, p. 1.
63 The person is not allowed to enter the country during the screening.
64 Plevák, 2024, pp. 1–2.
65 Vedsted-Hansen, 2024, pp. 1–5.
66 Tsourdi, 2024, pp. 5–20.
67 Bauerová, 2024, pp. 14–17.
68 Woolrych, 2024.

4.2. International Protection Procedures and Refugee Protection

This is probably the most important phase of the whole process. In particular, the Asylum Procedures Regulation[69] and the Border Return Procedure Regulation[70] are key regulations. The Common Asylum Policy and Procedure is based on the full and inclusive application of the Geneva Convention, complemented by the New York Protocol.

The aim of the new regulation is to streamline, simplify and, in particular, harmonise Member States' procedural procedures by introducing a common procedure for international protection within the European Union. Applications for international protection made by third-country nationals and stateless persons will be examined in a procedure governed by the same rules, regardless of the Member State in which the application was lodged, in order to ensure the equal treatment of applications for international protection, and clarity and legal certainty for individual applicants. This element is undoubtedly a major contribution to the protection of refugees and their rights. Despite many years of efforts, there are still considerable differences between Member States in terms of the types of procedures used, the rates of recognition, the type of protection granted, the level of material reception conditions or the benefits granted to applicants and beneficiaries of international protection. These differences significantly encourage secondary movements of persons and undermine the objective of ensuring that all applicants are treated equally under the Common European Asylum System, regardless of where in the Union they apply for international protection. Therefore, in this respect the new Pact brings a higher standard of refugee protection.

As mentioned above, "international protection" means refugee status or subsidiary protection status. Refugee status applies to a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion or nationality, or because he or she holds certain political opinions or belongs to a particular social group, is outside the country of his or her nationality and is unable, or owing to those fears, refuses to avail him or herself of the protection of the country concerned, or a stateless person who, for the same reasons, is outside the country of his or her previous habitual residence and who, owing to those fears, is unwilling or unable to return there and who is not covered by Article 12 of Regulation (EU) 2024/1347. A "person eligible for subsidiary protection" is a third-country national or a stateless person who does not qualify as a refugee but who has serious reasons to believe that he or she would be in real danger of suffering serious harm, as referred to in Article 15 of Regulation (EU) 2024/1347, if returned to his or her country of origin or, in the case of a stateless person, to the country of his or her previous habitual residence, and who is not covered by Article 15 of Regulation (EU) 2024/1347, nor by Article 17(1) and (2) of

69 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14th May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

70 Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14th May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148.

that Regulation, and who is unable or, because of the aforementioned danger, refuses to avail him or herself of the protection of that country.

It can be noted that the EU's concern to protect applicants for international protection "run through" the entire Regulation and thus the entire process of granting international protection. The basic principle is that the determining authority must assess applications objectively, impartially and on an individual basis. The staff assessing and deciding on applications must have appropriate knowledge and training, including relevant training under Article 8 of Regulation (EU) 2021/2303, on the relevant standards applicable in the field of asylum and refugee law. They must be able to consult with experts on specific issues, for example regarding health, culture, religion, mental health, children or gender, at any time, if necessary.

The Regulation elaborates upon the process of starting the asylum process, retaining also the key rule that asylum seekers should have an "effective opportunity" to lodge an application for asylum. (on the equivalent provision in the 2013 Directive, see, for example, Judgments of the CJEU in Cases C-808/18, C-823/21, C-72/22 PPU, and C-392/22: ruling out various national measures restricting access to the asylum process, such as limitations on the numbers allowed to cross the border to apply, obligations to apply abroad in advance, pushbacks, and a refusal to consider applications in "instrumentalization" cases, i.e. where Belarus pushed people across the border).[71]

In relation to each applicant, the competent authorities must fulfil a broad duty of information. 'An applicant for international protection is guaranteed the right to information concerning the procedure in question, in a language which he or she understands or *may reasonably be presumed to understand*' [Article 8(2)]. However, this alternative formulation is problematic. It creates serious risks that insufficient efforts will be made to ensure that the applicant effectively understands the information, thereby preventing him or her from accessing international protection.[72] The person must be informed of the right to make an application, of his or her (procedural) rights (including the right to a personal interview), and of his or her obligations during the procedure, including the consequences of failure to comply with them. Of great importance is the obligation to inform the applicant of the right to receive free legal information concerning the submission of an individual application and of the right to legal assistance and representation at all stages of the procedure (within the meaning of the Regulation), as well as of the time limits and stages of the procedure to be observed. The information must be provided to the applicant as quickly as possible in order to enable him or her to exercise his or her rights, or to fulfil his or her obligations in a proper and timely manner. In order to ensure that it is clearly demonstrable that the applicant has actually been informed, the applicant shall confirm this by signing the file. In addition, during the administrative procedure, the services of an interpreter shall be provided to the applicant for the purposes of the

71 Peers, 2024b.
72 ECRE, 2014, pp. 17–18.

registration and submission of the application and for the purposes of any personal interview, whenever proper communication cannot otherwise be ensured. Interpreting services shall be covered by public funds. The competent authorities shall give applicants the opportunity to communicate with the Office of the United Nations High Commissioner for Refugees or any other organisation providing legal advice or other information to applicants in accordance with national law. Such bodies shall be entitled to access to all information required for the assessment of applications and to information provided by experts.

To ensure that applicants will have the opportunity to be heard and present elements to substantiate their claims, the APR establishes different kinds of personal interviews during the asylum procedure. The applicant has the right to an admissibility interview before the competent authority decides on the inadmissibility of the application (art. 11) and to a substantive interview before a decision is taken on the merits (art. 12). The presence of the applicant's legal adviser shall be ensured in both cases [art. 14(4)]. Another important guarantee is that all interviews are recorded and transcribed, and applicants have the opportunity to review the transcripts, make comments, and provide clarification [art. 14(3)]. These interviews may be omitted in the scenarios listed under Article 13(11), including in two new and disputable circumstances: where the national authority considers the application inadmissible on the basis of the available evidence, and in the case of a subsequent application, where the preliminary examination is done on the basis of a written statement. This grants considerable discretion in rejecting applications without hearing the applicant and raises issues of procedural fairness and biased assessments by the authorities.[73]

The decision must be taken within the time limits set out in the Regulation. The decision shall be issued in writing and delivered to the applicant as soon as possible. If the decision is negative, the factual and legal reasons for the decision shall be stated. Where the applicant is legally represented by a representative or legal adviser, the decision-making authority may notify the representative or legal adviser instead of the applicant of the decision.

If the decision is negative, the applicant shall be guaranteed the right to an effective appeal before a court. An effective appeal shall entail a full and *ex nunc* review of the facts and legal issues,[74] at least before the court or tribunal of first instance. From the perspective of the protection of the rights of refugees, the key point is that they have the right to remain in the territory of the Member States until the expiry of the period within which they can exercise their right to an effective remedy and, if this right has been exercised within that period, until the outcome of the appeal

73 Chetail and Vallandro do Valle, 2024.
74 See the Judgment of the CJEU in Case C-406/18.

procedure is known.[75] However, the right to remain does not confer a right to a residence permit and does not give the applicant the right to travel to the territory of other Member States without a travel document as provided for in Article 6(3) of Directive (EU) 2024/1346.

Special guarantees and protections in asylum procedures are directed towards minors. Any action and decision-making must always be guided by the "best interests of the child". The determining authority must give the minor the opportunity for a personal interview, even where the application is made on his or her behalf (e.g. by a parent), unless it can be shown that this is not in the best interests of the child. The personal interview with the minor shall be conducted by a person who has the necessary knowledge of the rights and special needs of minors. The interview shall be conducted in a child-sensitive and contextual manner taking into account the age and maturity of the child. The decision on the minor's application shall be made only by staff who have the necessary knowledge and have received appropriate training in the rights and special needs of minors.

Close attention is paid to the protection of unaccompanied minors. In such situations, it is a fundamental principle or obligation to ensure that unaccompanied minors are represented and assisted in such a way that they can enjoy their rights and fulfil their obligations. A "temporary" representative with the necessary skills and expertise is appointed immediately and a "regular" representative is appointed within 15 days at the latest.

As mentioned above, in addition to the traditional international protection procedure, compulsory border asylum and return procedures are introduced at the EU's external borders in certain cases. This concerns cases of illegal entry of a migrant into the territory, including persons rescued at sea, if at least one of the following conditions is met: a) the applicant poses a danger to national security and public order; b) the applicant has not provided truthful information or has submitted false documents or has not provided relevant documents on his or her identity and nationality; c) the applicant comes from a country whose citizens have less than a 20% success rate in EU-wide asylum procedures.

The decision-making process for granting international protection is also covered by Regulation (EU) 2024/1346 of the European Parliament and of the Council of 14th May 2024 laying down standards for the reception of applicants for international protection. The Qualification Regulation is intended to replace the existing Qualification Directive and is one of the regulations that changes very little from the *status quo*. The main objective of the Regulation is a more uniform application of the grounds for recognising individual asylum seekers as persons in need of international protection and the possible granting of one of the international protection statuses (asylum or

75 Cf. in this respect Case C-924/19 PPU and C-925/19 *PPU FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság a Országos Idegenrendészeti Főigazgatóság* (2020), which concerned Hungary and where the Court emphasised the effective judicial review of a decision rejecting an asylum application, including the possibility to remain in the territory during the appeal procedure.

subsidiary protection). The Regulation also contains a section on the basic aspects of integration of applicants. By way of example only, Member States must guarantee minor children of applicants and minor applicants the same access to education as their own nationals and under similar conditions. Where a Member State provides accommodation to applicants, it shall take appropriate measures to preserve, as far as possible, the integrity of the family residing on its territory. Furthermore, Member States must ensure that applicants have access to the labour market, as well as access to language courses, civic education courses or vocational training courses which they consider appropriate to help improve their ability to act independently, to communicate with the competent authorities, or to find employment no later than six months from the date of registration of the application for international protection. Other guarantees are then directed, for example, at health and social care. In particular, the need to focus on applicants with special needs, such as minors, people with disabilities, the elderly, pregnant women, or lesbian, gay, bisexual, transgender and intersex people, is highlighted. Special care is also given to victims of trafficking in human beings or persons who have been subjected to torture, rape or other forms of severe psychological, physical or sexual violence.

Finally, a mention should be made of Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14th May 2024 on standards for the qualification of third-country nationals or stateless persons for international protection, a uniform status for refugees or persons eligible for subsidiary protection and the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council. In particular, it can be highlighted from this regulation that beneficiaries of international protection have the right to a residence permit for the duration of their refugee or subsidiary protection status. At the same time, they have the right to free movement within the territory of the Member State which had granted them international protection, including the right to freely choose their place of residence in that territory. In order to ensure successful integration, the regulation then further determines their access to employment, education and its recognition, social security, housing or health care. Special attention is again paid to the protection of minors and their rights.

5. EU Financial Support for Refugees and Their Protection

It is only logical that the various forms of assistance to refugees and the protection of their rights and dignity should depend on financial support. In addition to the legal instruments that ensure the protection of the status and rights of refugees in the form of binding rules of conduct (i.e. legal norms), economic support instruments cannot be overlooked.[76] The Asylum, Migration and Integration Fund (AMIF) 2021-2027 plays

76 On the issue of supporting the initial but also long-term integration of refugees – see European Commission, 2024d.

a key role within the EU in this respect.[77] The AMIF is a financial instrument of the European Union that supports EU Member States in implementing European asylum, migration and integration policies.[78] The EU Fund's policy objective is to contribute to the efficient management of migration flows and to the implementation, consolidation and development of the common asylum system and the common immigration policy (i.e. AMIF Objectives).[79]

The AMIF was used for the first time in the funding period from 2014 to 2020. Previously, migration policy projects were funded with EU funds from the Solidarity and Management of Migration Flows (SOLID) programme, which consisted of three individual funds, namely The European Refugee Fund (ERF), The European Fund for the Integration of third-country nationals (EIF), and The European Return Fund (RF). For the period 2014–2020, the AMIF has provided funding to push forward the EU's comprehensive agenda on migration in a challenging migration situation. It supported actions related to asylum, including resettlement and relocation, integration of third country nationals and return operations. During this funding period, over two million individuals have been helped by AMIF support for asylum and around EUR 2.4 billion were provided in support of urgent needs for asylum systems and reception capacities under Emergency Assistance (EMAS) funding.[80]

The renewed AMIF for 2021–2027 has a larger budget of €9.9 billion to be dedicated to Member States programmes as well as to emergency assistance, resettlement and humanitarian admission from non-EU countries, and to relocating asylum-seekers and refugees inside the EU, as part of solidarity efforts.[81] What Are the Objectives of the AMIF for 2021–2027? In essence, the following four main objectives can be identified.

The first is to strengthen and develop the CEAS: Measures and financial support in this area serve to improve reception conditions for persons seeking international protection and to systematically identify asylum seekers with special needs at an early stage. Furthermore, support is aimed at streamlining asylum procedures, including the development of ways to identify applicants. Another objective is to promote legal migration, social integration and inclusion of third-country nationals in EU countries. The aim is to promote legal migration in cooperation with third countries and to ensure safe and legal access routes to the EU. Another priority is to optimise and standardise pre-integration measures in the form of qualified professionals. The aim is to offer third-country nationals an orientation in the integration system and to create equal opportunities for them.

The third objective, on the other hand, is directed towards illegal migration. Support focuses on combating irregular migration, ensuring the safe and dignified

77 Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7th July 2021 establishing the Asylum, Migration and Integration Fund.
78 Federal Office for Migration and Refugees, 2024, pp. 1–4.
79 European Commission, 2024a.
80 Ibid.
81 Global Compact on Refugees, 2024.

return of refugees and their effective reintegration in third countries. Measures in this area are intended to unify and coordinate return procedures at EU and Member State level. In this context, incentives for irregular migration should be reduced and voluntary return should be encouraged. Particular emphasis is placed on tracing family members and taking into account the best interests of the child in reintegration. Enhanced cooperation with third countries should support their capacity for readmission and sustainable return. Finally, the fourth objective is aimed at solidarity and a common shared responsibility between all Member States, as well as balancing the asylum burden between EU Member States.

The fulfilment of the above objectives is realised through financial support for a variety of activities. Actions funded through the AMIF can cover a wide range of initiatives. Financial support may be directed to bodies providing support and various services to applicants for international protection, with an emphasis on vulnerable groups. Infrastructures used to receive applicants, as well as those serving return policy, are also funded. In addition, support for legal migration policies or integration measures in relation to third-country nationals, including early integration programmes focusing on education, language and other training (such as civic orientation courses and vocational guidance) is focussed to prepare them for active participation in and acceptance by the receiving society. Support is provided for the resettlement, humanitarian reception and transfers of applicants for international protection and beneficiaries of international protection. Last but not least, any cooperation with third countries in the field of asylum, legal migration and the fight against irregular migration may be supported.[82]

Typical beneficiaries of the AMIF may include state and federal agencies, local public authorities, NGOs, humanitarian organisations, private and public companies, or educational and research organisations.[83]

It can be added that third countries – or non-EU countries - may be associated with the AMIF and eligible for financing, if they have signed an agreement with the EU on the criteria and mechanisms for establishing the EU country that will be responsible for examining an asylum request lodged in an EU country or lodged in that third country. In addition, the participation of the third country should also be included in the AMIF annual or multiannual work programme. Currently no countries are affiliated to the AMIF or are in the process of negotiating their affiliation.

From 2023, all Member States participating in AMIF are required to submit an annual performance report to the European Commission providing information on the progress of their shared management programme. The scope of the report is defined in Article 35 of the AMIF Regulation and detailed in the related Commission Implementing Regulation (EU) 2023/169. This report helps to assess the programme's performance, any issues affecting it, as well as related remedy strategies. In addition,

82 Wolffhardt, 2020, pp. 2–29.
83 European Commission, 2024a.

its information feeds into the evaluation cycle and helps the Commission in its supervisory role.[84]

In addition to the AMIF, two other EU funds contribute to asylum and migration policy: the Internal Security Fund (ISF) and the Border Management and Visa Instrument (BMVI).

The Internal Security Fund (ISF)[85] is set up for the period 2021–2027 with a total budget of EUR 1.93 billion. The Fund should contribute to reach a high level of security in the EU, in particular by preventing and combating terrorism, radicalisation, serious and organised crime and cybercrime, by assisting and protecting victims of crime, and by preparing for, protecting against, and effectively managing security-related incidents, risks and crises.[86]

The Fund has three main objectives for its support. Firstly, to increase the exchange of information between and within EU law enforcement authorities and other relevant authorities, as well as with non-EU countries and international organisations. Secondly, to step up cross-border cooperation, including joint operations, particularly with regards to terrorism and serious and organised crime with a cross-border dimension. The final objective is to strengthen the capacity to fight and prevent crime, terrorism and radicalisation and to manage security incidents, risks and crises, in particular through increased cooperation between public authorities, civil society and private partners in the Member States.[87]

Specific actions that can be funded through the ISF can include a wide range of initiatives such as: Purchase/procurement of ICT systems and related training, testing as well as their improved interoperability and data quality, operations implementing or facilitating the implementation of the EU/EMPACT (European Multidisciplinary Platform against Criminal Threats) policy cycle, support to networks of specialised national units to improve mutual trust, exchange and dissemination of know-how, information, experience and best practices, pooling of resources and expertise in common centres of excellence or even support to education, and training for relevant law enforcement, judicial and administrative authorities.

The last fund that should be mentioned in this context is The Border Management and Visa Instrument (BMVI), which is a part of the Integrated Border Management Fund (IBMF), together with the Custom Control Equipment Instrument (CCEI). The IBMF is again set up for the period 2021–2027 with a total of EUR 7.37 billion. The current allocation reserved to the BMVI corresponds to EUR 6.7 billion for the same period. The BMVI's mission is to ensure a strong and effective European integrated border management at the Union's external borders, ensuring a high level of

84 Ibid.
85 Regulation (EU) 2021/1149 of the European Parliament and of the Council of 7 July 2021 establishing the Internal Security Fund.
86 European Commission, 2024c.
87 Ibid.

internal security within the Union while safeguarding the free movement of persons within it.[88]

The BMVI is primarily focussed on achieving the following objectives: (1) promoting effective European integrated border management at external borders, implemented by the European Border and Coast Guard as a shared responsibility with national authorities responsible for border management, to facilitate legitimate border crossings, prevent illegal immigration and cross-border immigration, and detect crime and effectively manage migratory movements; and (2) promoting a common visa policy, a harmonised approach with regards to the issuance of visas, to facilitate legitimate travel while helping to prevent migration and security risks.[89]

Actions funded through the BMVI may include a wide range of initiatives such as improving border controls in line with the European Agenda on Migration and the Charter of Fundamental Rights of the European Union, strengthening EU-level cooperation in border tasks, investments in common large-scale IT systems in border management and visa policy, investments in infrastructure and equipment, systems and services, training, exchange of experts, etc.

6. Conclusion

In 2023, the number of asylum seekers in EU countries will increase by 18 percent year-on-year to 1.14 million, the highest since the 2015 and 2016 migration crises. Most asylum seekers have come from Syria, Afghanistan or Turkey, and are heading for Germany or France.[90] It can be noted that EU countries are very often the destination of refugees from third countries seeking help and protection (in the form of granting international protection). As has already been mentioned above, EU migration and asylum policy is a very complex and also "sensitive" issue from many points of view. At the same time, it is an area that has been evolving for many decades, reflecting the changes (political, social, security and economic) that are taking place in the world and in Europe. At present, the EU and its asylum system are facing a "new" period, having succeeded, after many years of complex negotiations, in adopting a new, in some respects, and in others at least a "revised" comprehensive regulation of this area – the so-called Pact on Migration and Asylum.

Both the previous regulation and the new Pact on Migration and Asylum seek to find a compromise solution between many actors and their interests. On the one hand, there are persons – refugees – who, for various reasons, have left their homes and are seeking international protection in an EU Member State. It is essential to guarantee these persons their rights, in particular, a proper and fair assessment of

88 European Commission, 2024b.
89 Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7th July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy.
90 ČTK, 2024, p. 1.

their case, including the grounds for granting international protection. Special attention must be paid to minors and other vulnerable groups of refugees. On the other hand, there is the EU and its individual states, which are trying to regulate illegal migration in particular and to protect important public interests such as security and public order, crime prevention and others. It is therefore not easy to create an optimal and appropriately "balanced" system that reflects all this.

In view of the breadth of the whole issue, the main focus of the text is on the pre-entry screening process and the asylum procedure itself. These are areas that are crucial in terms of protecting the status and rights of refugees. It is in these areas that the most serious interference with their status can occur. An analysis of current and future arrangements shows that refugee protection has several layers. First and foremost, the legislation imposes requirements and obligations on the States themselves and their authorities that decide and act in the procedures. This regulation takes the form of both general principles (objectivity, individual treatment, etc.) that apply to their activities in general, and specific obligations (duty to inform, duty to state reasons, etc.) and requirements (on the training of officials, etc.). Then, specific procedural rights are granted to refugees themselves, at all stages of the process (right to information and instruction, right to be heard in a language they understand, right to a prompt and reasoned decision, right to judicial protection and many others). Finally, the support of third parties that provide assistance and advice to refugees (various NGOs) and monitor compliance with their rights plays an important role. In this respect, the legislation also emphasises cooperation between these organisations and the Member States. At the same time, there is an obligation to set up an independent monitoring body in each Member State (see above for details).

At first sight, therefore, it appears that there is a desire to protect refugees and guarantee their rights as much as possible. However, if we look deeper, we can see that many of the institutions are problematic and that the optimal balance between the protection of refugees and the interests of the Member States has not always been struck. Another problem is of course how the rules and principles that the legislation lays down will ultimately be applied in practice and whether a truly uniform and responsible approach to this issue by all Member States can be ensured. The fact that the Pact on Migration and Asylum is due to come into force in 2026 will also be a further test of the entire European asylum system and its functionality. It can only be hoped that the new regulation will bring about real and, in practice, functional protection for refugees and their rights within the EU, as well as the international protection procedure.

Bibliography

Literature

Battjes, H., Brouwer, E. (2015) 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?', *Review of European Administrative Law*, 8(2), pp. 183–214; https://doi.org/10.7590/187479815X14465419060505.

Bauerová, H. (2024) 'Hranice, bezpečnost a lidská práva: Dilemata Nového paktu o migraci a azylu', *Mezinárodní politika* [Online]. Available at: https://www.iir.cz/analyza-hranice-bezpecnost-a-lidska-prava-dilemata-noveho-paktu-o-migraci-a-azylu (Accessed: 6 October 2024).

Boccardi, I. (2002) *Europe and refugees: towards an EU asylum policy*. The Hague: Kluwer Law International.

ČTK (2024) *Do Evropské unie přišlo v roce 2023 nejvíce žadatelů o azyl od migrační krize* [Online]. Available at: https://ct24.ceskatelevize.cz/clanek/svet/do-evropske-unie-prislo-v-roce-2023-nejvice-zadatelu-o-azyl-od-migracni-krize-346546 (Accessed: 6 October 2024).

European Commission (2024a) *Asylum, Migration and Integration Fund (AMIF) 2021-2027* [Online]. Available at: https://home-affairs.ec.europa.eu/funding/asylum-migration-and-integration-funds/asylum-migration-and-integration-fund-2021-2027_en (Accessed: 6 October 2024).

European Commission (2024b) *Integrated Border Management Fund – Border Management and Visa Instrument (2021-27)* [Online]. Available at: https://home-affairs.ec.europa.eu/funding/borders-and-visa-funds/integrated-border-management-fund-border-management-and-visa-instrument-2021-27_en (Accessed: 6 October 2024).

European Commission (2024c) *Internal Security Fund (2021-2027)* [Online]. Available at: https://home-affairs.ec.europa.eu/funding/internal-security-funds/internal-security-fund-2021-2027_en (Accessed: 6 October 2024).

European Commission (2024d) *EU funds for migrant integration 2021-2027* [Online]. Available at: https://migrant-integration.ec.europa.eu/funding/eu-funds-2021-2027-period_en (Accessed: 6 October 2024).

European Parliament (2016) *Evaluation of the Implementation of the Dublin III Regulation – Final Report* [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2020-0245_EN.html (Accessed: 6 October 2024).

ECRE (2014) *Information Note on 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* [Online]. Available at: https://ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Asylum-Procedures-Directive-recast_December-2014.pdf (Accessed: 6 October 2024).

Federal Office for Migration and Refugees (2024) *Asylum, Migration and Integration Fund (AMIF) 2021-2027* [Online]. Available at: https://www.eu-migrationsfonds.de/EN/AMIF/amif_node.html (Accessed: 6 October 2024).

Fundamental Rights Agency (2022) *Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders* [Online]. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-monitor-fundamental-rights-eu-external-borders_en.pdf (Accessed: 6 October 2024).

Gil-Bazo, M.T. (2015) 'The safe third country concept in international agreements on refugee protection', *Netherlands Quarterly of Human Rights,* 33(1), pp. 42–77; https://doi.org/10.1177/016934411503300104.

Global Compact on Refugees (2024) EU supports a high quality asylum space with funding,

UNHC [Online]. Available at: https://globalcompactrefugees.org/eu-supports-high-quality-asylum-space-funding (Accessed: 6 October 2024).

Guibert, L., Milova, M., Movileanu, D. (2021) 'The New Pact on Migration and Asylum: A Brief Summary and Next Steps', *89 Initiative The first European think-do tank* [Online]. Available at: https://89initiative.com/the-new-pact-on-migration-and-asylum/ (Accessed: 6 October 2024).

Husseini, F., Bartoň, M., Kokeš, M., Kopa, M. et al. (2021) *Listina základních práv a svobod. Komentář.* Praha: C. H. Beck.

Chetail, V., Vallandro de Valle, M.F. (2024) *The Asylum Procedure Regulation and the Erosion of Refugee's Rights* [Online]. Available at: https://eumigrationlawblog.eu/the-asylum-procedure-regulation-and-the-erosion-of-refugees-rights/ (Accessed: 6 October 2024).

Chmelíčková, N. (2008) 'Společný evropský azylový systém-aktuální vývoj' in Jílek, D., Pořízek, P. (eds.) *Společný evropský azylový systém: transpozice směrnic*. Brno: Veřejný ochránce práv, pp. 11–15.

Janků, L. (2018) *Vylučující klauzule dle čl. 1F Úmluvy o právním postavení uprchlíků: možnosti a podmínky její aplikace vůči osobám podezřelým z terorismu*. Praha: Wolters Kluwer.

Jurman, M. (2005) 'Dublinské řízení u nás', *Právní rádce*, 13(6), pp. 42–45.

Jurníková, J. (2016) 'Několik poznámek k budování společného evropského azylového systému' in Jurníková, J., Králová, A. (eds.) *Společný evropský azylový systém v kontextu uprchlické krize.* Brno: Masarykova univerzita, Právnická fakulta, pp. 9–19.

Komínková, M. (2020) 'Nový pakt pro migraci a azylu – obsah a postoje aktérů', *Euroskop,* 30 October 2020. [Online]. Available at: https://euroskop.cz/2020/10/30/novy-pakt-pro-migraci-a-azyl-obsah-a-postoje-akteru/ (Accessed: 6 October 2024).

Kosař, D., Molek, P., Honusková, V., Jurman, M., Lupačová, H. (2010) *Zákon o azylu: komentář*. Praha: Wolters Kluwer.

Legomsky, S.H. (2003) *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection* [Online]. Available at: https://www.unhcr.org/media/no-2-secondary-refugee-movements-and-return-asylum-seekers-third-countries-meaning-effective (Accessed: 6 October 2024).

Marinho, C., Heinonen, M. (1998) '*Dublin after Schengen: Allocating Responsibility for Examining Asylum Applications in Practice', EIPASCOPE,* 3, pp. 1–12.

Pazderová, V. (2012) 'Dublinský systém – klauzule suverenity' in Jílek, D., Pořízek, P. (eds.) *Aktuální právní problémy azylového a cizineckého práva*. Brno: KVOP, pp. 322–342.

Peers, S. (2024a) *The new EU asylum laws, part 7: the new Regulation on asylum procedures* [Online]. Available at: https://eulawanalysis.blogspot.com/2024/04/the-new-eu-asylum-laws-part-7-new.html (Accessed: 6 October 2024).

Peers, S. (2024b) *The new Screening Regulation – part 5 of the analysis of new EU asylum laws* [Online]. Available at: https://eulawanalysis.blogspot.com/2024/04/the-new-screening-regulation-part-5-of.html (Accessed: 6 October 2024).

Pikna, B. (2012) *Evropský prostor svobody, bezpečnosti a práva, prizmatem Lisabonské smlouvy*. Praha: Linde.

Plevák, O. (2024) 'Migrační pakt bez emocí: Co přináší nová pravidla?', *Euroactiv* [Online]. Available at: https://euractiv.cz/section/vnitro-a-spravedlnost/linksdossier/migracni-pakt-bez-emoci-co-prinasi-nova-pravidla/ (Accessed: 6 October 2024).

Sandu, G. (2021) 'Asylum Policy', *European Parliament* [Online]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy. (Accessed: 6 October 2024).

Sehnálek, D. (2015) 'Kvóty pro imigranty – Právní pohled a analýza čl. 78 SFEU', *Časopis pro právní vědu a praxi*, 23(2), pp. 91–95.

Svobodová, N. (2017) 'Společný evropský azylový systém', *Ludek Niedermayer*, 1 November 2017. [Online]. Available at: https://www.niedermayer.cz/z-medii/articles/spolecny-evropsky-azylovy-system (Accessed: 6 October 2024).

Trauner, F. (2016) 'Asylum policy: the EU's 'crises' and the looming policy regime failure', *Journal of European Integration*, 38(3), pp. 311–325; https://doi.org/10.1080/07036337.2016.1140756.

Tsourdi, E. (2024) 'The new screening and border procedures: towards a seamless migration process?', *Policy Study* [Online]. Available at: https://epc.eu/content/FEPS-Policy_Study_-_The_New_Screening_and_Border_Procedure_-_DP_66__9_.pdf (Accessed: 6 October 2024).

Vedsted-Hansen, J. (2024) *Harmonisation of types of asylum procedures: new Regulation, old dilemmas* [Online]. Available at: https://eumigrationlawblog.eu/harmonisation-of-types-of-asylum-procedures-new-regulation-old-dilemmas/?print=print (Accessed: 6 October 2024).

Větrovský, J. (2018) 'Dublinský systém a hodnocení systémových nedostatků v azylovém řízení: případ Maďarska' in Jílek, D., Pořízek, P. (eds.) *Aktuální právní problémy azylového a cizineckého práva*. Brno: KVOP, pp. 305–321.

Wolffhardt, A. (2020) 'Making the most of EU funds to support a comprehensive approach to migrant integration', *RESOMA* [Online]. Available at: https://migrationresearch.com/storage/app/uploads/public/5ef/b3c/628/5efb3c628a86c767103633.pdf (Accessed: 6 October 2024).

Woolrych, K. (2024) *The EU Pact on Migration and Asylum, Explained* [Online]. Available at: https://hias.org/news/eu-pact-migration-and-asylum-explained/ (Accessed: 6 October 2024).

Wouters, C.W. (2009) *International Legal Standards for the Protection from Refoulement*. Antwerp–Oxford–Portland: Intersentia.

EU Documents

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.

Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148.

Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council.

Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council.

Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund.

Regulation (EU) 2021/1149 of the European Parliament and of the Council of 7 July 2021 establishing the Internal Security Fund.

Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

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.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection.

Part VII
Older Persons

Chapter 19

The International Protection of Older Persons: The United Nations Framework

Viktoriia Ivaniuk

ABSTRACT

The chapter explores the historical evolution of the rights of elderly people within the framework of international law, focusing on the legislative initiatives and protective mechanisms developed within the United Nations system. It outlines the post-war formation of international human rights standards, beginning with the UN Charter (1945) and the Universal Declaration of Human Rights (1948), which established the principle of universality of rights regardless of age. Special attention is given to the International Covenants of 1966, the Convention on the Elimination of All Forms of Discrimination against Women (1979), and the Convention against Torture (1984), which provide indirect but significant safeguards for older persons. The analysis further examines specialised UN documents such as the Vienna International Plan of Action on Ageing (1982), the UN Principles for Older Persons (1991), and the Madrid International Plan of Action on Ageing (2002), which progressively shaped a framework for the recognition of ageing as a global policy issue. Contemporary challenges are also addressed, particularly the vulnerability of elderly people in armed conflicts, with emphasis on Ukraine as a case study. The chapter highlights persistent gaps in legal protection, stressing that the absence of a binding international convention leaves older people insufficiently protected against discrimination, marginalisation, and age-specific vulnerabilities. In conclusion, the need for a specialised UN Convention on the Rights of Older Persons is underlined as a necessary step to ensure comprehensive legal guarantees, effective state obligations, and social inclusion for ageing populations worldwide.

KEYWORDS

elderly people, human rights protection, international human rights standards, United Nations, ageing

1. Introductory Thoughts

The rising share of the elderly population in world demography is one of the key global trends. According to the World Health Organisation, the elderly are defined as people over the age of 60.[1] In recent decades, many countries have gradually increased the

1 Багній and Коваль, 2019, p. 5.

Viktoriia Ivaniuk (2026) 'The International Protection of Older Persons: The United Nations Framework' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 793–813. https://doi.org/10.71009/2026.nj.hrpovg_19

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retirement age in response to population ageing and the growing burden on pension and social security systems.

According to the Department of Economic and Social Affairs of the United Nations Secretariat, between 2017 and 2030, the number of people aged 60 and over is projected to increase by 46 per cent – from 962 million to 1.4 billion – and exceed the global number of youth and children under the age of 10.[2] In terms of ensuring the health of older people, the World Health Report 2013 'The role of research for universal health coverage'[3] states that the annual increase in healthcare costs caused by population ageing is estimated to be less than 1 per cent between 2010 and 2060, with a downward trend in five European countries.

Older people often face discrimination in access to employment, social services and healthcare. Ignoring this issue threatens to further marginalise older people in society. This is especially noticeable when older people are left without social support or are subjected to stereotypes about their inability to make a significant contribution to society.

Another problematic aspect is that in crisis situations, such as armed conflicts and natural disasters, older people are one of the most vulnerable groups of the population, as they face limited access to medical care, social protection and humanitarian support. This issue has become particularly relevant in the context of the war in Ukraine, where older people in the occupied territories are facing serious problems.

In addition, older people often need additional social guarantees, such as medical care, pensions, access to housing and other types of support. This becomes particularly relevant when states face economic difficulties or crises, which makes it difficult to ensure that older people have full access to social services.

The United Nations plays an important role in shaping international standards for the protection of older people's rights. UN bodies are actively working on improving conditions for older people, but most of their recommendations are in the form of resolutions or principles that are not legally binding.

Given the demographic changes, the vulnerability of older people in crises and conflicts, and the lack of a separate international convention to protect their rights, it is important to research the history of older people's rights, their legislative history and protection in the UN. An overview of UN involvement and its mechanisms will help to understand the current state of legal protection and prospects for its improvement.

2. Post-War Development of International Human Rights Standards and Their Role for Older People

After the Second World War, the world needed a universal document that would protect human rights regardless of age, gender, race or other characteristics. International

2 United Nations, Department of Economic and Social Affairs, Population Division, 2017.
3 World Health Organization, 2013.

society faced a number of problems that required increased attention, including: 1) the impossibility of ensuring freedom, and a just and general peace without recognising the inherent dignity of all members of the human family, their equal and inalienable rights; 2) the existence of barbaric acts of disregard and neglect of human rights that outrage the conscience of mankind; 3) the need to reaffirm faith in fundamental human rights, the dignity and worth of the human person and the equality of men and women; 4) the aspiration of people to create a world in which they will enjoy freedom of speech and belief and be free from fear; 5) the need for states to undertake to promote cooperation, universal respect for and observance of human rights and fundamental freedoms; 6) a common understanding of the nature of rights and freedoms; 7) the need to protect human rights by the rule of law in order to ensure that individuals are not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.[4]

The establishment of the United Nations and the signing of the UN Charter on 26 June 1945[5] resulted in the placement of human rights in the sphere of international law. All UN Member States agreed to take measures to protect human rights. In early 1946, the UN Commission on Human Rights was established, and on 10 December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights in Paris.[6]

The Universal Declaration of Human Rights is considered as the first central document in the field of human rights.[7] The first draft of the Declaration was prepared by Canadian lawyer John Peters Humphrey, whose contribution remained little known until 1988. The final structure was later developed by French jurist René Cassin, Nobel Peace Prize laureate and one of the leading figures in international human rights law. Although the Canadian government initially abstained from voting, Humphrey's draft became the basis for the Declaration adopted in 1948. There was no more revolutionary event in the theory and practice of international law or organisations than the recognition that human rights are a matter of international concern.[8]

The preamble of the Universal Declaration of Human Rights emphasises the desire of all peoples to promote respect for human rights and freedoms as a fundamental task, as well as the need to ensure their fulfilment through national and international progressive measures.[9] In her speech at the Third Session of the UN General Assembly on 10 December 1948, the Chairman of the UN Commission on Human Rights, E. Roosevelt, noted the following:

> 'in approving the Universal Declaration of Human Rights, it is of the utmost importance to bear in mind the fundamental nature of the document [...] it is

4 Кириченко and Соколенко, 2018, p. 13.
5 *Charter of the United Nations*. Signed on 26 June 1945.
6 The 1948 Universal Declaration of Human Rights.
7 Панкевич, 2019, p. 11.
8 Кузенко, 2020, p. 38.
9 The 1948 Universal Declaration of Human Rights.

> a declaration of fundamental principles of human rights and freedoms which must be approved by the General Assembly by a formal vote of its members and which is to serve as a common standard for the attainment of all peoples of all nations'.[10]

Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights. Article 2 lays the foundation for equality of rights and freedoms. It is worth noting that the content of the declared human rights can be divided into four blocks: personal human rights; civil and political rights; social, economic and cultural rights. At the same time, Article 29 of the Universal Declaration of Human Rights is devoted to the duties of the individual to society and prohibits the abuse of rights to the detriment of the purposes and principles of the United Nations.[11]

The Universal Declaration of Human Rights served as the basis for the subsequent development of international human rights treaties, which contain somewhat expanded and specified universal human rights standards. Although the Declaration does not explicitly mention the rights of older people, it provides a framework for the protection of their rights, including the right to dignity and an adequate standard of living, social security. The importance of the Universal Declaration of Human Rights lies in the fact that it enshrines the idea of the universality of human rights, which do not depend on age, by proclaiming the right to equality and freedom from discrimination.

In 1966, the International Covenant on Civil and Political Rights[12] and the International Covenant on Economic, Social and Cultural Rights[13] were adopted. Although they do not specifically address the rights of older people, their provisions provide a general legal framework for the protection of human rights that can and should be applied to this vulnerable group.

The International Covenant on Civil and Political Rights protects fundamental civil and political rights that directly affect older people.[14] Article 6 enshrines the inherent right of everyone to life. In the context of older people's rights, this provision means that older people should be protected from any conditions that may endanger their lives, including inadequate access to healthcare or other vital resources.

Article 7 of the Covenant prohibits torture, cruel, inhuman or degrading treatment or punishment, and medical or scientific research without the free consent of the person. For older people, this provision ensures that those in hospitals or care institutions are guaranteed humane treatment, free from neglect or abuse, and that no medical experiments can be carried out on them without their voluntary consent.

10 Рабінович, 2016, p. 20.
11 The 1948 Universal Declaration of Human Rights.
12 The 1966 International Covenant on Civil and Political Rights.
13 The 1966 International Covenant on Economic, Social and Cultural Rights.
14 The 1966 International Covenant on Civil and Political Rights.

Article 9, which protects the right to liberty and security of the person, also applies to older persons. In their case, it prohibits arbitrary restrictions on freedom of movement in care facilities and protects against physical or psychological abuse in the family or institutional context.

Article 26 plays a particularly important role, as it proclaims the principle of equality before the law and prohibits discrimination. Although the Covenant does not directly mention "age" as a ground, it prohibits discrimination based on 'birth or other status', which is interpreted as covering older persons. Thus, the rights and freedoms guaranteed in the Covenant must be equally available to elderly people, regardless of their age.

Among other things, the International Covenant on Civil and Political Rights ensures that older persons can vote and take an active part in public life, either directly or through freely chosen representatives. This guarantee follows primarily from Article 25, which explicitly recognises the right of every citizen to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections without unreasonable restrictions. In addition, Article 2, which prohibits discrimination, and Article 26, which establishes the principle of equality before the law, provide an indirect basis for protecting the political rights of older persons by ensuring that age cannot be used as a ground for limiting participation in political life.

The role of the International Covenant on Economic, Social and Cultural Rights is to ensure economic, social and cultural rights, which are particularly important for older persons, as many of them may face socio-economic hardship due to age restrictions or retirement age.[15] Article 9 enshrines the right to social security, which is a fundamental right for older persons, including pensions, healthcare and other social benefits necessary to ensure a life of dignity.

The International Covenant on Economic, Social and Cultural Rights also establishes the right to an adequate standard of living, which means ensuring decent living conditions for older persons, including access to food, clothing, housing and other basic needs (Article 11).

Older people require specialised medical care, and Article 12 of the International Covenant on Economic, Social and Cultural Rights ensures that they have access to healthcare services, especially in view of their age-related needs. Article 12(1) proclaims the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In the case of older persons, this entails the obligation of States Parties to take special measures that go beyond general healthcare provision. Such measures include the development of geriatric medicine, ensuring regular access to treatment for chronic diseases common in old age, availability of affordable medicines, rehabilitation and palliative care, and psychological support to address loneliness and depression. These guarantees are particularly important for the elderly, since without them the general right to health may remain only declarative, given the physical, social and economic vulnerability of this group.

15 The 1966 International Covenant on Economic, Social and Cultural Rights.

Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights ensure that older persons have access to information, cultural activities and lifelong learning, which contributes to their social integration and personal development.

It is important to note that both international covenants create basic rights, but do not always provide specific systemic protection mechanisms for older people, which becomes particularly critical in the context of an ageing population. Given the specific challenges, they face, including access to health and social services, social exclusion and economic insecurity in practice, enhanced monitoring mechanisms are needed to ensure the effective realisation of these rights.

The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979.[16] The provisions of the Convention aim to protect women's rights against all forms of discrimination based on sex, and this instrument is critical for older women. Older women often face discrimination in the socio-economic and political spheres because of their age and gender. The Convention requires states to ensure equal access to social protection, health services, education and participation in public life, regardless of age.[17] This is particularly relevant for older women, who often find themselves in conditions of economic vulnerability due to insufficient pension payments or other forms of social support.

Article 11 emphasises the importance of equal labour and social security conditions for all women, including older women, including in the event of retirement, unemployment, sickness, disability, old age and other incapacity for work, as well as the right to paid leave.

It is worth noting that older women need specialised medical care, taking into account age-related changes. To ensure this, Article 12 guarantees women's right to adequate healthcare, including access to services necessary to maintain the health of older women.

The Convention on the Elimination of All Forms of Discrimination against Women recognises the right of women to participate in public and political life on an equal basis with men. Articles 7 and 8 guarantee that older women have the right to participate in political processes, including elections, and to be represented in government.

In 1984, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[18] was adopted. The Convention plays an important role in protecting the rights of older people, as they are often in situations of increased vulnerability, especially in health and social care institutions, where they may face abuse or neglect. The Convention against Torture clearly prohibits all forms of ill-treatment, including torture, which can be both physical and psychological.[19]

16 The 1979 Convention on the Elimination of All Forms of Discrimination against Women.
17 Ibid.
18 The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
19 Ibid.

Older people, especially those suffering from dementia or other illnesses, may be vulnerable to abuse in care settings. In order to prevent any violations of the rights of older persons, the Convention against Torture requires states to establish effective mechanisms for monitoring such institutions. Article 2(2) is particularly relevant, as it stipulates that no exceptional circumstances whatsoever – whether a state of war, internal instability or any other public emergency – may be invoked as a justification of torture. This provision is vital for the elderly, since during times of conflict or crisis they are at the highest risk of neglect or abuse.

Article 4 obliges States Parties to ensure that all acts of torture are offences under their criminal law. This indirectly strengthens the protection of older persons, as abuse or degrading treatment in care institutions must be criminalised and punished. Article 6 requires States Parties to promptly arrest and secure anyone suspected of torture, which is important in cases where older persons are subjected to mistreatment by caregivers or institutional staff. Article 12 is equally significant, as it obliges States Parties to conduct a prompt and impartial investigation wherever there are reasonable grounds for believing that an act of torture has been committed. For older people, who may have limited ability to defend themselves or file complaints, such independent inquiries are often the only effective safeguard against impunity.

Articles 13 and 14 of the Convention also enshrine guarantees crucial for the elderly. They provide the right to complain, to have their case impartially examined, and to obtain redress and fair compensation. Older people who have been subjected to ill-treatment thus have the right to both protection and reparation, while the state bears the duty to ensure justice and adequate remedies for their suffering.

Based on the above, it is worth noting that both the 1979 Convention on the Elimination of All Forms of Discrimination against Women and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment play an important role in protecting the rights of older persons, in particular through combatting discrimination and protecting them from abuse. Although these conventions are not specifically targeted at older persons, their provisions provide universal rights that are important for this vulnerable group.

3. Development of Specialised International Standards for the Protection of Older Persons' Rights

Despite the fact that the above-mentioned acts are recognised as human rights standards, the international community is making efforts to develop specialised norms to protect the rights of older persons that would take into account the specifics of this category of persons. For example, in 1982, the UN General Assembly convened the first World Assembly on Ageing, which led to the development of the Vienna International Plan of Action.[20] This was the first international document on ageing adopted

20 United Nations, Department of International Economic and Social Affairs, 1982.

by the United Nations and officially published by the UN Department of International Economic and Social Affairs (New York, 1983).

The Vienna Plan contains 62 recommendations covering demographic, humanitarian and developmental aspects of ageing. These are grouped into three main areas: health and nutrition; protection of elderly consumers and housing; family, social welfare and income security. For instance, the document stresses the need for adequate nutrition programmes for older persons, the adaptation of housing to age-related needs (e.g. accessible facilities and safe environments), as well as the promotion of opportunities for employment and lifelong education. These measures illustrate the comprehensive approach of the Vienna Plan, which combined social, economic and health priorities in order to improve the living conditions of older persons worldwide.[21]

A new stage in drawing public attention to the rights of older people and improving their protection was the development of the UN Principles for Older Persons in 1991.[22] This is the first specialised international document dedicated exclusively to the rights of older people. The development of these principles reflected a change in the approach to older people, who had previously been seen only as objects of social assistance. These principles stipulate that older people have the right not only to social protection, but also to full participation in public life.

It is important to note that prior to the adoption of the UN Principles, older people were not generally considered as a separate category in need of special protection. Increasing attention to the demographic ageing of the population, especially in developed countries, has prompted the international community to review policies towards this group. The UN recognised the need to create universal standards to ensure the rights of older people, taking into account their specific needs.

At the turn of the 1980s and 1990s, the international community faced challenges related to demographic ageing. In many countries, the number of older people was increasing significantly, which raised the issue of their social protection and rights. The adoption of the Principles was the result of active discussions within various UN bodies dealing with social policy and human rights. An important step was taken during the International Decade of Older Persons (1982–1991), during which the UN focused its efforts on studying the problems of ageing and developing appropriate policy strategies.

The UN Principles define five main areas for the protection of older people:

- independence: the principle stipulates that older people should have access to livelihoods, education, employment, social care and healthcare. They have the right to live in conditions that allow them to maintain their independence and autonomy,
- participation: older persons have the right to take an active part in the political, economic, social and cultural life of society, to influence decisions

21 Предибайло, 2023, p. 28.
22 United Nations, 1991.

affecting them, and to continue to work or engage in community activities of their choice,
- care: older people have the right to healthcare, social protection and care, including support to ensure adequate living conditions, as well as the right to access services that promote their physical, mental and emotional well-being,
- self-fulfilment: the principles stipulate that older people have the right to develop their abilities, to acquire new knowledge and skills, and to benefit from cultural and educational resources,
- dignity: older persons should live in conditions that guarantee respect for their dignity, regardless of their physical or mental condition, and be protected from exploitation and abuse.

The adoption of the UN Principles for Older Persons in 1991 has had important implications for national policy-making in many countries, despite their recommendatory nature. They became the basis for the development and improvement of legislation and social protection programmes aimed at supporting older people. The Principles have become a key document in defining the rights of older people at the international level, contributing to the improvement of their situation and increasing attention to ageing issues on a global scale.

The UN Principles for Older Persons also laid the groundwork for future international initiatives, such as the Madrid International Plan of Action on Ageing.[23] The Plan was adopted during the Second World Meeting on Ageing, held under the auspices of the United Nations in Madrid in April 2002. Its purpose was to provide concrete recommendations to governments and the international community on how to adapt societies to demographic change and ensure decent living conditions for older people.[24]

Prior to the adoption of the Madrid Plan, demographic trends showed a rapid increase in the number of older people, especially in developed countries. According to forecasts, by 2050, the number of people over 60 could grow to two billion, which required a fundamental change in approaches to social policy, healthcare, the labour market and economic planning. In this context, the Madrid Plan was the first global attempt at the international level to integrate ageing issues into a sustainable development policy.

The Madrid International Plan of Action on Ageing consists of three priority areas, each of which provides specific recommendations and actions for governments and international organisations:

1. Ageing and Development:
   - integrating ageing issues into economic and social policy,
   - creating conditions for active participation of older people in economic life,

23 *The 2002 Madrid International Plan of Action on Ageing*, 2002.
24 Ibid.

- supporting the employment of older people by introducing flexible employment schemes and ensuring equal access to the labour market,
- ensuring social protection of the elderly and increasing pension payments,
- integrating ageing issues into sustainable development policy and poverty reduction.
- recognition of the contribution of older people to the social and economic development of society.

2. Advancing Health and Well-Being in Old Age:
- ensuring access to medical care and health services that meet the needs of older people,
- developing long-term care systems that include support at home, in communities, and in specialised institutions,
- promoting healthy ageing through the promotion of active lifestyles, good nutrition and disease prevention,
- supporting the mental health of older adults and preventing age discrimination in healthcare.

3. Ensuring Enabling and Supportive Environments:
- promoting an environment that supports the independence and autonomy of older people,
- developing inclusive communities that take into account the needs of older people, including access to transport, housing, and public services,
- combatting age discrimination and promoting positive attitudes toward aging,
- supporting families caring for the elderly and developing social support programmes.

One of the key aspects of the Madrid Plan of Action is the call for governments to develop national strategies and action plans on ageing that are tailored to the specific conditions and needs of each country. The UN and its regional commissions monitor the implementation of the plan, supporting countries in developing policies and ensuring the rights of older people. The plan also calls for active collaboration between governments, non-governmental organisations, the private sector, and academia to ensure its effective implementation.

It is worth noting that the Madrid Plan is primarily a global framework strategy with which states have committed themselves to align their work and actions at the national level. The choice and implementation of these actions depend heavily on the capabilities of a particular country.[25] The Madrid Plan holds particular importance for countries experiencing rapid demographic ageing but do not yet have developed social protection systems. The governments of these countries, in particular in Eastern

25 Мартинова, 2017, p. 92.

Europe, Latin America and Asia, are actively using the plan's recommendations to reform their healthcare systems, pension funds, and social support programmes.

Despite the fact that the Madrid International Plan of Action was an important step in recognising the rights of older people at the international level, its implementation faces numerous challenges. Key issues remain, such as age discrimination, limited access to medical services, and insufficient pensions and social programmes. At the same time, the Action Plan has become the basis for future discussions on the need to develop a global UN convention on the rights of older persons, which would provide clearer legal obligations for countries to protect the rights of older persons.

The Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly in 2006, is also worth mentioning in the context of protecting the rights of older people.[26] The Convention emphasises equality, respect for dignity, and non-discrimination as key principles for ensuring the rights of people facing various forms of disability, especially in older age. The Convention attaches particular importance to the challenges faced by older people when they are affected by disabilities or chronic diseases, which often cause functional limitations. Through this document, the international community recognises that older people require special legal protection, as the disabilities that accompany ageing can impair access to social, health and economic rights.

Article 3 of the Convention recognises the general principles of independence, autonomy, and the right of persons with disabilities to make decisions about their own lives. Although older people are not directly mentioned in this provision, its guarantees can be applied to them, since many elderly persons experience disabilities in older age. This approach is particularly important, as society often perceives older people as dependent on outside help, while the Convention emphasises the need to respect their autonomy and self-determination.

The principle of non-discrimination, enshrined in Article 5, is also of crucial importance. While the Convention does not explicitly mention older people in this article, its guarantees extend to them indirectly, as they may face multiple discrimination on the basis of both age and disability. Thus, Article 5 can be interpreted as requiring States Parties to ensure equal access for older persons with disabilities to healthcare, education, employment and social protection.

The provisions of Article 9 of the Convention call for accessibility of the physical environment, transport, information and communications for persons with disabilities. For older persons, this means access to public places, buildings, services and information, which is essential for their social integration and full participation in society. Accessibility also refers to healthcare services and social protection programmes, which are often difficult for older persons with disabilities to access due to barriers or lack of appropriate facilities.

Article 19 enshrines the right of persons with disabilities to live in the community and to have access to services that facilitate their full inclusion in society.

26 The 2006 Convention on the Rights of Persons with Disabilities.

For older persons who require assistance due to disability or physical limitations, this provision emphasises the importance of establishing social support programmes that allow them to remain at home or in the community rather than in institutional settings (nursing homes). The Convention thus encourages the development of long-term home-based care, which ensures better respect for human rights.

Older persons with disabilities are a particularly vulnerable group, often falling victim to exploitation or abuse. In Article 16, the Convention establishes the obligation of states to take effective measures to prevent all forms of violence, abuse and exploitation against persons with disabilities, especially in institutional settings, and both within and outside the home. For older people, this means additional protection from abuse by carers, family members or social service workers.

Finally, it should be noted that the Convention makes explicit reference to older persons in two provisions. Article 25(b) guarantees the right to health and obliges States Parties to provide health services needed by persons with disabilities, including those resulting from ageing. Article 28(b) recognises the right to an adequate standard of living and social protection, with particular attention to age-related needs such as appropriate housing, access to social services and income security. These provisions demonstrate that the Convention not only applies indirectly to older persons through its general principles but also directly addresses their specific vulnerabilities in the context of ageing and disability.

The Convention also emphasises the right of persons with disabilities to participate in cultural life, sports and recreational activities. For older people, this means being able to engage in activities and participate in cultural and social events, which contributes to their social integration and mental health.

On 27 September 2013, the Human Rights Council adopted resolution 24/20, establishing the mandate of the Independent Expert on the enjoyment of all human rights by older persons.[27] It was most recently renewed by resolution 51/4 in 2022.[28] According to resolution 24/20, the Independent Expert is mandated to assess the implementation of international treaties on older persons by parties. The Independent Expert is asked to identify both good practices and gaps in the implementation of existing laws relating to the promotion and protection of the rights of older persons. Pursuant to this mandate, on 12 November 2015, the Independent Expert sent a request to states and stakeholders to identify and collect information on good and best practices. A total of 74 responses were received: 40 from states, 14 from national human rights institutions, 19 from non-governmental organisations and 1 from an intergovernmental organisation.[29]

It is worth noting that the activities of the Independent Expert are effective in drawing attention to the problems of older people and formulating recommendations for states. However, the mandate of the Independent Expert is advisory in nature and

27 Human Rights Council, 2013.
28 Human Rights Council, 2022.
29 Грень, 2020, p. 18.

does not provide for strict enforcement mechanisms to implement its recommendations. This limits the possibility of influencing real changes in state policy. Therefore, to achieve greater results, it is necessary to expand its mandate, develop a specialised international agreement on the rights of older persons and provide better funding to increase the reach and impact of its activities.

4. Protection of the Rights of Older People in the Context of Armed Conflict: Ukraine and International Efforts

Despite the fact that older persons are protected by international humanitarian law and international human rights law, their needs and protection are often ignored by the parties to the conflict during armed conflict, as evidenced by numerous cases documented by the media, human rights organisations, etc. Older people are the most vulnerable in armed conflicts for a number of reasons: limited mobility, poor health, unwillingness to evacuate to protect family property, etc.[30]

To date, there are no known cases filed by Ukraine with the UN bodies specifically related to the protection of the rights of older persons. However, the issue of protecting the rights of older people has been raised by Ukraine in various contexts, especially in connection with the impact of the armed conflict on vulnerable groups, including older people.

The Universal Periodic Review, established by the UN Human Rights Council, plays a key role in protecting the rights of older people by facilitating the monitoring and evaluation of the human rights situation in each UN Member State. This UN mechanism allows countries to regularly submit reports on measures taken to improve the situation in various areas of human rights and receive recommendations from other countries.[31] During the Universal Periodic Review, countries are obliged to report on the status of the rights of older persons, including social protection, healthcare and decent living conditions. The reports pay special attention to the challenges faced by older people in conflict and displacement, which is relevant for Ukraine in the context of war.

During the third cycle of the Universal Periodic Review, Ukraine drew attention to the vulnerable situation of older people, especially in conflict zones. The Ukrainian state emphasised that it is important to ensure equal access to social protection and medical care for this category of the population, in particular for internally displaced persons, a significant number of whom are also elderly. These issues have been mentioned in reports highlighting the deteriorating living conditions, limited access to healthcare and difficult socio-economic circumstances for the older population, especially in the context of Russia's armed aggression against Ukraine.[32]

30 Предибайло, 2022, p. 438.
31 United Nations Human Rights Council, no date.
32 Universal Periodic Review Preparation Coalition, 2017.

In a 2020 report to the Committee on Economic, Social and Cultural Rights, Ukraine noted that internally displaced older people who have lost their homes or live in a conflict zone face problems in obtaining pensions, accessing health services and social programmes. The Ukrainian delegation explained that of the 1.4 million internally displaced persons currently registered, about 700,000 were pensioners. The government had streamlined the conditions for internally displaced persons to receive pensions. Individuals who had permanent residency in the government-controlled territory could receive a pension payment even if they did not have a certificate.[33] In addition to difficulties in obtaining pensions, internally displaced older people also faced limited access to medical services. In the conflict areas, medical facilities were often destroyed or inaccessible due to the fighting. Older people who had chronic illnesses or needed regular medical supervision had difficulty accessing the medical care they needed. In many cases, they were unable to reach medical facilities due to physical limitations or lack of transport. In addition to pensions and medical services, internally displaced older people faced problems accessing other social programmes that were supposed to support their livelihoods. These programmes often require registration and documents, which many of them lost during displacement. In the context of economic instability and social exclusion, older people were at an increased risk of poverty and social vulnerability.

The reports of the Office of the United Nations High Commissioner for Human Rights for 2022 and 2023 drew particular attention to the difficult situation of older persons affected by the armed conflict in eastern Ukraine and the annexation of Crimea.[34] Older people are one of the most vulnerable categories of the population facing numerous problems, including:

- limited access to healthcare: as a result of the conflict and occupation, some medical facilities have been damaged or made inaccessible. Older people who have chronic illnesses or require regular medical supervision have experienced difficulties in obtaining the care they need. Interruptions in access to medicines and medical services have aggravated their health conditions;
- social protection: many older people in the occupied territories and conflict zones are unable to receive pensions and other social benefits. As a result of displacement and changes in administrative governance in these areas, they are often left without basic financial support;
- humanitarian assistance: due to the hostilities, humanitarian access to certain areas is limited, which affects the ability to provide older people with food, hygiene products and other necessary resources. The Office of the United Nations High Commissioner for Human Rights notes that older people often find themselves in isolation, without family support, which worsens their situation;

33 Committee on Economic, Social and Cultural Rights, 2020.
34 Office of the High Commissioner for Human Rights, 2023.

- displacement and housing: older people forced to leave their homes due to the hostilities face challenges in finding accommodation. Rental prices in safe regions have risen significantly, putting additional financial burdens on pensioners. Many of them end up in temporary shelters or are forced to stay in dangerous areas.

In addition, before the war, many older people with disabilities lived in apartments or houses that were adjusted to their physical needs, installed with e.g. ramps or handrails. Older people with disabilities relied on formal and informal networks of family members, friends, neighbours, paid care workers or social workers to provide them with the support they needed at home. Displacement shattered those support systems.[35]

It is worth noting that despite the absence of a significant number of known cases specifically filed by Ukraine with the UN bodies on the rights of older persons, this issue remains important in the international context. This category of the population is in a very vulnerable position, facing numerous challenges, such as limited access to healthcare, social benefits and humanitarian assistance. The state needs to continue to intensify its efforts in international and national structures to ensure the protection of the rights of older people, during military aggression as well.

5. The Need to Develop a Specialised International Convention on the Rights of Older People: Social, Legal and Economic Challenges

The development of a separate international convention on the protection of the rights of older persons is extremely important for a number of social, legal and economic reasons. Older people have specific needs that are not fully covered by existing international legal instruments. Despite the existence of general international human rights instruments, such as the Universal Declaration of Human Rights and other thematic conventions (e.g. the Convention on the Rights of Persons with Disabilities), older people face challenges that require special protection.

The first problematic aspect is the insufficient coverage of specific problems of older people, such as: access to healthcare and social services, taking into account age-related changes; problems with receiving pensions, especially for internally displaced persons and those living in conflict zones; ageism (age discrimination) in the labour market, social life and access to resources; the need to maintain an independent and dignified life. Existing conventions are broad and do not provide targeted protection for older people. For example, the rights to healthcare and social assistance are general rights, but they do not take into account age-related challenges, such as the need for access to specific healthcare services for older persons or special assistance for those suffering from chronic diseases.

35 Amnesty International, 2022.

Secondly, there is no specific attention paid to older people in the existing conventions. There are specific conventions, such as the Convention on the Rights of Persons with Disabilities or the Convention on the Elimination of All Forms of Discrimination against Women, that protect certain groups of people. However, older people as a separate vulnerable group remain out of focus. Their problems are only partially covered in the context of other categories: disability, gender or social security. Without a specialised convention, states have no clear obligations to protect the rights of older persons. Existing obligations are partial and indirect, and therefore do not provide a comprehensive approach to ageing and maintaining a decent standard of living in older age.

The third problematic aspect is uneven implementation at the national level. While general international human rights instruments are binding, the implementation of older people's rights at the national level is often insufficient. States may not take adequate measures to address the specific challenges faced by older persons because there are no specific legal obligations.

Fourthly, older people are vulnerable in conflict situations. Conflicts, natural disasters and humanitarian crises create additional risks for older people. They are often left behind in the distribution of humanitarian aid, and due to physical limitations, cannot evacuate or receive the necessary assistance. Existing conventions do not provide sufficient protection in such situations, as the specific needs of older people are not prioritised.

In view of the above, a special convention on the rights of older persons would help to bridge these gaps by creating clear legal obligations for states to ensure their rights and protection, especially in the context of demographic change, conflict situations and discrimination.

6. Final Thoughts

The study of the history of elderly people's rights and their protection within the UN framework confirms that demographic ageing is not only a social but also a political and legal challenge of global importance. The increase in the number of older persons worldwide has made their protection an urgent task for both states and international organisations. Although the fundamental human rights framework established by the UN Charter, the Universal Declaration of Human Rights and subsequent international covenants ensures the principle of equality, in practice these instruments do not always reflect the specific needs of elderly populations. Older persons face unique risks linked to health, economic security, social exclusion and discrimination, which require specialised legal responses.

A review of historical development shows that while older persons were initially included only indirectly within the scope of general human rights instruments, over time the international community recognised the necessity of targeted standards. The adoption of the Vienna International Plan of Action (1982), the UN Principles for

Older Persons (1991) and the Madrid International Plan of Action on Ageing (2002) marked turning points in shifting perception: from seeing elderly people as passive recipients of assistance to recognising them as active rights-holders entitled to independence, participation and dignity. These documents contributed to shaping policies worldwide, but their recommendatory character significantly limited their practical effect.

In the present context, elderly people continue to be among the most vulnerable groups, especially in situations of armed conflict, natural disasters and humanitarian crises. The experience of Ukraine has clearly demonstrated that older persons suffer from restricted access to pensions, health services, medicines, housing and humanitarian aid. Age discrimination is exacerbated under conditions of displacement and social instability, while the loss of family support networks places older persons at risk of isolation and poverty. Reports of the UN High Commissioner for Human Rights and the activity of the Independent Expert on the enjoyment of all human rights by older persons highlight these systemic problems, but without binding obligations, states remaining free to ignore recommendations.

The absence of a specialised UN convention on the rights of older persons remains a fundamental gap in international law, as existing treaties address only certain aspects (gender, disability, protection from torture) and leave older people without direct and consistent safeguards. This fragmentation weakens state obligations and hinders effective protection. A comprehensive UN Convention on the Rights of Older Persons would consolidate existing principles and establish binding standards tailored to the challenges of ageing societies, ensuring access to healthcare and social services, combatting ageism, and guaranteeing full participation in political, social and cultural life. Such an instrument is essential for strengthening accountability, eliminating discrimination, and recognising older persons as equal members of society, entitled to dignity, independence and security, thereby enabling the international community to respond to demographic change and ensure social justice for present and future generations.

Bibliography

Literature

Багній, М.С., Коваль, О.Я. [Bahnii, M.S., Koval, O.Ia.] (2019) '*Збірка 'Захист прав людей поважного віку: успішні історії*'' [Zbirka 'Zakhyst prav liudei povazhnoho viku: uspishni istorii']. Львів: Громадська організація 'Суспільство і право' [Lviv: Hromadska orhanizatsiia 'Suspilstvo i pravo'].

Грень, Н.М. [Hren, N.M.] (2020) 'Міжнародні інституційні органи попередження та протидії дискримінації осіб літнього віку' [Mizhnarodni instytutsiini orhany poperedzhennia ta protydii dyskryminatsii osib litnoho viku], *Право і суспільство* [Pravo i suspilstvo], 6(2), pp. 16–19; https://doi.org/10.32842/2078-3736/2020.6.2.1.3.

Кириченко, В.М., Соколенко, Ю.М. [Kyrychenko, V.M., Sokolenko, Yu.M.] (2018) 'Загальна декларація прав людини: історико-правові аспекти (до 70-річчя прийняття)' [Zahalna deklaratsiia prav liudyny: istoryko-pravovi aspekty (do 70-richchia pryiniattia)], *Науковий вісник Міжнародного гуманітарного університету. Серія: Юриспруденція* [Naukovyi visnyk Mizhnarodnoho humanitarnoho universytetu. Seriia: Yurysprudentsiia], 36(2), pp. 12–15 [Online]. Available at: https://vestnik-pravo.mgu.od.ua/archive/juspradenc36/part_2/5.pdf (Accessed: 27 August 2024).

Кузенко, У.І. [Kuzenko, U.I.] (2020) 'Загальна декларація прав людини як джерело універсальних міжнародно-правових стандартів прав людини' [Zagal´na deklaracija prav ljudini jak džerelo universal´nih mižnarodno-pravovih standartiv prav ljudini], *Науково-інформаційний вісник Івано-Франківського університету права імені Короля Данила Галицького* [Naukovo-informacijnij visnik Ivano-Frankivs´kogo universitetu prava imeni Korolja Danila Galic´kogo], 9(21), pp. 36–42; https://doi.org/10.33098/2078-6670.2020.9.21.36-42.

Мартинова, Л.Б. [Martynova, L.B.] (2017) 'Державна політика у сфері захисту літніх людей в Україні' [Derzhavna polityka u sferi zakhystu litnikh liudei v Ukraini], *Вісник Хмельницького національного університету* [Visnyk Khmelnytskoho natsionalnoho universytetu], 1, pp. 91–94 [Online]. Available at: https://journals.khnu.km.ua/vestnik/pdf/ekon/pdfbase/2017/2017_1/jrn/pdf/21.pdf (Accessed: 27 August 2024).

Панкевич, І.М. [Pankevych, I.M.] (2019) 'Історико-правові аспекти становлення інституту прав людини' [Istoryko-pravovi aspekty stanovlennia instytutu prav liudyny], *Загальна декларація прав людини ООН 1948 року: стан реалізації в Україні: матеріали круглого столу* [Zahalna deklaratsiia prav liudyny OON 1948 roku: stan realizatsii v Ukraini: materialy kruhloho stolu]. Івано-Франківськ: Прикарпатський національний університет імені Василя Стефаника [Ivano-Frankivsk: Prykarpatskyi natsionalnyi universytet imeni Vasylia Stefanyka], pp. 9–13.

Предибайло, А.І. [Predybailo, A.I.] (2022) 'Міжнародний захист осіб похилого віку під час збройних конфліктів' [Mižnarodnij zahist osib pohilogo viku pid čas zbrojnih konfliktiv], *Аналітично-порівняльне правознавство* [Analitično-porivnjal´ne pravoznavstvo], 5, pp. 435–438; https://doi.org/10.24144/2788-6018.2022.05.80.

Предибайло, А.І. [Predybailo, A.I.] (2023) *Міжнародно-правовий захист осіб похилого віку* [Mizhnarodno-pravovyi zakhyst osib pokhyloho viku]: дисертація на здобуття ступеня доктора філософії за спеціальністю 293 «Міжнародне право» [dysertatsiia na zdobuttia stupenia doktora filosofii za spetsialnistiu 293 «Mizhnarodne pravo»]. Харків: Харківський національний університет імені В.Н. Каразіна Міністерства освіти і науки України [Kharkiv: Kharkivskyi natsionalnyi universytet imeni V.N. Karazina Ministerstva osvity i nauky Ukrainy].

Рабінович, П.М. [Rabinovych, P.M.] (2016) 'Міжнародні стандарти прав людини: властивості, загальне поняття, класифікація' [Mizhnarodni standarty prav liudyny: vlastyvosti, zahalne poniattia, klasyfikatsiia], *Вісник Національної академії правових наук України* [Visnyk Natsionalnoi akademii pravovykh nauk Ukrainy], 1(84), pp. 19–29 [Online]. Available at: https://visnyk.kh.ua/uk/journals/visnik-naprnu-1-2016r/mizhnarodni-standarti-prav-lyudini-vlastivosti-zagalne-ponyattya-klasifikatsiya (Accessed: 27 August 2024).

Legal Sources

Charter of the United Nations. Signed on 26 June 1945 [Online]. Available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf (Accessed: 10 June 2024).

The 1948 Universal Declaration of Human Rights [Online]. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (Accessed: 10 June 2024).

The 1966 International Covenant on Civil and Political Rights [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (Accessed: 15 July 2024).

The 1966 International Covenant on Economic, Social and Cultural Rights [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (Accessed: 15 July 2024).

The 1979 Convention on the Elimination of All Forms of Discrimination against Women [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women (Accessed: 18 July 2024).

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading (Accessed: 25 July 2024).

The 2006 Convention on the Rights of Persons with Disabilities [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities (Accessed: 18 August 2024).

Online Sources

The 2002 Madrid International Plan of Action on Ageing (2002) [Online]. Available at: https://social.un.org/ageing-working-group/documents/mipaa-en.pdf (Accessed: 7 August 2024).

Amnesty International (2022) *Investigation: Older people's experience of war in Ukraine* [Online]. Available at: https://www.amnesty.org/en/latest/research/2022/12/older-people-ukraine-war-displacement-and-access-to-housing/ (Accessed: 27 August 2024).

Committee on Economic, Social and Cultural Rights (2020) *Consequences of internal displacement at the centre of Committee on Economic, Social and Cultural Rights' dialogue with Ukraine* [Online]. Available at: https://www.ohchr.org/en/statements/2020/02/consequences-internal-displacement-centre-committee-economic-social-and-cultural (Accessed: 10 September 2024).

Human Rights Council (2013) *The human rights of older persons, Resolution 24/20. A/HRC/RES/24/20*. 27 September 2013. [Online]. Available at: https://undocs.org/A/HRC/RES/24/20 (Accessed: 26 August 2024).

Human Rights Council (2022) *The human rights of older persons, Resolution 51/4. A/HRC/RES/51/4*. 6 October 2022. [Online]. Available at: https://undocs.org/A/HRC/RES/51/4 (Accessed: 26 August 2024).

Office of the High Commissioner for Human Rights (2023) *Briefing Paper 'The human rights situation of older persons in Ukraine in the context of the armed attack by the Russian Federation'* [Online]. Available at: https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/2023-HRMMU-Briefing-Note-Older-Persons-ENG.pdf (Accessed: 23 July 2024).

Office of the High Commissioner for Human Rights (no date) Independent Expert on the enjoyment of all human rights by older persons [Online]. Available at: https://www.ohchr.org/en/special-procedures/ie-older-persons (Accessed: 26 August 2024).

United Nations (1991) *United Nations Principles for Older Persons*. Adopted by General Assembly resolution 46/91 of 16 December 1991 [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles-older-persons (Accessed: 2 August 2024).

United Nations Human Rights Council (no date) *The Universal Periodic Review* [Online]. Available at: https://www.ohchr.org/en/hr-bodies/upr/upr-home (Accessed: 3 September 2024).

United Nations, Department of Economic and Social Affairs, Population Division. (2017) *World Population Ageing 2017 – Highlights (ST/ESA/SER.A/397)* [Online]. Available at: https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Highlights.pdf (Accessed: 1 July 2024).

United Nations, Department of International Economic and Social Affairs (1982) *Vienna International Plan of Action on Ageing*. New York: United Nations [Online]. Available at: https://www.un.org/esa/socdev/ageing/documents/Resources/VIPEE-English.pdf (Accessed: 3 September 2024).

Universal Periodic Review Preparation Coalition (2017) *Universal Periodic Review: An Alternative Dimension (2017). Third cycle of UPR, Ukraine. Compilation of alternative reports of civil society organizations* [Online]. Available at: https://www.vplyv.org.ua/archives/537 (Accessed: 5 September 2024).

World Health Organization (2013) *The World Health Report 2013 'The Role of Research for Universal Health Coverage'* [Online]. Available at: https://hsgm.saglik.gov.tr/depo/birimler/saglikli-beslenme-ve-hareketli-hayat-db/Dokumanlar/Ingilizce_Yayinlar/Research_for_Universal_Health_Coverage.pdf (Accessed: 3 July 2024).

| Chapter 20 |

The Rights of Older Persons in the Jurisprudence of the European Court of Human Rights

Nato Gugava

ABSTRACT

The protection of the rights of the elderly has been actively discussed internationally in the last few decades. Despite numerous attempts and discussions, no agreement has been reached between the States regarding the adoption of a binding international act within the framework of the United Nations. Regardless of the fact that there are conventions on the legal status of women, children, ethnic minorities, and persons with disabilities regarding individual subjects, it is still not possible to adopt a binding international act to protect the problems faced by the elderly and their rights.

Taking into account the mentioned challenges and the fact that the protection of the rights of elderly people is a serious problem faced by the most of the States, including those on the European continent, it is extremely important to generalise the practice of the European Court of Human Rights in this direction, since it is the institution that establishes guidelines and mandatory standards for States. The Convention on Human Rights and Fundamental Freedoms does not outline elderly people as beneficiaries and subjects of the Convention; however, the European Court of Human Rights considers a number of applications from elderly people regarding the violation of their rights, in relation to such rights as right to life, prohibition of abuse, right to respect for private life, and right to a fair trial. Accordingly, in this chapter, we will discuss cases of the European Court of Human Rights in which the decisions made create a precedent law and a guidance standard not only for the State participating in the dispute but for other States as well.

KEYWORDS

rights of the elderly, health of the elderly, supportive environment, protection from violence, right to fair trial, decisions of the European Court of Human Rights

1. Introduction

The population is aging at a rapid pace worldwide. Accordingly, the rapid increase in the number of elderly people makes it imperative for States to pay even more attention to promoting their health, since older people, almost everywhere, have to deal with a number of challenges in terms of dignified and healthy aging. While exercising human rights, problems are being constantly faced, including violence,

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social protection, food and housing, the right to work and access to the labor market, equality, justice, education, access to health support, and long-term palliative care.[1] Therefore, in social, constitutional and democratic States, where respect for human dignity and its inviolability is a main constitutional principle, the State has a positive obligation to introduce all the necessary measures that will serve the elderly people in being full and dignified members of the society.

It should be noted that the Convention on the Protection of Human Rights and Fundamental Freedoms[2] and the European Court of Human Rights are important mechanisms for the protection of the rights of the elderly people, which ensure the member States of the Council of Europe to fulfill their obligations under the Convention and its protocols. However, the Convention does not regulate the rights of the elderly people separately, according to judicial practice. Considering their special needs, the rights and freedoms protected by the Convention apply to them differently and give rise to specific obligations towards the State. Taking into account the fact that the European mechanisms for human rights protection protect such rights regardless of the individual's age, they are therefore relevant for determining the legal status of the elderly people. That is why, decisions made by the European Court of Human Rights on cases against elderly people create precedent law for State as well. Accordingly, the relevant decisions made against central and eastern European countries which create guidance standard for States, will be discussed in this chapter.

2. Provision of Health and Welfare for Elderly People

Providing healthcare is not only a premise for individual well-being, but well-performing health care system and access to it is a prerequisite for community well-being, development, and affluence creation. Healthy life-style is each individual's responsibility. However, the State is obliged to create an environment that enables individuals to maintain good health and well-being even in old age. For humanitarian and economic purposes, it is vital for elderly people to have access to preventive, medical treatment and rehabilitation services. The Action Plan of Madrid highlights the importance of development of geriatric medical treatment.[3]

The right to health care is a fundamental human right that guarantees individuals access to timely, acceptable, and affordable health services of appropriate quality. It is a critical component of the broader right to health, which the World Health Organisation (WHO) defines as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'[4] This right is enshrined in multiple

1 Human Rights Council, 2021.
2 Council of Europe, 1950.
3 *Political Declaration and Madrid International Plan of Action on Ageing*, 2002, pp. 8–12.
4 World Health Organisation, 1948.

international legal instruments, reflecting a global consensus on the importance of health for human dignity and development.

The foundation of the right to health care is laid out in the Universal Declaration of Human Rights, which states that 'everyone has the right to a standard of living adequate for the health and well-being,' including medical care (Article 25).[5] This was further codified in the International Covenant on Economic, Social and Cultural Rights, Article 12 of which explicitly recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[6]

The Convention on the Rights of Persons with Disabilities emphasises accessibility and non-discrimination in health services for people with disabilities, reinforcing the inclusive nature of the right to health.[7] Additionally, the Convention on the Elimination of All Forms of Discrimination Against Women recognises women's right to health, highlighting reproductive and sexual health care.[8] The Convention on the Rights of the Child also guarantees children's right to the highest attainable standard of health.[9]

At the regional level, the European Social Charter explicitly addresses health and social protection, particularly for vulnerable groups such as the elderly.[10] Meanwhile the African Charter on Human and Peoples' Rights emphasises the right to health and medical care.[11]

Therefore, scholars define the right to healthcare as encompassing availability, accessibility, acceptability, and quality of health services – the AAAQ framework – as outlined by the United Nations Committee on Economic, Social, and Cultural Rights.[12] This includes preventive, curative, palliative, and rehabilitative services.[13] The right also entails underlying determinants of health such as safe water, sanitation, adequate nutrition, and housing.[14]

Several experts argue that the State has a core obligation to ensure equitable access to health services without discrimination, especially for vulnerable populations such as the elderly, children, persons with disabilities, and marginalised groups.[15] Moreover, the importance of geriatric care is increasingly emphasised in global demographic changes.[16]

A growing body of literature connects the right to health care to broader societal goals, emphasising that good health is a prerequisite for sustainable development,

5 United Nations, 1948, Article 25.
6 United Nations, 1966, Article 12.
7 United Nations, 2006, Article 25.
8 United Nations, 1979.
9 United Nations, 1989.
10 Council of Europe, 1996.
11 African Union, 1981.
12 UN Committee on Economic, Social and Cultural Rights, 2000.
13 Gostin, Mann and Gostin 1994; Freedman et al., 2005.
14 Sakellariou and Rotarou, 2017.
15 Yamin, 2008; Forman and Ooms, 2015.
16 Kendig et al., 2016; Beard et al., 2016.

economic prosperity, and social stability.[17] The United Nations' Madrid International Plan of Action on Ageing underscores the importance of developing geriatric medical care to meet the needs of an ageing population.[18]

It should be also noted that, in interpreting Court decisions concerning the right to health care, it is critical to ground analyses in international legal standards, complemented by scientific literature and expert opinion on health systems, human rights law, and social determinants of health.[19] Such a multidisciplinary approach ensures comprehensive understanding and robust reasoning.

Elderly people need access to health and other care services tailored to their specific needs. The European Court of Human Rights examines the protection of the rights of the elderly people being under residential and institutional care from the perspective of the right to life. That is, the Court explains that Article 2 of the Convention (right to life) imposes positive obligations upon States to take relevant measures in order to protect lives of those under its jurisdiction. Such principle applies to public healthcare field and according to the Court's interpretation, it obliges the States to create regulations for both public and private hospitals as well as residential institutions; moreover, to take proper measures in order to protect patients' lives and 'create effective independent system, both in public and private sector, which helps to determine the causes of patient's death and reveal a person responsible for it.' Along with residential and institutional care, an appropriate care at home should also be available for elderly people who desire to live in familiar environment. The European Court of Human Rights considers these issues in many of its decisions. One of the cases regarding the above-mentioned is the case "*McDonald v. the United Kingdom*."[20] The applicant, Ms. McDonald, who was born in 1943, London, complained about a reduction of night-time care by a local authority of the amount allocated for her weekly care; the applicant complained under Article 8 of the Convention that the withdrawal of night-time care disproportionately interfered with her right to respect for her private life.[21] Ms McDonald was unable to provide herself with night-time toileting independently, which is why she was provided with seventy hours per week of night-time care.[22] Later, local authority decided to reduce her weekly care and provide incontinence pads, as well as reduce the amount allocated for the applicant's weekly care from GBP 703 to GBP 450. The applicant alleged that the decision to reduce her care allowance on the basis that she could use incontinence pads at night, even though she was not incontinent, had caused an unjustifiable and disproportionate interference with her right to respect for private life, and had exposed her to considerable indignity which would amount to an interference with her right to respect for her private life in breach of Article 8 of the Convention. In 2008, the applicant sought a permission to apply for

17 Sen, 1999; Marmot, 2005; World Health Organisation, 2008.
18 *Political Declaration and Madrid International Plan of Action on Ageing*, 2002.
19 Forman and Ooms, 2015; Gostin and Sridhar, 2014, pp. 1732–1740.
20 Case of *McDonald v. The United Kingdom*, Judgment, Strasbourg, 20 August, 2014.
21 Ibid., para. 35.
22 Ibid., para. 7.

judicial review as the local authority unreasonably and unlawfully failed to satisfy her special needs, but she was refused. Later, she applied to the Court of Appeal for permission to apply for permission to appeal against the refusal of permission to apply for judicial review on the following grounds: first, the reduction in funding was inconsistent regarding of her night-time needs; second, that the reduction in funding breached her rights under Article 8 of the Convention; and third, by reducing her funding the local authority had failed to comply with its obligations under the Disability Discrimination Act 1995. With regard to the complaint under Article 8 of the Convention, the Court of Appeal found that the conditions for finding a violation had not been established; however, the applicant was granted permission to appeal to the Supreme Court, which she did. The Supreme Court agreed with the Court of Appeal that there had been neither interference with the applicant's rights under Article 8 of the Convention nor failure to comply with the Disability Discrimination Act 1995.[23]

As Ms McDonald, in her point of view, could not find any justice by applying to local courts, she applied to the European Court of Human Rights. In her appeal, the applicant complained under Article 8 of the Convention, she submitted that by the decision which was made by the local courts to withdraw her night-time care, violated her right to respect for her private life. According to the applicant's complaint, the aspects of Article 8 of the Convention relating to personal and psychological integrity were all in play, and the interference negatively affected the applicant's ability to maintain an independent life at home, as well as with her partner. Moreover, the situation as a whole exposed her to considerable indignity and placed significant caring responsibilities on her partner, who was unable to tale a proper care of Ms McDonald.[24] In response, the Government submitted that there had been no violation of the Article 8 of the Convention. The Government stated that there had been no interference with the applicant's rights under Article 8 of the Convention. They accepted that dignity and personal autonomy were matters that fell within the ambit of Article 8, but they also argued that the care provided to the applicant during the relevant period had respected the applicant's dignity and private life even if it was not the care package that she had wanted. Moreover, any interference was in accordance with the law and was necessary and proportionate in the interests of other care-users and the economic well-being of the State given the substantial demand for adult care services. The Government therefore argued that to provide the applicant with the proper support in the form of night-time care was not under any positive obligations. To the extent of the obligation that it was under a duty by virtue of Article 8 to provide her with a service which enabled her to live with dignity, had been met by the care package provided by the local authority.[25]

Considering all the above-mentioned facts, the European Court of Human Rights submitted that there had been a violation of Article 8 of the Convention. One of the

23 Ibid., paras. 13–24.
24 Ibid., para. 38.
25 Ibid., paras. 43–45.

questions that arose from the Court was whether the facts of the case fell within the scope of the concept of "respect" for "private life" in Article 8 of the Convention, as the notion itself encompassed a person's physical and psychological integrity, the right to "personal development", and the concept of personal autonomy. In practice, in many of other cases, the Court had held that Article 8 was relevant to such complaints that were about public funding to support the mobility as well as quality of disabled applicants. In the present case, the Court agreed with the general assessment of the applicant's situation and considered that the particular measure complained by the applicant had an impact on her, which reduced the level of her healthcare and obstructed the enjoyment of her right to respect for private life as guaranteed under Article 8 § 1 of the Convention. In many other cases, the Court considered issues related to funding for care and medical treatment which fell within the field of obligations as the applicants complained about a lack of action by the respondent States. In such cases, the States refused to provide funding for medical equipment or treatment. In this regard, in the present case, even though the local authority had initially provided the applicant with night-time care, she expressed dissatisfaction with not a lack of action but the decision made by the local authority to reduce the care package that had been available to her. Because of the above-mentioned factors, the Court prepared to approach the present case as one that involved an interference with the applicant's right to respect her private life. Such interference would have been in breach of Article 8 of the Convention unless it could have been justified under paragraph 2 of the same Article as being "in accordance with the law", providing legitimate aims being "necessary in democratic society" in order to achieve aims concerned. It is noteworthy that the Supreme Court held that the local authority violated its statutory duty to provide care to the applicant according to its own assessment of her needs between 21 November 2008 – the date when the local authority withdrew night-time care – and 4 November 2009 – the date of the authority's first care plan review. According to the above-mentioned, the Government accepted that any interference with the applicant's right to her private life was not "in accordance with the law" as required by paragraph 2 of Article 8 of the Convention. On this ground, the Court found that from 21 November 2008 to 4 November 2009 the interference with the applicant's right to respect for her private life was in breach of Article 8 of the Convention. However, from 4 November 2009 onward, the interference was "in accordance with the law", so the Court considered that the interference pursued a legitimate aim, that was the economic well-being of the State and other care-users' interests. Moreover, the refusal to provide the applicant with a night-time carer to help her was "necessary in a democratic society" for the purposes of paragraph 2 of Article 8 of the Convention.[26] To conclude, based on the aforementioned considerations, the Court concluded that from 4 November 2009 onwards, the interference with the applicant's right to respect for her private life was both proportionate and justified in terms of the requirement of "necessity in a democratic society" under Article 8 § 2; therefore, in respect of the

26 Ibid., paras. 46–53.

mentioned period the complaint was manifestly ill-founded and had to be rejected in accordance with Article 35 §§ 3 and 4 of the Convention. So, there had been a violation of Article 8 of the Convention in respect of the period from 21 November 2008 to 4 November 2009 and the remainder of the applicant's complaint was inadmissible.[27]

In this regard, Case of "*Gross v. Switzerland*"[28] is also noteworthy, as the applicant, Ms Alda Gross, who was born in 1931 in Switzerland and died in 2010, expressed the wish to end her life. Her will was explained by her health conditions, as she was becoming frailer as time passed and was unwilling to continue suffering due to her mental and physical difficulties.[29] In 2005, Ms Gross had a failed suicide attempt and received inpatient treatment for six months in a psychiatric hospital. This treatment did not, however, did not alter her wish to die, so she contacted an assisted-death association, EXIT, for support. The association replied that it would be difficult to find a medical practitioner who would be ready to provide her with a medical prescription for the lethal drug. On the basis of psychiatric examination, there was no doubt that the applicant was able to form her own judgement and her wish to die was not based on any psychiatric illness. From a psychiatric/medical point of view, the psychiatrist did not have any objection to the applicant being prescribed a lethal dose of sodium pentobarbital. However, he refrained from issuing the necessary prescription himself on the grounds that he did not want to confuse the roles of medical expert and treating physician.[30] Based on the above-mentioned, the applicant's representative submitted the applicant's request to be given a prescription for sodium pentobarbital to three further medical practitioners, who all declined to issue the requested prescription. In 2008, the applicant submitted a request to the Health Board of the Canton of Zurich to be given with 15 gr of sodium pentobarbital, but she was rejected. Later, in 2009, the applicant lodged an appeal with the Administrative Court of the Canton of Zurich. On 16 December 2008, the applicant submitted a request to the Health Board of the Canton of Zurich to be provided with 15 grams of sodium pentobarbital in order for her to commit suicide. On 29 April 2009 the Health Board rejected the applicant's request. Her request was dismissed again on the ground that the content of the case failed to demonstrate the relevant prerequisites for issuing a medical prescription. In 2010, her appeal was also dismissed by the Federal Supreme Court. It observed that based on the guidelines adopted by the Swiss Academy of Medical Sciences, the applicant did not suffer from a terminal illness; her will to die was based on her advanced age and increasing frailty. It also noted that in order to issue the requested medical substance a thorough medical examination was required, supervised by a specialist practitioner who was prepared to issue the necessary prescription.

In 2010, counsel of the applicant lodged an application with the European Court of Human Rights. In 2011 she received a medical prescription for 15 grams of sodium

27 Ibid., paras. 58–59.
28 Case of *Gross v. Switzerland*, Judgment, Strasbourg, 30 September, 2014.
29 Ibid., paras. 6–7.
30 Ibid., para. 10.

pentobarbital, which she imbibed and ended her life on 10 November, 2011. According to a police report Ms Gross committed suicide with the assistance of EXIT and no third party was involved in criminal liability in this context.[31]

In 2014, when preparing memorial to the Court, the Government found out that the applicant had died on 10 November, 2011. The Government noted that Ms Gross's counsel had failed to inform the Court of the applicant's death, and accordingly misled the Court in his submissions by giving the impression as the applicant was still alive. Regarding the above-mentioned, the applicants counsel responded that he was not aware of his client's death until he received a copy of the Government's memorial in 2014, as he had not had any personal contact with Ms Gross since January 2010. The counsel also noted that his applicant communicated with Mr. F., a retired pastor who voluntarily worked for EXIT, whom he contacted once he found out about his client's death. Mr. F. explained that he did not notify the counsel of the applicant's death at the applicant's request, as she feared that the ongoing proceedings at the Court would otherwise be discontinued. She wanted 'to open the way for other people in her situation.' It was up to the Court to decide whether to continue the proceedings of the present case or not. In the Court's view, the present case raised public interest that required further examination.[32]

The Court noted that the applicant complained that by denying her the right to decide by what means and at what point her life would end the Swiss authorities had breached Article 8 of the Convention. It also observed that in 2012, notice of her application was given to the Government and in 2013 the Chamber delivered a judgment indicating that there had been a breach of Article 8 of the Convention, based on the assumption that Ms Gross was still alive, until her death was revealed. Those circumstances were not brought to the Court. In his note, counsel for the applicant explained the whole situation to the Court. Because counsel did not have direct communication with his client, a number of concerns rose regarding his role as a legal representative in the proceedings. Against this background, the Grand Chamber considered that the circumstances of the applicant's death concerned the very core of her complaint under the Convention. Moreover, had these facts been known to the Chamber, it might have had a decisive influence on its judgment concluding that there had been a breach of Article 8 of the Convention. Accordingly, the Court affirmed the Government's preliminary objection that the applicant's conduct constituted an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention.[33]

31 Ibid., paras. 11–15.
32 Ibid., paras. 19–26.
33 Ibid., paras. 27–37.

3. Promotion and Development of a Supportive Environment for Elderly People

It is vital for elderly people to be provided with safe and affordable housing. The mentioned is a serious challenge for developing countries, where lots of elderly people do not have proper housing in neither cities nor urban communities, as well as in villages, where in agrarian environment a lot of people in age remain without care and services. That is why it is important for the States to improve the design of the living environment, taking into account the needs of the elderly people, especially the disabled, and to develop an accessible transportation system for them.

Besides, the support of caregivers is very important in order to develop the supporting environment for elderly people.

In such developing countries, where the care of the elderly people is mainly provided in families, it is important, on the one hand, to develop such services and programs that ensure the effective implementation of care; and on the other hand, supporting social programs, aged caregivers, and families under their care. Therefore, it is also a priority to determine the needs of aged female caregivers and develop social, economic and psychological support programs for them.

Ensuring safe and affordable housing for elderly individuals is a crucial challenge for developing countries. In these regions, many elderly people lack adequate housing not only in urban areas but also in rural and agrarian communities, where access to care and services is often limited.[34] To address this issue, it is essential for governments to improve the design of living environments by considering the specific needs of elderly people, particularly those with disabilities. Additionally, developing accessible transportation systems tailored to the elderly population is vital for enhancing their mobility and independence.[35]

From the European perspective, the concept of "age-friendly environments", promoted by the World Health Organisation's Global Age-Friendly Cities Project, serves as a model for such improvements. These environments emphasise safe housing, accessible transportation, and supportive community services as key components to improve the quality of life for older adults.[36]

In addition to physical infrastructure, support for caregivers plays a critical role in creating a supportive environment for elderly people. In many developing countries, elderly care is primarily provided by family members. Thus, it is important to develop services and programs that enhance the effectiveness of caregiving while also offering social support to caregivers themselves. This includes recognising the specific needs

34 United Nations, 2017.
35 World Health Organisation, 2015, pp. 73–74.
36 World Health Organisation, 2007, p 16.

of aged female caregivers, who often bear the majority of caregiving responsibilities, and providing them with social, economic, and psychological support programs.[37]

In this regard, the case of "*Jivan v. Romania*"[38] should be noted. The application concerned allegations that the domestic authorities wrongly assessed the severity of the applicant's disability, who was born in 1930 and died in 2020, thus depriving him of the possibility of benefiting from a personal assistant, and that the proceedings concerning that assessment had lasted too long. It was communicated under Articles 8 and 6 § 1 of the Convention respectively. Later in court proceedings his interests were presented by his son, Mr Ioan-Doroteu Jivan (the applicant). In 2017 the applicant was in his late eighties. In 2015, he lost his leg, which he had partially amputated later, when he was eighty-five years old. The applicant suffered from several medical conditions, such as cataracts, loss of hearing and incontinence. He needed a wheelchair to move around and had recently become bedridden as he had lost the strength to manipulate his wheelchair. He lived on the fourth floor of a building and was helped in his daily activities by his son. There were no neighbors or other family members nearby to offer support. In 2017, a physician acting at the request of the Bihor Commission for the Assessment of Adults with Disabilities (later Commission) evaluated the applicant's functional status a few times, according to the index of independence in activities of daily living. According to the assessment of the applicant's living conditions, in its report the Commission noted, that he was bedridden, and could not move around his flat without a wheelchair. He needed help with feeding, moving and transport, using means of communication, and taking care of his finances and medication as well. He was fully dependent on support for his personal hygiene, dressing, preparing food, housework, and grocery shopping. The report also mentioned that the applicant was living on his own and received money, food, and help with housekeeping from his son. Despite of numerous assessments done throughout the whole year, later in 2017, the Commission issued a certificate which indicated the applicant's condition as medium-level disabled, not severe-level disabled. The applicant contested the assessment and requested to be recognised as suffering from a severe disability necessitating a personal assistant. This certificate was annulled by the courts; but in 2018, the Commission issued a new certificate conforming the applicant's medium-level disability. Moreover, it concluded that the applicant's condition was permanent and did not need periodic reassessment. In 2019, the applicant contested the Commission's decision before the Bihor County Court, which allowed the applicant's claim. In response, the Commission appealed and the Oradea Court of Appeal found that the certificate issued by the Commission had been accurate.[39]

In 2020, the applicant died. On 27 April 2020, Mr Ioan-Dan Jivan, his son and only heir, expressed his wish to continue the proceedings; the European Court of Human

37 Pinquart and Sörensen, 2006, pp. 577–595.
38 Case of *Jivan v. Romania*, Judgment, Strasbourg, 08 May, 2022.
39 Ibid., paras. 5–13.

Rights accepted Mr Jivan's initiative. As the applicant complained that by denying him the benefit of a personal assistant, a right he should have benefitted from by virtue of law, the authorities had breached his right to respect for his private life, in so far as they had deprived him of his autonomy and of access to the outside world, thus forcing him into isolation.[40] He relied on Article 8 of the Convention: '[e]veryone has the right to respect for his private and family life, his home and his correspondence.' In many of cases considered by the Court, it was held that Article 8 was relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants. By examining the factors declared in the present case, the Court stated that the applicant's actual conditions were severe: he was old, immobilised, partially incontinent, and needed help for his daily activities. Because of his health, in the context of his living arrangements, the applicant needed constant support. The domestic authorities were thus called to make assessments which impacted on the applicant's personal autonomy and dignity, and thus on his enjoyment of his right to respect for private life as guaranteed under Article 8 § 1 of the Convention. Moreover, the Court considered that as the applicant's condition was refused to be classified as severe which needed a personal assistant, had an impact on his enjoyment of his right to respect for private life again guaranteed under Article 8 § 1 of the Convention.[41] The Court reiterated that issues of general policy, including those of social, economic and healthcare policies, were of a wide margin usually allowed to the State under the Convention. If a restriction on fundamental rights applied to vulnerable groups such as those who suffered the discrimination, then the State's margin of appreciation should have been narrower with very weighty reasons for the restrictions.[42] The arguments that the applicant raised before the authorities, were of his situation, both medical and social, provided with the evidence. The Court noted that those arguments were specific as well as relevant and important, and the Government did not argue otherwise. However, neither the Commission nor the Court of Appeal, when issuing a certificate or final decision, considered them. His living conditions and the lack of a support provided by family or neighbours were not mentioned in those decisions either. Moreover, neither the applicant's age nor the fact of his leg amputation was taken into account by the authorities. As a consequence of those decisions, the authorities did not offer the applicant any alternative practical arrangements to provide him with the constant support he needed. Having regard to all the above-mentioned considerations, the Court considered that the domestic authorities did not do what was reasonable in the circumstances of the case to ensure the applicant who was an elderly disabled person, effective protection of his right to respect for his private life, thus failing to meet the fair balance required by Article 8.

40 Ibid., para. 28.
41 Ibid., paras. 32–35.
42 Ibid., para. 42.

For these reasons, the Court concluded that there had been a violation of Article 8 of the Convention.[43]

Besides, the applicant complained that the related proceedings were overlong, especially for someone of his age, which caused the difficulties he encountered daily. In this respect, he relied on Article 6 of the Convention, relating to Right to a Fair Trial. In response, the Government argued that applicant did not use the available domestic compensatory remedies, even though the applicant argued that he should have been exonerated from using those remedies because of his age, health issues, and financial resources. Accordingly, the Court did have any reason to consider that the applicant's circumstances freed him from the obligation to avail himself of those remedies. So, the complaint was to be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.[44]

4. Protection of Elderly People From Abuse/Violence

Elderly people's abuse can be supposed as a global social issue that affects the health and human rights of numerous older persons, and is an issue that deserves the attention of the international community. The court considers the protection of elderly people from abuse within the framework of Article 3 of the Convention (prohibition of torture). Considering the age, degrading treatment provided by Article 3 of the Convention allows interpretation to ensure effective protection of elderly people from violence. It is interesting what is the practice of the European Court of Human Rights in relation to these issues.

Elder abuse is increasingly recognised as a significant global social issue, impacting the health, well-being, and human rights of a growing population of older individuals.[45] The protection of elderly people from abuse is framed within international human rights instruments, notably Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment. The case law of the European Court of Human Rights (ECtHR) demonstrates a growing recognition of elder abuse as a violation under Article 3, reinforcing the obligation of states to protect elderly individuals from abuse and neglect.[46] Examining the ECtHR's jurisprudence in this domain reveals how the Court approaches and enforces these protections in practice.

In Case "Heinisch vs Germany",[47] the applicant, Ms Brigitte Heinisch, was born in 1961 in Berlin. She had been working as a geriatric nurse for the State – through the company Vivantes, specialising in health care, geriatrics, and assistance to the elderly – from 16 September 2000 until 9 February 2005, when she was dismissed.

43 Ibid., paras. 48–53.
44 Ibid., paras. 54–58.
45 Yon et al., 2017, pp. 147–156.
46 Kessler, 2013, pp. 128–146.
47 Case of *Heinisch v. Germany*, Judgment, Strasbourg, 21 October, 2011.

Between 24 January 2003 and 19 October 2004, the applicant, along with her colleagues, regularly indicated to the management that they were overburdened because of staff shortages and therefore had difficulties carrying out their duties. From 19 May 2003 onwards, the applicant repeatedly became ill and was sometimes unable to work. One medical certificate stated that this was due to overworking. On 9 November, 2004, the applicant's legal counsel wrote to the Vivantes management explaining the poor conditions of the staff. He requested the management to specify how they intended to avoid criminal responsibility and how they intended to ensure the proper care of the patients. In a week, the MDK (independent supervisory body) visited the premises indicating that the staffing situation, although difficult, was not critical. So, the management rejected the applicant's accusations causing the applicant's lawyer to lodge a criminal complaint against Vivantes for aggravated fraud requesting the public prosecutor to examine the circumstances of the case. On 5 January 2005, the Berlin Public Prosecutor's Office discontinued the preliminary investigations against Vivantes, and in a letter dated 19 January 2005, the nursing home dismissed the applicant, on account of her repeated illness. The applicant, along with her friends, issued a leaflet stating that she lodged a criminal complaint which did not result in a criminal investigation and she had been dismissed on account of her illness. She was asked by the company to make a statement regarding the leaflet but she refused to do so. On 4 February 2005, Vivantes informed the works council that it was intending to dismiss the applicant without notice, but the works council declared that it would not agree to the applicant's dismissal. However, On 9 February 2005, the applicant's employer dismissed her without notice or, alternatively, by 31 March 2005, on suspicion of having initiated the production and dissemination of the leaflet.[48]

To the European Court of Human Rights, the applicant alleged, in particular, that her dismissal without notice from her employment as a geriatric nurse, on the grounds that she had brought a criminal complaint against her employer alleging deficiencies in the institutional care provided, and the refusal of the domestic courts in the ensuing proceedings to order her reinstatement, had infringed her right to freedom of expression, as provided in Article 10 of the Convention.[49] The Court observed that the complaint brought by the applicant had to be regarded as whistleblowing because of the unlawful conduct of the employer, which fell under Article 10 of the Convention. Therefore, the Court considered that the applicant's dissmisal upheld by the German courts, constituted an interference with her right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. Such interference would be considered as a violation of Article 10 unless it was "prescribed by law" under paragraph 2 and was "necessary in a democratic society" for the achievement of such aim.[50] In response, the Government argued that the applicant's dismissal without notice had been necessary means to protect the employer's reputation and

48 Ibid., paras. 7–21.
49 Ibid., para. 41.
50 Ibid., paras. 43–46.

rights; accordingly, the interference with the applicant's right to freedom of expression would have been justified under paragraph 2 of Article 10. The domestic courts indicated that the applicant's complaint did not encompass concrete information to verify her allegations; due to this reason, competent public prosecution authorities discontinued the preliminary investigation.[51]

In order to make the final conclusion when assessing the proportionality of the interference in relation to the legitimate aim pursued, the Court took into account several factors of the case. First, particular attention should be paid to the public interest involved in the disclosed information. Second, the authenticity of the disclosed information mattered. The disclosed information should have been carefully verified to the extent permitted by the circumstances as being accurate and reliable. Another important factor was the motive behind the actions, as well as the damage suffered by the employer as a result of disclosure, and an assessment of whether the damaged outweighed the interest of the public in having the information revealed. Lastly, in connection with the review of the proportionality of the interference in relation to the legitimate aim pursued, a careful analysis of the penalty imposed on the applicant and its consequences was required. Considering the circumstances of the present case, the Court declared that the information disclosed by the applicant was undeniably of public interest.[52] In light of these considerations, the Court found that the public interest in receiving information about shortcomings in the provision of institutional care for the elderly especially by a State-owned company was so important in a democratic society that it outweighed the interest in protecting the latter's business reputation and interests. Therefore, the Court noted that the applicant faced the heaviest sanction possible under labour law. Such sanction would not only have a negative impact on the applicant's career but also have a serious effect on other employees of Vivantes, which discouraged them from reporting any shortcomings having in institutional care. Accordingly, the Court considered that the applicant's dismissal without notice in the case at hand was disproportionately severe. Therefore, the Court noted that in the present case, the domestic courts failed to strike a fair balance between the need to protect the employer's reputation and rights on the one hand and the need to protect the applicant's right to freedom of expression on the other. So, there had accordingly been a breach of Article 10 of the Convention.[53]

In the case "H.M. vs Switzerland",[54] the applicant was 85 years old, born in 1912. She lived with her husband in the house owned by one of their sons, He.M. In 1994, at their request, the applicant and her husband were placed under the guardianship of their other son, A.M. At the end of 1994, her husband moved into the Nursing home. It was agreed that the applicant herself would also move into the Nursing Home within a week, but she did not. Ms H.M. was periodically visited by the Association for

51 Ibid., paras. 52–53.
52 Ibid., paras. 66–71.
53 Ibid., paras. 90–95.
54 Case of *H.M. v. Switzerland*, Judgment, Strasbourg, 26 May, 2002.

Home Visits to the Sick and Housebound, but they soon stopped visiting the applicant, as they stated that the applicant along with her son did not open the door to them. Meanwhile, her health deteriorated. So, On 13 December 1996, the Lyss Guardianship Commission requested the Aarberg District Government Office to place the applicant in an old people's nursing home. Even though the applicant refused to be placed in nursing home, on 20 December 1996 the applicant was placed in the S. Nursing Home.[55] The applicant and her son, each filed an appeal with the Deprivation of Liberty on Grounds of Welfare Assistance Cantonal Appeals Commission of the Canton of Berne. At the hearing, the applicant explained that even though she did not have any reasons to be unhappy with the nursing home, still she did not want to stay there. The appeals were dismissed the same day by the Appeals Commission based on two main grounds of welfare assistance. First, the applicant had been neglected because she was no longer able to maintain basic dietary and hygiene needs. Second, the Appeals Commission considered that 'during the hearing, it had come to the conclusion that the applicant had a mental disability – dementia.' Moreover, if the applicant was released, she would return home to her son, an invalid himself, who could not provide his mother with sufficient care. However, the Appeals Commission further found that the deprivation of liberty on grounds of welfare assistance complied with Article 5 § 1 (e) of the Convention, as that provision also permitted a deprivation of liberty in cases of vagrancy, a term that was to be understood in a wide sense. On 14 January 1998, the Aarberg District Government Office lifted the applicant's placement order as she had agreed to reside in the nursing home of her own free will.[56]

On 16 December 1997, the applicant's complaint was presented in the European Court of Human Rights. Ms H.M. complained of the unlawfulness of her deprivation of liberty as she was placed in a nursing home on account of neglect against her will. She stated that she could take care of herself at home; also, she did not want to leave her son on his own. She also indicated that she did not fall into the vagrancy category, which might have served as a ground for detention, as she had a fixed domicile with her son and as an old-aged pensioner, received a regular pension. Thus, none of the justifiable grounds of detention under Article 5 § 1 were met in her case.[57]

On the other hand, the Government stated that the applicant had freedom of movement in the Nursing Home, she was free to have personal contacts, write letters, and make calls. The only limitation on her was that she had to respect the fixed hours for medical treatment. Moreover, she had agreed to stay in the nursing home of her own free will. As a result, the applicant's freedom of movement was, in fact, enhanced thanks to the care provided in the home. The other reason that played a role in the applicant's placement in the Nursing Home was that she had been the subject of guardianship order, terminated on account of the applicant's son. Another reason was the evaluation of the person's ability to lead a dignified life, degree of integration into a

55 Ibid., paras. 10–19.
56 Ibid., paras. 20–27.
57 Ibid., paras. 32–34.

social network, and state of health. Thus, the applicant's placement in a nursing home complied with the requirements of Article 5 § 1 (e) of the Convention. Besides, the Government also pointed out that based on the Appeals Commission consideration the applicant suffered from a mental disability, senile dementia. In the Government's view, that type of mental disability was one of the grounds to justify the applicant's detention under Article 5 § 1 (e) of the Convention.[58]

As the applicant complained that she had been placed in the nursing home against her will, the Government argued that the applicant had been deprived of her liberty within the Article 5 of the Convention. In this regard, the European Court of Human Rights noted, while considering the case, whether it was deprivation of liberty or not, the starting point should have been the study of all factors of the applicant's condition, including measures to be taken, and the duration, results and means of their realisation as a whole. The distinction between a deprivation of and restriction upon liberty was merely one of degree or intensity, and not one of nature or substance.[59] Turning to the circumstances of the present case, the decision to place the applicant in the nursing home was made based on her unsatisfactory living conditions. In the nursing home, she had freedom of movement and was able to maintain social contact with the outside world. Turning to the circumstances of the present case, the Court noted that even though Ms H.M. had the possibility to stay at home and being cared for by the Lyss Association for Home Visits to the Sick and Housebound, she and her son had refused to cooperation with the association. Thus, her living conditions deteriorated. Therefore, the applicant herself could not decide what she preferred. For instance, at the hearing before the Appeals Commission, she stated that she did not feel unhappy with the nursing home. Moreover, after moving to the nursing home, the applicant agreed to stay there. Based on the above-mentioned factors, the Court concluded that in the circumstances of the present case, the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5 § 1, but was a responsible measure taken by the competent authorities in the applicant's interests. Accordingly, Article 5 § 1 is not applicable in the present case.[60] Consequently, the court focused more on the best interest of the beneficiary, instead of her autonomy and degree of freedom. This highlights the difficulty of protecting the needs of the elderly people and putting the line between their autonomy and independence.

Therefore, it should be also noted, that later, in the case of "*Stanev v. Bulgaria*",[61] the Court noted, that the element of a person's "consent" is indeed decisive as to the extent to which there has been a deprivation of liberty. In particular, the court explained that placing Mr. Stanev under institutional care without his consent and thus restricting his right to freedom violated Article 5 of the Convention. Mr. Stanev

58 Ibid., paras. 35–39.
59 Ibid., paras. 40–49.
60 Ibid., paras. 44–48.
61 Case of *Stanev v. Bulgaria*, Judgment, Strabourg, January 17, 2012.

was born in 1956, in Ruse. At Mr. Stanev's relative's request, the Ruse regional prosecutor applied to the Ruse Regional Court for a declaration of the applicant's total legal incapacity. It observed, in particular, that between 1975 and 2000, he had been admitted to a psychiatric hospital on several occasions. According to the evidence, Mr. Stanev had sold all his possessions and spent all his money on alcohol and became aggressive whenever he drank, he also begged for a living. So, Ruse Municipal Council appointed R.P., a council officer, as the applicant's trustee, who later asked the Ruse social services to place the applicant in a social care home for adults with mental disorders. Later, the applicant was taken by ambulance to the social care home, without giving him any explanation for the reasons for and the length of his placement in the home. In 2002, the trustee R.P. and the Pastra social care home signed an agreement, which mentioned neither the applicant's name nor the duration of its validity. It appeared that the applicant's entire invalidity pension was transferred to the home. 80% covered the provided services and the remaining 20% was set aside for the applicant's personal use.[62] Mr. Stanev's identity papers were kept by the home's management and he was only allowed to leave the home with special permission from the director. Between 2002 and 2006 the applicant returned to Ruse three times on home leave. The maximum period of leave was approximately 10 days. Following the first two trips to Ruse, the applicant returned on the due date, but he failed to return after the third period of leave, though he was driven back to the social care home later by the employees. The applicant asserted that the food provided at the home was insufficient and of poor quality. Access to the bathroom was permitted once a week; it was unhealthy and decaying. The toilets, situated in the courtyard, consisted of holes in the ground covered by dilapidated shelters and were in very poor condition. The applicant had access to a television set, several books and a chessboard in a common room at the home until 3 p.m., when the room was locked shut. The room was not heated in winter and the residents kept their coats, hats and gloves on when they were there. No other social, cultural or sports activities were available. The applicant also submitted that the staff at the social care home had refused to supply him with envelopes for his mail. The Government did not comment on those allegations.

On 25 November, the applicant through his lawyer, asked the public prosecutor's office to apply to the Regional Court for restoring his legal capacity. The public prosecutor asked the social care home to send him a doctor's opinion and other medical certificates concerning the applicant's condition. In these documents Mr. Stanev was admitted to show the symptoms of schizophrenia, he was on maintenance medication under supervision of psychiatrist. His behavior was tense and suspicious with poor communication skills. Thus, he did not show any signs of ability to integrate into the society and needed to stay in the Pastra social care home. Accordingly, based on the above-mentioned factors, the regional prosecutor refused to apply for restoration of the applicant's legal capacity. The regional prosecutor's refusal was upheld on 11 October 2005 by the appellate prosecutor, and subsequently by the chief public

62 Ibid., paras. 4–12.

prosecutor's office at the Supreme Court of Cassation on 29 November 2005. Lastly, the applicant submitted that on several occasions he had orally requested his trustee to institute proceedings for his release from trusteeship, but the trustee had always refused to do so.[63] Once a year, the director of the social care home and the social worker at the home drew up evaluation reports on the applicant's behaviour and social skills, which indicated that the applicant did not have communicative personality, did not join in group activities, refused to take medication. As he did not get along with his half-sister, it was unclear whether he had anywhere to live outside the social care home. In 2005, the applicant's trustee asked the Municipal Council to grant a social allowance to facilitate the applicant's integration into the community. In 2007 he was granted the monthly allowance of approximately 10 euros. In 2006, based on the applicant's lawyer's request, he was examined by the different psychiatrist from the one from the social care home. According to the assessment, the applicant did not show any symptoms of schizophrenia, thus the previous diagnosis was imprecise. Therefore, he did not show any signs of aggressive personality. According to the report, the applicant's stay in the Pastra social care home was very destructive for his health. It recommended that he leave the home because of the risk of developing "institutionalisation syndrome" the longer he stayed there. The only aspect of monitor was his passion towards alcohol.[64]

To the European Court of Human Rights Mr. Stanev complained about his situation relying on Article 5, Article 3, Article 13, Article 6 and Article 8 of the Convention. Relying on Article 5 of the Convention, the applicant complained about his placement in the social care home against his will that had deprived him of the right to have the lawfulness of that measure reviewed by a court, and the right to compensation for the alleged violations of that Article: '[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.'[65] Mr. Stanev's case was different from that of *H.M. v. Switzerland* (cited above). The applicant in that case had consented to her placement in a nursing home. For his own part, Mr. Stanev had never expressed the wish to live in the Pastra social care home. Moreover, in the case of *H.M. v. Switzerland*, the authorities' decision to place the applicant in a nursing home was based on a thorough examination which assessed her poor living conditions resulting her to have health issues. H.M's condition was due to her lack of cooperation with a social-welfare authority. In Stanev's case, it was on the contrary; he had never been offered alternative social care and had never refused such assistance. The Court considered that a "deprivation of liberty" within the meaning of Article 5 in the present case was closely linked to the merits of the complaint under that Article.[66] The Court observed that in the present case the question whether the applicant

63 Ibid., paras. 16–30.
64 Ibid., paras. 31–34.
65 Ibid., para. 91.
66 Ibid., para. 104.

properly exhausted domestic remedies to challenge the lawfulness of his continued placement in the Pastra social care home was closely linked to his allegations under Article 5 § 4, so it should have been joined to the merits under that provision.[67]

Relying on Article 3, taken alone and in conjunction with Article 13 of the Convention, the applicant complained that the living conditions at the social care home were poor and there were no remedies available in Bulgarian law to remedy the situation. These provisions are worded as follows: Article 3 – 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'; Article 13 – 'Everyone whose rights and freedoms as set forth in Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'[68] The applicant also alleged that he had not had the possibility under Bulgarian law of directly bringing judicial proceedings for restoration of legal capacity, and relied on Article 6 § 1, the relevant parts of which read as follows: 'In the determination of his civil rights and obligations [...] everyone is entitled to a fair [...] hearing [...] by an independent and impartial tribunal established by law.'[69] Besides all these numerous complaints, Mr. Stanev alleged that he had suffered unjustified interference with his right to respect for his private life and home as a result of the restrictive trusteeship regime, including his placement in the social care home and the physical living conditions there. As well as citing Article 13, he relied on Article 8.

Based on the above-mentioned, the Court considered that these complaints raised serious issues of fact and law which could not be resolved at this stage in the examination of the application, but required examination on the merits. It follows that the complaints could not be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No were no other ground for declaring complaints inadmissible, subject to the question of exhaustion of domestic remedies, which has been joined to the merits of these complaints. For these reasons, the Court concluded the merits the question of the applicability of Article 5 and the Government's objection of failure to exhaust domestic remedies in respect of the complaints under Articles 5 and 6, and also under Article 8, taken alone and in conjunction with Article 13 of the Convention, thus declared the application admissible, without prejudging the merits of the case.

As it is very important to create a safe environment for elderly people, especially when they are in need. In this regard, the case of "*Dodov v. Bulgaria*"[70] is noteworthy. This case concerned the disappearance of the applicant's mother, who suffered from Alzheimer's disease, from a state-run nursing home for the older. The applicant alleged that his mother's life had been put at risk through the negligence of the nursing home staff, that the police had not undertaken all necessary measures

67 Ibid., para. 114.
68 Ibid., para. 127.
69 Ibid., para. 134.
70 Case of *Dodov v. Bulgaria*, Judgment, Strasbourg, April 17, 2008.

to search for his mother immediately after her disappearance and that the ensuing investigation had not resulted in criminal or disciplinary sanctions; therefore, the applicant's attempt to obtain compensation in civil proceedings had been frustrated by the dilatory approach.[71]

In 1996, the applicant complained to the prosecution authorities alleging that the police had not taken the necessary steps to search for his mother following her disappearance in 1995. Though the prosecuting authorities refused to open criminal proceedings, considering that the police had acted diligently. Later, the applicant brought a civil action for non-pecuniary damages resulting from his mother's disappearance before the Sofia City Court. However, the Sofia Municipality, which managed the nursing home, as well as the Sofia Directorate of Internal Affairs, stated that the case did not fall to be examined under the State Responsibility for Damage Act.[72] On 16 August 2002 the applicant appealed. The Appellate Court, criticised the Sofia City Court's failure to collect relevant evidence and ordered the summonsing of witnesses and the production of other evidence in the appellate proceedings. However, in its judgment, the Appellate Court found that the State Responsibility for Damage Act only concerned those damages that were resulted from administrative decisions or acts in the exercise of administrative functions. Thus, the applicant's claim did not concern such decisions or acts and was left to be examined under the general provisions of tort law. For that reason, the Appellate Court annulled the Sofia City Court's judgment and remanded the case for renewed examination by the Sofia City Court. In 2004, the applicant filed a cassation appeal which was rejected by the Supreme Court of Cassation on the ground that it found that the Sofia City Court had been wrong to examine the case under the State Responsibility for Damage Act.[73]

On 9 December 1998, Mr. Dodov, the applicant, complained to the European Court of Human Rights. He complained that the facts of the disappearance of his mother breached Articles 2, 13, and 17 of the Convention. The applicant also complained that the police had not undertaken all relevant measures to search for the applicant's mother once after her disappearance. Moreover, the applicant's attempt to obtain compensation in civil proceedings had been frustrated by the dilatory approach of the defendant State authorities and delays imputable to the courts. The Court considered that the relevant provision was Article 2 § 1 of the Convention, which reads as follows: 'Everyone's right to life shall be protected by law.'[74] It is noteworthy that the Court highlighted that the applicant's complaints concerned two different sets of facts that requires separate examination, that are: a) Alleged violation of Article 2 § 1 in respect of the alleged impossibility to hold accountable the relevant institutions and staff; b) Alleged violation of Article 2 in respect of the reaction of the police after Mrs Stoyanova's disappearance. The Court noted that due to fact that the applicant's mother

71 Ibid., para. 3.
72 Ibid., paras. 28–35.
73 Ibid., paras. 45–50.
74 Ibid., paras. 63–64.

suffered from Alzheimer's disease and her mental capacities had deteriorated time by time, she definitely needed constant supervision. As eleven years passed since Mrs Stoyanova's disappearance, the Court, for the purposes of the case presumed that she had died. The Court observed that the events in the present case by no means involved deprivation of life, the scope of application of Article 2 of the Convention.[75] In these circumstances, the Court considered that the legal system as a whole, faced with an arguable case of negligent acts endangering human life, failed to provide an adequate and timely response, consonant with the State's procedural obligations under Article 2. There had been, therefore, a violation of Article 2 § 1 in this respect.[76]

Besides, the applicant complained that the length of the civil proceedings in his case exceeded reasonable time, thus violated Article 6 § 1of the Convention which reads as follows: 'In the determination of his civil rights and obligations [...], everyone is entitled to a [...] hearing within a reasonable time.'[77] The Court observed that the period to be taken into account started on 10 July 1996, when the applicant brought his action. In June 2006, the proceedings were again pending before the first-instance court. They had thus lasted ten years and were probably still pending due to several delays and adjournments. In sum, the Court considers that the authorities' decision to undo all procedural acts and commence afresh the collection of evidence was unjustified and incompatible with their duty to act with particular expedition in cases concerning the right to life.

Considering all stated facts, the Court held that there had been a violation of Article 2 of the convention in respect of the State's positive duty to make available judicial remedies capable of establishing the facts, also there had been a violation of Article 6 § 1 of the Convention.[78]

The case of "*Rodina v. Latvia*"[79] concerns the applicant who was born in 1954, in Riga, Latvia. She was a doctor with at least 25 years' work experience, working in the State Blood Donor Centre as the head of the Audit Department at the material time.[80]

On 31 January 2005, the Russian-language newspaper published an article entitled 'An apartment sets a family at loggerheads'. Even though the applicant was not mentioned by her full name in the article; she was referred to as 'the elder daughter.' However, the article contained her maiden name, her mother's full name, the first names of her father, sister and niece, as well as her profession and place of residence and her photograph. The article contained a big family portrait, provided by the applicant's mother. According to the article, the applicant placed her mother in a psychiatric hospital and, in the meantime, sold her mother's apartment. Even though the applicant's mother's health improved, the applicant refused to take her out of the hospital as well as support her. As the applicant stated, before the article was

75 Ibid., paras. 68–71.
76 Ibid., para. 97.
77 Ibid., para. 104.
78 Ibid., paras. 108–120.
79 Case of *Rodina v. Latvia*, Judgment, Strasbourg, 14 August, 2020.
80 Ibid., para. 1.

published, the journalist had called and asked her about family situation. She had not been informed that the article would be accompanied by the family portrait, and she was also not allowed to see the draft article.[81]

In 2005 the applicant, together with her husband and son, brought proceedings against the publisher, the applicant's sister N.Ļ. and her niece's husband J.K. The allegations were that her rights, as guaranteed by Article 8 of the Convention, were violated on account of the publication of her family story in a newspaper, as well as its broadcast on television and the Latvian courts' failure to protect her rights in two sets of civil proceedings.

The Riga City Centre District court partially granted the applicant's claim against the publisher, as it analysed the article, it found out that the text had gone beyond the views expressed by the family members, which had been damaging to the applicant's honour and dignity. In the court's opinion, one of the most important grounds for the applicant's claim, which again damaged the honour and dignity of the applicant along with infringing right to private life, had been the fact that the article included a family portrait.[82]

Again, in 2005, ten months after the newspaper article, Latvian commercial television broadcast a program entitled 'No time for taboos', airing a short feature about the conflict in the applicant's family scandal. During the program, the applicant's full name was mentioned twice, as well as the applicant's and her mother's personal data. The family portrait, which had been published in the newspaper, was also broadcast.[83] As the applicant stated, prior to the broadcast, she had been informed by the journalist about the planned broadcast. Even though the applicant had asked the journalist to cancel the broadcast, she had been refused, accordingly, the applicant refused an interview, due to personal reasons.[84] In December 2005, the applicant brought proceedings against television, her and sister, later in 2006, she brought her claim against journalist and the television production company.[85]

Later in 2009, the Riga Regional Court quashed the judgment and dismissed the applicant's claim. Moreover, according to the appellate court, the impugned statement had not damaged the applicant's honour and dignity.[86] Therefore, the Senate of the Supreme Court held that the appellate court had been right to dismiss the applicant's claim.[87]

The applicant complained about the publication of her family story in the newspaper and its broadcast on television. She also alleged that the domestic courts had failed to protect her rights in both sets of civil proceedings. The Court examined the

81 Ibid., paras. 5–11.
82 Ibid., paras. 16–18.
83 Ibid., paras. 26–28.
84 Ibid., para. 31.
85 Ibid., para. 32.
86 Ibid., paras. 21–22.
87 Ibid., para. 50.

applicant's complaints under Article 8 of the Convention.[88] The Court observed that the parties disagreed about existing remedies in the Latvian legal system in order to protect the right to private life.[89] As a result, the Court noted that the applicant's complaints were neither manifestly ill-founded under Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds.[90]

The instant case concerned two sets of civil proceedings instituted by the applicant against her relatives and against the mass media, (the first set of civil proceedings) and on television (the second set of civil proceedings). Although the applicant's full name was not disclosed in the newspaper article, the Court considered, contrary to the Government's submissions, that the article contained identifiable information such as her maiden name, names of her relatives and, most importantly, her photograph in a private context. According to the Court, more personal information about the applicant was disclosed in the television broadcast that caused more serious allegations against her.

In the light of the above-mentioned considerations, the Court found that the domestic courts in both sets of civil proceedings failed to strike a fair balance between the applicant's right to respect for her private life under Article 8 of the Convention and her relatives' right to freedom of expression, as reported by the mass media, under Article 10 of the Convention. The Court therefore found that there had been a violation of Article 8 of the Convention in respect of both sets of civil proceedings.[91]

One of the main aspects in the field of human right's protection is age and gender equality. It is very important especially for vulnerable groups such as elderly people to be full members of the society without any form of discrimination. In this regard, the case of "*Grant v. The United Kingdom*"[92] is very interesting. The case originated under Article 34 of the Convention by Ms Linda Grant, in 2003. She complained about the lack of recognition of her change of gender and the refusal of the Department of Social Security (DSS) to pay her a retirement pension at the age of 60, like other women. Because of this, Ms. Grant relied on Article 8 of the Convention, taken alone as well as in conjunction with Article 14 of the Convention.[93]

According to the applicant's birth certificate, she was male, served in the army for three years from the age of 17, and then worked as a police officer. 9 years later, she had gender reassignment surgery. Since 1963 she had been identified as a woman on her National Insurance card and paid contributions to the National Insurance scheme at the female rate. In 1972 she became self-employed and started paying into a private pension fund. In 1997, when the applicant became 60, she applied to the local government benefits office for State pension payments. Her application was refused on the grounds that she had applied "too early" was only entitled to a State pension from the

88 Ibid., para. 65.
89 Ibid., para. 79.
90 Ibid., para. 85.
91 Ibid., para. 135.
92 Case of *Grant v. The United Kingdom*, Judgment, Strasbourg 23 August, 2006.
93 Ibid., paras. 1–2.

age of 65, the retirement age applicable to men. The applicant appealed against the decision in Birmingham Social Security Appeal Tribunal and Social Security Commissioner, which was dismissed on the basis of established case-law. In the Court of Appeal, the applicant sought a declaration that she was entitled to her full retirement pension from her 60th birthday. Meanwhile, the applicant reached the age of 65 and her pension payments began. In 2005 the applicant was issued with a Gender Recognition Certificate following her application under the Gender Recognition Act 2004.[94]

On 8 October 2003, in consideration of the above-mentioned, the applicant complained to the European Court of Human Rights, that the law relating to transsexual persons in general and the decision of the DSS in particular denying her a retirement pension at the age of 60 violated her rights under Article 8 of the Convention.[95] According to the applicant, she had been issued a National Insurance card as a woman and had made contributions at the female rate, she had never been informed otherwise.

According to the Court, it found that the applicant – a post-operative male-to-female transsexual might have claimed to be a victim of a breach of her right to her private life contrary to Article 8 of the Convention due to the lack of legal recognition of her change of gender. The applicant's victim status came to an end when the Gender Recognition Act 2004 came into force, thereby providing the applicant with the means on a domestic level to obtain the legal recognition previously denied. The Court should have therefore rejected the applicant's claims that her victim status should have been regarded as existing encompassing the decision which first denied her the pension payable to women. Consequently, as the applicant complained specifically of the refusal to accord her the pension rights applicable to women of biological origin, she might have claimed to be a victim of this aspect of the lack of legal recognition from the moment when the authorities refused to give effect to her claim. Based on the above-mentioned considerations, the Court found that there had been a violation of the applicant's right to respect her private life contrary to Article 8 of the Convention.[96]

5. Development of Elderly People and Their Active Participation in Social Life

For the development of elderly people and their active participation in public life, it is vital for the State to recognise the involvement of the elderly people in creation of economical affluence of the country without discrimination. Unfortunately, their contribution is not recognised at a time when they care for their family members, run the household, and are involved in community activities. Participation in social, economic, cultural, sports, recreational or volunteering activities enhances the

94 Ibid., paras. 7–15.
95 Ibid., para. 33.
96 Ibid., paras. 40–44.

creation of economical affluence.[97] To achieve the mentioned goal, one of the main tasks is to create the employment opportunities for every elderly person who is able to work. Among them, by promoting the employment of able-bodied population, by implementing relevant policy, including the involvement of the aged women. Therefore, promoting the self-employment of elderly people, by creating small business programs, without gender and age discrimination. In order to create employment opportunities, it is necessary to promote the continuation of labor relations and not to allow stereotypical advantages for young employees.

Active participation of elderly individuals is essential for their well-being and societal progress. The World Health Organisation highlights that *active aging* promotes health, security, and sustained social engagement, which contributes to economic and social vitality.[98] This concept stresses maintaining physical, social, and mental activities throughout aging.[99]

Economic involvement is a key component. Zaidi[100] emphasises that employment and entrepreneurship policies for older adults reduce social welfare burdens and foster social inclusion. Supporting self-employment tailored to older adults' capacities has yielded positive results internationally.[101] Ensuring equal access free of age and gender discrimination is critical.[102]

Labor market stereotypes favoring younger workers limit opportunities for elderly employees, despite their valuable experience.[103]

Overall, comprehensive, non-discriminatory policies integrating economic, social, and cultural dimensions are vital for the development and active participation of elderly people in public life.

Regarding the above-mentioned, the Court of Human Rights considered the case of "*Zavodnik v. Slovenia*",[104] a pensioner born in 1938, who complained about his former employer, company Z.R., for transferring him to another company. The applicant also complained, under Article 6 of the Convention, that a set of bankruptcy proceedings had been unfair. He also complained, under Articles 6 and 13 of the Convention, of the excessive length of the proceedings and the ineffectiveness of remedies in that connection.[105] According to the applicant, he was personally served with neither the court's notification of the hearing on the distribution of the bankruptcy estate nor its decision, which was made on 10 September 2008. The mentioned had prevented Mr. Zavodnik from attending the hearing and deprived him the opportunity to lodge an appeal within the reasonable time-limit. Moreover, the applicant argued that he

97 *Political Declaration and Madrid International Plan of Action on Ageing*, 2002, pp. 19–20.
98 World Health Organisation, 2015, p. 45.
99 Ibid.
100 Zaidi, 2010, p. 330.
101 Moulaert et al., 2007, p. 585.
102 European Commission, 2018, p. 78.
103 Posthuma and Campion, 2013, p. 70.
104 Case of *Zavodnik v. Slovenia*, Judgment, Strasbourg, 21 August, 2015.
105 Ibid., paras. 3–6.

should have known about the progress in the proceedings from media, as being an elderly person, he did not even know how to use a computer and how to access the internet. Lastly, the applicant argued that he had not insisted on the appointment of a committee of creditors at the hearing because the trustee had advised the creditors including Mr. Zavodnik, that because the value of the estate was low, the appointment of a committee was not advisable and would merely add to the costs of the proceedings.[106]

As the applicant alleged that the failure to serve him in person with a court summons and with the decision issued at the hearing had prevented him from effectively participating in the hearing and lodging an appeal within the specified time-limit, the Court was therefore called upon to examine whether those facts impaired the applicant's right of access to a court.

Article 6 § 1 of the Convention does not provide for a specific form of service of documents. However, the general concept of a fair trial, encompassing the fundamental principle that proceedings should be adversarial, requires that all the parties to civil proceedings should have the opportunity to be aware of and to comment on the observations filed or evidence adduced by the other party with a view to influencing the court's decision. If court documents, including summonses to hearings, are not served in person, an applicant might be prevented from defending himself in the proceedings. Moreover, the right of access to a court entails the entitlement to receive adequate notification of judicial decisions, particularly in cases where an appeal might be sought within a prescribed time-limit. Finally, the Court reiterates that its task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention.[107] In the circumstances of the present case, the Court was unable to come to a conclusion that the applicant had a fair opportunity to have knowledge of the hearing on the distribution of the estate and that his failure to take part in the proceedings was due to a lack of diligence on his part. By being deprived of the opportunity of taking part in the hearing of 10 September 2008, the applicant was prevented from challenging the receiver's plan for the distribution of the estate and thus from vindicating his right to obtain a higher percentage of his claim for unpaid wages. The foregoing considerations were sufficient to conclude that there had been a violation of the applicant's right to a fair hearing under Article 6 § 1 of the Convention.[108]

The applicant further complained that the length of the proceedings had been incompatible with the "reasonable time" requirement that also laid down in Article 6 § 1 of the Convention, as well as the fact that remedies available to him for excessive duration of legal proceedings in Slovenia had been ineffective. Mr. Zavodnik relied on Article 13 of the Convention, which reads as follows: '[e]veryone whose rights and

106 Ibid., paras. 59–63.
107 Ibid., paras. 69–74.
108 Ibid., paras. 81–82.

freedoms as set forth in [this] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'[109]

According to the above-mentioned, the Court stated that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute.[110] Having examined all the material submitted to it and having regard to its case-law on the subject, the Court, for the reasons set out above, considered that in the instant case the overall length of the proceedings was excessive and failed to meet the "reasonable time" requirement. There had accordingly been a violation of Article 6 § 1 of the Convention. Besides, the Court reiterated that Article 13 guaranteed an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time.[111]

Turning to the circumstances of the present case, the Court declared the complaints under Article 6 § 1 of the Convention concerning the length and unfairness of the bankruptcy proceedings by reason of the failure to inform the applicant of the hearing on the main distribution of the estate, and the complaint under Article 13 of the Convention concerning the lack of an effective legal remedy in respect of the length of proceedings admissible. The Court declared that there had been a violation of Article 6 § 1 of the Convention on account of the failure to properly inform the applicant about the hearing on the distribution of the estate as well as a violation of Articles 6 § 1 and 13 of the Convention on account of the length of the proceedings and ineffectiveness of remedies in this respect.

6. Right to Fair Trial

Right to fair trial enshrines the principle of the rule of law.[112] Although the text of the first paragraph of Article 6 of the European Convention does not distinguish between the general content of the right to a fair trial in civil and criminal law, the practice of the European Court of Human Rights has developed in such a way that, two different directions of interpretation of the right to a fair trial have been formed depending on which field of action the application for violation of the right is related to – civil or criminal.[113] As a rule, the court imposes stricter standards in the criminal area and gives more flexibility to the national legislature in the civil sphere.[114]

109 Ibid., paras. 83–84.
110 Ibid., para. 94.
111 Ibid., paras. 99–101.
112 Vitkauskas and Dikov, 2017, p 11.
113 Council of Europe, 2013.
114 Ibid.

However, when we discuss about the right to a fair trial of the elderly people, for the purposes of Article 6 of the European Convention on Human Rights, it is important to assess, on the one hand, the nature of the application and the extent of the circumstances to which the final decision made by the national court was fair in a particular case. On the other hand, it was also imperative to assess the extent to which the party's right to a fair procedure was protected during the trial. In particular, whether the elderly person had the opportunity to present his case to the court in the context of the ongoing civil dispute or the criminal proceedings against him, to protest the falsified or illegal evidence presented against him and not to be put in a worse position than his opponent. In addition, it is important to assess the impact of individual violations on the legal interests and rights of the elderly people.

When discussing the right to a fair trial of older persons under Article 6 of the European Convention on Human Rights (ECHR), it is crucial to consider their specific vulnerabilities, both in terms of substantive justice and procedural guarantees.[115] The European Court of Human Rights (ECtHR) has held that age can be a relevant factor in determining whether the requirement of a "reasonable time" has been met. The Council of Europe Recommendation CM/Rec(2014)2 on the promotion of human rights of older persons encourages member states to adapt legal procedures to the needs of older persons, including accessible formats, simplified communication, and expedition of proceedings when necessary.[116]

Procedural safeguards such as the right to understand and participate in proceedings, access legal assistance, and challenge evidence are particularly significant for older individuals, who may face cognitive, physical, or sensory limitations. According to Schmahl, although the ECHR prohibits discrimination, "age" is not always explicitly addressed, and protections for older persons remain underdeveloped compared to other vulnerable groups.[117] Therefore, ensuring a fair trial for older persons may require not only formal equality but also reasonable accommodations to guarantee full and effective participation, as also emphasised by Doron, Numhauser-Henning, Spanier, Georgantzi and Mantovani in their review of ageism in the legal system.[118]

In the case of "*Cibicki v. Poland*",[119] the applicant, Mr. Cibicki, was born in 1931, in Poland. In 1997, the applicant launched civil proceedings asking for the division of his late parents' marital property, which included a collection of 300 valuable paintings. He was the only heir of his deceased mother, but his deceased father's second wife inherited after him according to his last will.[120] As the Wrocław District Court found that many of these paintings had been contested as belonging to the applicant's parents, the Court decided to order the preparation of an expert opinion regarding the value and origin of the paintings. Moreover, the court considered that

115 Ibid., p. 6.
116 Council of Europe, 2014.
117 Schmahl, 2022, pp. 148–181.
118 Doron et al., 2018.
119 Case of *Cibicki v. Poland*, Judgment, Strasbourg, 03 June, 2009.
120 Ibid., paras. 5–6.

since the applicant had initiated the proceedings, he should have covered the costs of the expert's opinion and ordered him to pay PLN 5,000 [approximately 1,200 euros (EUR)] as an advance on the costs of the expert opinion. Accordingly, the applicant applied for an exemption from the court fees as he was a pensioner and received an old-age pension. The Wrocław District Court acknowledged the applicant's difficult financial situation, but considered that since the beginning of the proceedings in 1997, the applicant should have saved money to pay the future court fees. Thus, the court dismissed the applicant's appeal. In 2004, the Wrocław District Court concluded a decision on the applicant's case and divided the property in question. The applicant was awarded to pay the other party PLN 2,225 and to reimburse them PLN 14,400 for the costs of the proceedings. The applicant appealed against this decision and applied to be exempted from court fees, though his appeal was dismissed by the Wrocław District Court. The court found that the applicant's financial situation had not changed since 2004. Thus, in the court's opinion the applicant should have saved enough money to pay the future costs of the proceedings. This decision was appealed again by the applicant's lawyer. In this case the Wrocław District Court partly allowed the appeal and exempted the applicant from fees exceeding PLN 600 (approximately EUR 150). However, the Wrocław District Court had to reject the appeal since the applicant did not pay court fees for proceeding with his appeal.[121]

Based on the above-mentioned, the applicant complained to the European Court of Human Rights that, because he could not pay the fees required from him for further proceeding of his appeal, he had been deprived of his right of access to a court and his trial had been unfair under to Article 6 § 1 of the Convention In response, the Government submitted that the applicant's right to fair hearing had been respected and that the applicant should have known that the proceedings might have been costly. Moreover, they submitted that the applicant could have applied for a partial exemption from the costs entailed by the preparation of the expert opinion. In sum, the Government invited the Court to find that there had been no violation of Article 6 of the Convention.[122]

As the Court considered all facts related to the case, it observed that was a pensioner receiving his old-age pension, and his household included unemployed wife and his handicapped brother. It was clear from the domestic court's decisions that that the authorities knew about his difficult situation as a whole. Nevertheless, the courts assumed that the applicant could have saved money to pay court fees, which the Court considered that this assessment was based only on theoretical calculation of the applicant's ability to save money from his very modest income. In fact, the applicant's family income was not even enough to cover maintenance, medication and other basic need.

The Court considered that the issue under the fair trial principle was by all means linked to the applicant's inability to pursue his appeal against the District Court's

121 Ibid., paras. 11–20.
122 Ibid., paras. 22–24.

judgment. With regard to the prominent place held by the right to a court in a democratic society, the Court considered that the judicial authorities failed to secure a proper balance between the interest of the State in collecting court fees for dealing with claims as well as the interest of the applicant in pursuing his appeal. For the above reasons, the Court concluded that there had been a violation of Article 6 § 1 of the Convention as ordering the applicant to bear the costs of the expert opinion and refusal to exempt him from court fees for pursuing his appeal, constituted a breach of his right to a fair trial and right of access to a court.[123]

Another case, "*Halka and Others v. Poland*",[124] is also noteworthy in this regard. The applicants, Polish nationals, alleged that their right to a "hearing within a reasonable time" had not been respected. Two applicants were born in 1927 and 1950, the other two were born in 1954 respectively. Jan Hałka, the first applicant's husband, who was a member of the Polish resistance troops of the underground Home Army was arrested by the NKVD in 1944. He died on 17 November 1986. In 1994, the applicants filed an application with the Warsaw Regional Court for compensation, whereby persons were prosecuted for their activities aimed at achieving independence for Poland. The first applicant submitted that she was elderly person and asked a judge to fix a date for hearing as soon as possible.[125] In 2002, the Warsaw Regional Court held a hearing in the applicants' case and awarded the applicant and her three daughters compensation. Later, the first and the third applicant were informed that they could collect the sums, and they did so, though the second and the fourth applicant have not had yet received their share of the compensation awarded.[126]

Accordingly, the applicants complained to the European Court of Human Rights that the length of the proceedings was incompatible with the "reasonable time" under Article 6 § 1 of the Convention.[127]

The parties agreed that the period to be taken into consideration began on 8 December 1994, the date when the applicants lodged their claim with the Warsaw Regional Court and ended on 4 December, 2000, once the Warsaw Regional Court provided its judgment. However, the applicant's claim was satisfied on 25 March 2002, although not entirely, when the first and the third applicant received their shares of the compensation awarded. According to the above-mentioned the Court noted that the decisive point was when a claimant actually became "effective", that is when his/her judiciary-determined claim was finally satisfied. In the present case, since the first and third applicant were satisfied on 25 March, 2002, the period to be examined under Article 6 § 1 was 7 years, 3 months and 17 days. As for the second and the fourth applicant, who had not received the compensation so far, the period exceeded 7 years and 3 months.[128]

123 Ibid., paras. 34–35.
124 Case of *Halka and Others v. Poland*, Judgment, Strasbourg, 02 October, 2002.
125 Ibid., paras. 6–9.
126 Ibid., paras. 13–14.
127 Ibid., para. 17.
128 Ibid., paras. 19–21.

The applicants also submitted that their case had not been complex as the trial court did not need to obtain fresh evidence; moreover, it held only one hearing. Therefore, the excessive length of the proceedings had put a severe strain on them, in particular because of the first applicant's great age. Besides, the applicants also claimed that even though they had been awarded the compensation in 2000, they did not receive it until 2002, and it was only paid to two applicants.[129] They also stressed that the authorities should have known that they would have to deal with many similar cases lodged by other victims of repression. That is why, in their opinion, the authorities had been fully responsible for the slow conduct of the proceeding in their case.

In response, the Government accepted that the case had not been particularly complex and the applicants did not contribute to the length of the proceedings. However, the Government argued that the domestic courts satisfied the applicants' claim by awarding each of them compensation. In conclusion, the Government invited the Court to find that there had been no violation of Article 6 § 1 of the Convention.[130]

By examining all circumstances of the case, the Court noted that the reasonableness of the length of proceedings should have been assessed regarding the circumstances of the case and criteria established by the case-law. The Court observed that the parties agreed that did not in any way contribute to the length of the proceedings. The Court also accepted that the Warsaw Regional Court had to deal with an increased case-load due to the huge number of similar applications submitted to the court. However, the Court accepted that due to the political situation in Poland, the applicants were able to apply for compensation as late as 50 years after the relevant events. Considering the first applicant's age and the long time she had been waiting for redress, over seven years of litigation should have been considered as a considerable period. However, the Court also considered that the measures taken by the authorities to remedy the situation did not result in any significant acceleration of the proceedings in the applicants' case. Therefore, the Court found that the remedial action relied on by the Government could not exonerate the authorities from their responsibility for the total delay in the proceedings. Consequently, the Court concluded that an overall period of more than seven years could not be deemed to satisfy the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, so there had been a breach of Article 6 § 1 of the Convention.[131]

7. Summary

Protecting the elderly and creating adequate living conditions for them is one of the main obligations of the State, since they have a significant impact on the social and political development of the country. It is impossible to achieve real, inclusive, and

129 Ibid., paras. 23–24.
130 Ibid., paras. 26–32.
131 Ibid., paras. 33–39.

stable development without elderly people's active involvement. Accordingly, each State faces challenges to create/implement policy adjusted to special needs of the elderly people, in order to provide them to have equal opportunities to be in involved in economic, political, and social procedures.

Based on the relevant practice of the Court of Human Rights, the elderly often face stigma and discrimination. Very often, their rights on individual, public and institutional level are breached due to their age. Such attitude is supported by common stereotypes that elderly people are just the past and often, their role and existence are invisible for their families and society. Elderly people often suffer from various abusive treatment conducted by those who they trust most. Abusive treatment has many forms, among them, physical, psychological, and sexual. Also, financial and material violence, abandonment, neglect, as well as loss of dignity and respect. Therefore, it might happen in caregiving contexts.

It should be noted that States permanently face challenges related to protection of elderly people's rights, which requires diligence actions. To overcome such challenges, it is important for the States to enhance the legislation and practice, as well as development of national standards of human rights. In this process a regional institution such as European Court of Human Rights plays an important role. Accordingly, in this chapter, the cases considered of the European Court of Human Rights, which create standards and assessment criteria for elderly people's cases, are important tools not only for Central and Eastern European States but those interested in effective protection of elderly people's rights and improvement of living conditions.

Bibliography

Literature

Beard, J.R. et al. (2016) 'The World report on ageing and health: a policy framework for healthy ageing', *Lancet*, 387, pp. 2145–2154; https://doi.org/10.1016/S0140-6736(15)00516-4.

Council of Europe (2013) *Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)* [Online]. Available at: https://www.ordineavvocatitorino.it/sites/default/files/Guide_Art_6_ENG.pdf (Accessed: 30 September 2024).

Doron, I., Numhauser-Henning, A., Spanier, B., Georgantzi, N., Mantovani, E. (2018) 'Ageism and Anti-Ageism in the Legal System: A Review of Key Themes' in Ayalon, L., Tesch-Römer, C. (eds.) *Contemporary Perspectives on Ageism.* Cham: Springer. pp. 303–319; https://doi.org/10.1007/978-3-319-73820-8_19.

European Commission (2018) *The 2018 Ageing Report: Economic and Budgetary Projections for the EU Member States (2016-2070)*. Luxembourg: Publications Office of the European Union [Online]. Available at: https://economy-finance.ec.europa.eu/document/download/ff55ad51-8013-429c-81e7-34187ced2f1a_en?filename=ip079_en.pdf (Accessed: 30 September 2024).

Forman, L., Ooms, G. (2015) 'Rights-Based Approaches to Health Policies and Programmes: Articulations, Ambiguities and Assessment', *Journal of Public Health Policy*, 31(2), pp. 129–145; https://doi.org/10.1057/jphp.2010.7.

Freedman, L.P. et al. (2005) 'Defining inequities in health', *Journal of Epidemiology & Community Health*, 59(4).

Gostin, L., Mann, J., Gostin, L. (1994) 'Towards the development of a human rights impact assessment for the formulation and evaluation of public health policies', *Health and Human Rights*, 1(1), pp. 58–80; https://doi.org/10.2307/4065262.

Gostin, L.O., Sridhar, D. (2014) 'Global health and the law', *New England Journal of Medicine*, 370(18), pp. 1732-1740; https://doi.org/10.1056/NEJMra1314094.

Human Rights Council (2021) *Human rights of older person, resolution 48/3*, 7 October 2021. [Online]. Available at: https://digitallibrary.un.org/record/3945626?v=pdf (Accessed: 30 September 2024).

Kendig, H.L. et al. (2016) 'Older adults and health care in the twenty-first century', *Lancet*, 387.

Kessler, R. (2013) 'European human rights and ageing: The European Court of Human Rights and older people's rights', *Journal of Elder Abuse & Neglect*, 25(2), pp. 128–146.

Marmot, M. (2005) 'Social determinants of health inequalities", *Lancet*, 365, pp. 1099–1104; https://doi.org/10.1016/S0140-6736(05)71146-6.

Moulaert, F., Martinelli, F., Swyngedouw, E., Gonzalez, S. (2007) 'Towards alternative model(s) of local innovation', *Urban Studies*, 44(3), pp. 581–599; https://doi.org/10.1080/00420980500279893.

Pinquart, M., Sörensen, S. (2006) 'Helping caregivers of persons with dementia: Which interventions work and how large are their effects?' *International Psychogeriatrics*, 18(4), pp. 577–595; https://doi.org/10.1017/S1041610206003462.

Political Declaration and Madrid International Plan of Action on Ageing (2002) New York: United Nations [Online]. Available at: https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf (Accessed: 30 September 2024).

Posthuma, R.A., Campion, M.A. (2013) 'Age stereotypes in the workplace: Common stereotypes, moderators, and future research directions', *Journal of Management*, 35(1), pp. 158–188; https://doi.org/10.1177/0149206308318617.

Sakellariou, D., Rotarou, E.S. (2017) 'Access to healthcare for men and women with disabilities in the UK', *Disability and Health Journal*, 10(4); https://doi.org/10.1136/bmjopen-2017-016614.

Schmahl, S. (2022) 'Schutz und Rechte älterer Menschen in der Europäischen Menschenrechtskonvention und der Revidierten Europäischen Sozialcharta', *Archiv des Völkerrechts*, 60(2), pp. 148–181; https://doi.org/10.1628/avr-2022-0010.

Sen, A. (1999) *Development as Freedom*. Oxford: Oxford University Press.

UN Committee on Economic, Social and Cultural Rights (2000) *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health* [Online]. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/Health/GC14.pdf (Accessed: 30 September 2024).

United Nations (2007) *World Population Ageing 2017*. New York: United Nations [Online]. Available at: https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Report.pdf (Accessed: 30 September 2024).

Vitkauskas, D., Dikov, G. (2017) *Protecting the Right To a Fair Trial Under The European Convention On Human Rights: A Handbook For Lega Practitioners*. 2nd edn. Strasbourg: Council of Europe.

World Health Organisation (2007) *Global Age-friendly Cities: A Guide* [Online]. Available at: https://iris.who.int/server/api/core/bitstreams/08caa73b-5934-4b6b-bffe-d27fbe92e6e7/content (Accessed: 30 September 2024).

World Health Organisation (2008) *The World Health Report 2008 – Primary Health Care: Now More Than Ever* [Online]. Available at: https://www.who.int/whr/2008/en/ (Accessed: 30 September 2024).

World Health Organisation (2015) *World report on ageing and health* [Online]. Available at: https://iris.who.int/server/api/core/bitstreams/5174879e-b0dc-43fc-b3a8-b1db31c51d4c/content (Accessed: 30 September 2024).

Yamin, A.E. (2008) 'Power, Suffering, and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter', *Health and Human Rights Journal*, 10(2), pp. 314–316; https://doi.org/10.1080/18918131.2016.1249598.

Yon, Y., Mikton, C.R., Gassoumis, Z.D., Wilber, K.H. (2017) 'Elder abuse prevalence in community settings: A systematic review and meta-analysis', *The Lancet Global Health*, 5(2), pp. 147–156; https://doi.org/10.1016/S2214-109X(17)30006-2.

Zaidi, A. (2010) 'Active ageing index: conceptual background, construction and first results', *Journal of European Social Policy*, 20(4), pp. 325–339.

Legal Sources

African Union (1981) *African Charter on Human and Peoples' Rights*. Adopted by the Organisation of African Unity on 27 June 1981.

Council of Europe (1950) *Convention on the Protection of Human Rights and Fundamental Freedoms*. Adopted by the Council of Europe on 4 November 1950.

Council of Europe (1996) *European Social Charter (Revised).* Adopted by the Council of Europe on 3 April 1996.

Council of Europe (2014) *Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of the human rights of older persons*. Adopted on 19 February 2014.

United Nations (1948) *Universal Declaration of Human Rights*. Adopted by the United Nations General Assembly on 10 December 1948.

United Nations (1966) *International Covenant on Economic, Social and Cultural Rights*. Adopted by the United Nations General Assembly.

United Nations (1979) *Convention on the Elimination of All Forms of Discrimination Against Women.* Adopted by the United Nations General Assembly on 18 December 1979.

United Nations (1989) *Convention on the Rights of the Child*. Adopted by the United Nations General Assembly on 20 November 1989.

United Nations (2006) *Convention on the Rights of Persons with Disabilities*. Adopted by the United Nations General Assembly on 13 December 2006.

World Health Organisation (1948) *Constitution of the World Health Organisation*. Adopted by the International Health Conference in 1946.

Case -Law

Case of *McDonald v. The United Kingdom*, Judgment, Strasbourg, 20 August, 2014.

Case of *Gross v. Switzerland*, Judgment, Strasbourg, 30 September, 2014.

Case of *Jivan v. Romania*, Judgment, Strasbourg, 8 May, 2022.

Case of *Heinisch v. Germany*, Judgment, Strasbourg, 21 October, 2011.

Case of *H.M. v. Switzerland*, Judgment, Strasbourg, 26 May, 2002.

Case of *Stanev v. Bulgaria*, Judgment, Strabourg, January 17, 2012.

Case of *Dodov v. Bulgaria*, Judgment, Strasbourg, April 17, 2008.

Case of *Rodina v. Latvia*, Judgment, Strasbourg, 14 August, 2020.

Case of *Grant v. The United Kingdom*, Judgment, Strasbourg 23 August, 2006.

Case of *Zavodnik v. Slovenia*, Judgment, Strasbourg, 21 August, 2015.

Case of *Cibicki v. Poland*, Judgment, Strasbourg, 3 June, 2009.

Case of *Halka and Others* v. Poland, Judgment, Strasbourg, 2 October, 2002.

| Chapter 21 |

The Protection of Older Persons in European Union Law

Marcel Dolobáč

ABSTRACT

This chapter examines the legal framework of the European Union concerning the protection of older persons, with a particular focus on the prohibition of age discrimination in employment. It analyses the evolution of the principle of equal treatment in EU primary and secondary law, especially within the framework of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Special attention is devoted to the jurisprudence of the Court of Justice of the European Union, whose case law has played a crucial role in defining the scope of protection against age discrimination and the conditions under which differential treatment may be considered justified. The chapter also outlines key EU policy initiatives aimed at promoting active ageing and strengthening the social inclusion of older persons. The analysis demonstrates that EU law seeks to balance the protection of older workers with legitimate employment and labour-market objectives, including intergenerational solidarity and sustainable social policy.

KEYWORDS

age discrimination, equal treatment, Directive 2000/78/EC, Court of Justice of the European Union, employment protection, active ageing, labour market policies, EU strategies on ageing

1. Introduction

European integration, as a result of a number of mainly economic and political compromises, has been characterised by successive complex structural changes, the process of which has not been completed, even today. The founding Treaties [the Treaty establishing the European Coal and Steel Community (1951), the Treaty establishing the European Economic Community (1957) and the Treaty establishing the European Atomic Energy Community (1957)][1] were mainly aimed at economic prog-

1 The Treaty establishing the European Coal and Steel Community, signed in Paris on 18th April 1951; the Treaty establishing the European Economic Community, signed in Rome on 25th March 1957; and the Treaty establishing the European Atomic Energy Community, signed in Rome on 25th March 1957.

Marcel Dolobáč (2026) 'The Protection of Older Persons in European Union Law' in Jakab, N. (ed.) *Human Rights Protection of Vulnerable Groups*. Miskolc–Budapest: Central European Academic Publishing, pp. 851–879. https://doi.org/10.71009/2026.nj.hrpovg_21

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ress. Social integration was seen more as a secondary or concomitant consequence of economic cooperation and development. In the same sense, the principle of equal treatment that shall be applied was also looked to, even though it was initially seen as only a means to achieve the single market as the main economic goal. Over time, the view began to prevail (at that time) in the Communities that economic integration and the free market were not possible without the simultaneous convergence and levelling of conditions in the social sphere as well. Without analysing in detail the various milestones of the Union's (or previous Communities') rebirth,[2] there is now no doubt that the European Union is not only an economic grouping, but also a social grouping, with the prism of compliance with fundamental rights and freedoms, including the prohibition of discrimination in the broadest sense of the word, as an important agenda.

The same treatment principle is one of the fundamental principles of European Union law, which goes beyond social law and becomes an elementary basis for the further development of primary and secondary Union law. There cannot be a fair exercise of the law which is contrary to the principle of equal treatment and the substantive concept of non-discrimination.

Initially, the European Union (or European Communities) focused only on protection against discrimination on the grounds of sex. The prohibition of discrimination was already enshrined in the Treaty establishing the European Community (1957) (hereinafter also referred to as TEC), but the primary law at that time only enshrined the principle of equal pay between men and women. The ratification of the Treaty of Amsterdam (1997),[3] was a major milestone in the extension of the prohibition of discrimination, both because the primary law on equal pay for men and women was supplemented by other provisions which allowed the creation of secondary law on the equal treatment of men and women in matters of employment and occupation, and because it created a legislative framework for the adoption of positive measures. However, the most significant change as a result of the ratification of the Amsterdam Treaty was the adoption of Article 13 TEC, which is currently contained in Article 19 of the Treaty on the Functioning of the European Union (2007) (hereinafter also referred to as TFEU).[4] The adoption of this amendment extended the scope for anti-discriminatory Union regulation (in addition to the previously established criterion of sex) to other criteria, *including age*.

The age protection of the elderly is one of the main topics currently being discussed at international and EU level, as the elderly population and their share of the population is increasing due to the ageing of the population. The European Commission (the Commission) has defined active and healthy ageing as a major societal challenge that is common to all European countries and where the European Union (the EU) can

2 See for example Barancová, 2012, pp. 10–23.

3 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997. More Kľučka and Mazák, 2004, pp. 27–29.

4 Consolidated version of the Treaty on the Functioning of the European Union.

play an essential role and lead Member States in providing innovative solutions to this challenge. This chapter will examine the EU legal and policy framework on older people and analyse the status of older people's rights as recognised by EU law and the case law of the Court of Justice of the EU (hereafter the Court of Justice). The cases that this thesis briefly encounter will include judgments of the Court of Justice that directly relate to the legal rights of older people or deal directly with issues of age discrimination.

In this context it should be stressed that The Court of Justice's case-law, which is constantly evolving, is also the most extensive in this area of legal regulation. The most important decisions of the Court of Justice have gradually been reflected in the legal regulation of Union law.

2. Protection Provided by the European Union

2.1. Primary Law

Within the primary Union law, legal grounds for the principle of equal treatment are principally contained in Article 8, Article 10, Article 19, Article 153 and Article 157 of TFEU. Other legal bases, however, can also be found in Article 21 of the Community Charter of the Fundamental Social Rights of Workers (1989),[5] in Article 20 and Article 21 of the Charter of Fundamental Rights of the European Union (2000),[6] or in Principle 3 of the European Pillar of Social Rights (2017).[7]

For future interpretation it should be noted that The Union law distinguishes between *the principle of equal opportunities* and the *principle of equal treatment*. The distinction arises directly from the primary law pursuant to Article 157 of the Treaty on the Functioning of the European Union, when the principle of equal opportunities is perceived as part of the more widely conceived principle of equal treatment which mainly pertains to the right to access employment, or possibly the right career growth. On the other hand, the principle of equal treatment in the area of labour law represents, in terms of the content, not only equal opportunities in access to employment, but also and simultaneously equal treatment during the term of an employment relationship, and possibly also after its termination.

5 Adopted in 1989, it emphasises workers' social rights and promotes employee involvement in workplace decision-making, fair working conditions, equal treatment and protection from discrimination. Community Charter of the Fundamental Social Rights of Workers, adopted at the Strasbourg European Council on 9th December 1989.

6 Adopted in 2000 and legally binding since 2009. It contains articles on the right to fair working conditions, protection against unfair dismissal, the right to information and consultation in enterprises, and supports collective bargaining and trade unions. Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7th December 2000.

7 Adopted in 2017 at EU level, it contains 20 principles to promote fair working conditions and access to social protection. It is the basis for new labour law initiatives. European Pillar of Social Rights, proclaimed in Gothenburg on 17th November 2017.

Apart from the term *equal treatment*, both legal scholarship and the case law of the Court of Justice of the European Union (hereinafter the Court of Justice) frequently use the term *prohibition of discrimination*. From a substantive perspective, there is no major difference between these two concepts, as the *prohibition of discrimination* may be seen as a negative formulation and, in many contexts, a contentual synonym of the *principle of equal treatment* or the *principle of non-discrimination*. Nevertheless, it should be acknowledged that the concept of *equality* is broader in scope than the *prohibition of discrimination*, since violations of equality may also occur through other forms of unequal treatment or exclusion, such as hate speech or social marginalisation.[8]

As it has already been said, the adoption of the mentioned Amsterdam Treaty has widened the room for adopting the anti-discrimination Union amendment also *based on criteria other* than sex. Pursuant to Article 19 par. 1 of TFEU, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on *sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.* Finally, Article 19 par. 2 of TFEU enables the member states to adopt positive incentive measures also with regards to persons according to the mentioned criteria.

Articles 8 and 10 of TFEU declare *value orientation* of the Union in respect to the principle of equal treatment when they stipulate that '*in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women*' (Article 8 of TFEU) and '*in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*' (Article 10 of TFEU). Defining the value orientation of the European Union activity is also related in Article 153 of TFEU which, among other things, names (I) equality between men and women in access to and treatment in the labour market, and (II) the fight against social exclusion, both as fields in which the Union supports and complements the activities of the member states.

Following the primary law we can identify the prohibition of discrimination on the basis of these criteria: sex, racial and ethnic origin, religion and belief, disability, *age* and sexual orientation.

The Charter goes even further in terms of stipulating criteria related to the prohibition of discrimination, and beyond the scope of TFEU it entrenches in its Article 21 the prohibition of any discrimination *mainly 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.* Article 25 of the Charter guarantees 'the rights of older persons to dignity and independence and to participate in social and cultural life.'

In order to promote a deeper and fairer economic and monetary union, the European Union has adopted a set of principles grouped together in the European Pillar of Social Rights. The European Pillar of Social Rights is aimed at establishing new

8 For wider professional debate on designated terms see, for example, Koldinská, 2010, p. 10.

and more effective rights for citizens. It is grounded in 20 key priorities, which are categorised into three areas: I) equal opportunity and access to the labour market, II) equal working conditions, and III) social protection and inclusion. Protection against age discrimination is addressed directly in Chapter I, Part 3, and consequently the social protection of older persons is addressed in Chapter III, specifically in Part 15 (income in old age).

2.2. Secondary Law

The secondary amendment of prohibition of discrimination is particularly wide and to a large extent diversified. The principle of discrimination on the grounds of age is covered by the Framework Directive 2000/78/EC,[9] which provides a general framework for equal treatment in employment and occupation (together with discrimination on the grounds of religion or belief, sexual orientation and disability). The justification for the adoption of Directive 2000/78/EC (the reasons for the adoption of the Directive) shows that discrimination on the grounds of age can obstruct the achievement of a high level of employment and social protection, as well as the improvements in the standard of living and quality of life, economic and social cohesion and solidarity and the free movement of persons. As stated in Recital 11 of the Preamble to the Directive 2000/78/EC, such discrimination may hinder the attainment of these objectives. The secondary legislation builds not only on primary Union law, but also on a number of instruments of the international community by which all Member States are bound.

Directive 2000/78/EC aims to establish a general framework of conditions and measures to combat discrimination in employment, occupation and vocational training. To this end, Article 2 of the Directive 2000/78/EC defines direct discrimination, indirect discrimination and harassment as acts which are prohibited.

Direct discrimination occurs where one person is treated less favourably than another in a comparable situation on any of the protected grounds. Indirect discrimination arises where an apparently neutral provision, criterion or practice would put persons having a particular characteristic at a disadvantage compared with others, unless that measure is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary. Harassment is defined as unwanted conduct related to any of the protected grounds, with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In addition, sexual harassment, as defined in Directive 2006/54/EC,[10] constitutes unwanted verbal, non-verbal or physical conduct of a sexual nature with the same detrimental effect on the person's dignity.

9 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

10 Directive 2006/54/EC of the European Parliament and of the Council of 5th July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

As with the application of the principle of equal treatment on the grounds of race and ethnic origin (Directive 2000/43/EC),[11] the substantive scope of the prohibition of non-discrimination within the meaning of Directive 2000/78/EC does not extend to differences in treatment on the grounds of nationality. Directive 2000/78/EC, as one of the key equality directives in the EU legal framework, also explicitly provides that it does not affect the laws and conditions applicable to the entry and residence of third-country nationals and stateless persons in the territory of the Member States, nor any treatment accorded to them in relation to their legal status.

Directive 2000/78/EC, which regulates discrimination on the grounds of age, is narrower in scope than other directives[12] at first sight – discrimination is forbidden only in employment, occupations and vocational trainings. For this reason, the Commission has drafted a new Directive[13] on the implementation of the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, which was not intended to replace the existing legislation, but merely to complement it. The aim of the new legislation was to extend the scope of Union anti-discrimination law and to extend the application of the principle of equal treatment on the basis of the above criteria beyond the labour market, i.e. in areas other than employment and occupation. In particular, this proposal by the European Commission was intended to create a more comprehensive legal framework that would prohibit age discrimination (but also disability, sexual orientation and religion) in the following areas as well: access to social protection, education, healthcare, services and housing.

Finally, Directive 2000/78/EC has not been replaced to date. Although the draft directive received the support of the European Parliament, it failed to achieve unanimous agreement in the EU Council, without which the directive cannot be approved. The reasons presented for the opposition of some Member States were concerns about excessive interference in national law and different levels or scope of protection against discrimination. However even with hindsight, the draft directive in question provides the basis for further legislative progress and legally relevant discussions on extending protection against discrimination in Union labour, and we can also find references to it in new Union initiatives and social policy.

In general terms, it can be summarised that the prohibition of discrimination within the material scope of secondary Union law is general and covers a range of differentiation criteria for persons covered by Union law (in particular Directive 2000/78/EC, Directive 2000/43/EC and Directive 2006/54/EC). At the same time, primary law (Articles 19 and 157 TFEU) also provides, for all differentiation criteria, the same legal basis for *the admissibility of differential treatment which is not considered discrimination* (i.e. positive action). However, if we take a closer look at the specific regulation of

11 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
12 E.g. Directive 2000/43/EC – the directive which regulates the prohibition of the principle of equal treatment based on race and ethnic origin.
13 European Commission, 2008.

the secondary law standards, in particular Directive 2000/78/EC, we find a slightly different regulation concerning the possible differential treatment in relation to each differentiation criterion, which respects both the specificities of particular groups of persons, but also looks at the legitimate needs of the majority.

Under European Union secondary law, the prohibition of discrimination on the grounds of age is an important part of achieving the objectives of achieving the desired employment rate and promoting a diverse workforce. However, in certain circumstances, differential treatment on the grounds of age can be justified, and the reasons should lie, in particular, in the application of employment and labour market support policies. According to Directive 2000/78/EC, differences in treatment may include, but are not limited to: a) the establishment of specific conditions of the access to employment and training, employment and occupation, including dismissal and remuneration conditions for younger and older workers and persons with a care obligation, in order to promote their professional integration or to ensure their protection; b) setting minimum conditions of age, professional experience or seniority for access to employment or to certain employment-related benefits; c) the setting of an upper age limit for applicants resulting from specific training requirements for the post to be filled or from the necessity of a reasonable period of employment before retirement.

Member States may further provide that, in occupational social security schemes, the fixing of the age of eligibility for or entitlement to retirement or invalidity pensions, including the fixing of different age limits in those schemes for employees, shall not constitute discrimination on the grounds of age, provided that this does not result in discrimination on the grounds of sex. Furthermore, in order to maintain the combat effectiveness of their armed forces, Member States may exclude the armed forces from the personal scope of Directive 2000/78/EC with regards to discrimination on the grounds of age (as well as on the grounds of disability).

Although Directive 2000/78/EC states in point 25 that

> 'a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate',

the case-law of the Court of Justice confirms that the boundary between legitimate differences of treatment and discriminatory conduct is not clearly defined and is only gradually evolving with the development of society itself. In this regard, Directive 2006/54/EC also contains provisions relevant to age-related discrimination, particularly in Articles 7, 8, 9, 11 and 13, which address issues such as equal treatment in occupational social security schemes, access to employment, vocational training and

working conditions. The relevant case-law of the Court of Justice is dealt with in the next chapter.

3. Court of Justice Case Law on Age Discrimination

The Court of Justice has repeatedly addressed the issue of the prohibition of age discrimination in the field of employment, and its case law has had a significant impact on the interpretation and application of European equal treatment law. Its case law has made a significant contribution to the protection of employees' rights against age discrimination, and continues to shape the application of the prohibition of age discrimination in employment relationships in EU Member States.

So what has the case-law of the Court of Justice brought?

The Court of Justice has ruled, among other things, that the prohibition of discrimination on the grounds of age is a general principle of EU law.[14] In the *Mangold* case (see also the interpretation below), the Court of Justice sought to answer the question of the age restriction in fixed-term employment contracts. In its decision it found that although Directive 2000/78/EC had not yet been transposed into national law, the *prohibition of age discrimination was so important that Member States had to respect this principle*. It should be noted that this judgment was not only ground-breaking, but also substantially criticised. The criticism[15] was mainly directed at the inference of the horizontal effect of the Directive, which was considered by the scientific community to be disproportionate and, from their point of view, interfering with national competences.

The *Mangold* decision was followed by a number of other decisions,[16] which considered the justification for termination of employment in connection with reaching retirement age.

Finally, the impact of the Court's case law has left no doubt (despite the initial criticism of the Mangold judgment) about the direct applicability of Directive 2000/78/EC, which provides a general framework for the prohibition of discrimination, including discrimination on the grounds of age.[17]

The Court has addressed the question of whether the compulsory fixing of retirement ages for specific groups of employees (namely pilots *in Prigge*) is discriminatory.[18] The conclusions in that case can be generalised to other cases where employers

14 CJEU ruling in C-144/04 – Mangold.

15 For example, see Temming, 2007. See also Zedler, 2006.

16 In Palacios de la Villa as well as in case C-45/09 – Rosenbladt, the provision for automatic termination of employment on reaching retirement age was at issue. In Case C-388/07 – Age Concern England, the possibility of dismissing an employee on the grounds of retirement age.

17 The CJEU's decision in C-555/07 – Kücükdeveci. Specifically in this case, national law did not allow older employees to have their years of service fully taken into account for the purposes of the notice period.

18 CJEU decision in C-447/09 – Prigge.

have to show objective reasons for a difference in treatment. The age restriction must always be justified by legitimate aims (which of course include safety reasons).

The Court of Justice has also clarified the objective justification for differential treatment in a number of decisions. It has highlighted the basic premise that differential treatment on the grounds of age may be admissible if it is objectively justified by a legitimate aim and the means of achieving it are proportionate and necessary. The decision in *Age Concern England* was particularly illuminating.[19] The Court recognised that measures which promote the employment of younger people or protect older workers may be justified, but must be proportionate to the aim pursued.

Last but not least, the CJEU's decisions set precedents that Member States respect in their labour law systems. In this way, it contributes to the harmonisation of EU and national law on age discrimination. Protecting employees against age discrimination has thus taken on a new meaning and the legal options for individuals have been considerably broadened. Having said this, it is important to emphasise that the CJEU has a key role to play in strengthening the rights of employees by ensuring that Member States and employers comply with the principles of equal treatment and non-discrimination in accordance with European law.[20]

From another perspective, it can be noted that the case law of the Court of Justice has had a significant impact on several areas of elder law. The key areas are:

General protection against discrimination: decisions of the EU Courts[21] strengthen legal standards against age discrimination, contributing to greater protections for older workers in the workplace.

Access to employment: the EU SD stresses the need to ensure that older workers have equal opportunities for employment and career progression, thus promoting the active participation of older people in the labour market.

The area of the right to adequate working conditions: the EU RSD also addresses how working conditions should be adapted to the needs of older workers to reduce physical strain and promote their performance.

The right to continued employment: the right of older workers to continue working thanks to measures taken, including flexible working conditions.

Moreover, the CJEU does not leave out the *area of social security***.** Court decisions contribute to creating frameworks to protect the pension rights of older workers to ensure their dignified existence after retirement.

Support in these areas through EU case law contributes to creating an inclusive working environment.

19 Decision in C-388/07 – Age Concern England.
20 Petery and Grosch, 2022, pp. 379–382.
21 Such as CJEU Decision C-441/14 – Dansk Industry.

4. Key Decisions of the Court of Justice of the European Union

As already mentioned several times, an important legal basis for protection against discrimination on the grounds of age is Directive 2000/78/EC, which provides a general framework for equal treatment in employment and occupation. The interpretation of its provisions has been the subject of several preliminary rulings before the Court of Justice of the European Union.

4.1. Termination of Employment on the Grounds of Age

The attainment of a certain age as a legally relevant fact for the creation of a legitimate reason for termination of employment is a relatively popular phenomenon in the Member States. Termination of employment occurs either automatically if certain conditions are met, one of which is reaching a certain age (e.g. 65), or if these conditions are met, the employer has the option of terminating the employment relationship with the employee by giving notice (as is currently the case in Slovakia).[22]

The main reasons for adopting these rules are the division of labour between generations, the rejuvenation of certain jobs, and the reduction of unemployment in the country. In the following section, we will focus on a number of decisions of the Court of Justice which assess the compatibility of Directive 2000/78/EC with national legislation on the termination of an employment relationship on reaching a certain age as a legal ground for its termination.

4.2. Case C-411/05 Félix Palacios de la Villa v. Cortefiel Servicios SA

Félix Palacios de Villa was an employee whose employment was terminated when he had reached the age of 65, being the standard retirement age in Spain. National law has given social partners the power to agree in a Collective Agreement on the automatic termination of employment for all employees who have reached the age of 65 and have fulfilled the conditions for an old-age pension. The principal dispute concerned a former employee and his employer, who challenged the automatic termination of his employment on the grounds that he had reached the age of 65 and had at the same time satisfied the conditions for receiving an old-age pension.

Mr Palacios de la Villa alleged an infringement of his fundamental rights, in particular the right to equal treatment. The purpose of the Employment Equality Directive was to establish a general framework to ensure the equality of treatment in employment for all[23] (i.e. for every person) by affording them effective protection

22 Note: The Slovak Labour Code adopted, as of 1st January 2022, the possibility for an employer to terminate an employee if the employee had reached the age of 65 and was entitled to an old-age pension [act No. 311/2001 Coll., the Labour Code, Article 63(1)(f)]. However, the effectiveness of the provision of the Slovak Labour Code introducing a termination ground for reaching a certain age has been suspended by the Constitutional Court of the Slovak Republic (PL. ÚS 12/2021-79 of 15th December 2021). The final decision has not been issued even after more than three years.

23 Para. 42 of CJEU Ruling C-411/05 – Félix Palacios de Villa c/a Cortefiel Servicios SA.

against discrimination based on one of the grounds listed in the Employment Equality Directive, namely Article 1. Age is included in this list of discriminatory grounds. The Court therefore considers in these proceedings whether Directive 2000/78/EC applies to the dispute in the main proceedings and if so, whether national legislation such as that described above is compatible with European Union law.

The Court found that the national legislation at issue fulfilled the *a priori* definitional characteristics of the difference in treatment (but that did not automatically imply discrimination). The comparator was all other persons in gainful employment who had not yet reached that age or who had reached that age but did not satisfy the conditions for the award of an old-age pension. However, the Court subsequently held that unequal treatment such as that at issue in the main proceedings did not constitute discrimination prohibited by Article 2 of Directive 2000/78/EC '*if, in the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and training objectives, and if the means of achieving that aim are proportionate and necessary*'.[24]

The aim of the national legislation adopted was to offer labour market opportunities to jobseekers,[25] and to regulate the national labour market,[26] in particular for the purpose of curbing unemployment.

Lastly, the Court pointed out that the legislation concerned was not solely based on a certain age, but took into account other cumulative conditions, in particular the fact that the persons concerned receive or are entitled to receive certain financial compensation in the form of an old-age pension at the end of their working/employment life, and that the legislation cannot therefore be regarded as disproportionate.[27]

As a result of the legal assessment of the national legislation in the light of Directive 2000/78/EC, the Court of Justice found that the provisions of that directive did not preclude Member States since the adoption of national legislation which included provisions on compulsory retirement which required, as the only conditions, that the worker must have reached a specific retirement age and had satisfied the other conditions for the receipt of a retirement pension. Such a measure, although based on age, which is a discriminatory feature, is objectively and reasonably justified by a legitimate objective relating to employment policy and the labour market.

4.3. Case C-45/09 Gisela Rosenbladt c/a Oellerking Gebäudereinigungsges. mbH

The present decision is, in relation to the dispute in the main proceedings, similar to the case in Case C-411/05 Félix Palacios de Villa c/a Cortefiel Servicios SA (the Villa case). Ms Gisela was a cleaner who had worked part-time for her employer for 39 years. Her employment ended when she reached retirement age (65).

24 Art. 6(1) first sub-paragraph of the Employment Equality Directive.
25 Paragraph 60 of CJEU Ruling C-411/05 Félix Palacios de Villa c/a Cortefiel Servicios SA.
26 Ibid., para. 62.
27 Ibid., para. 73.

The legal basis for the termination of the employment relationship in question was the collective agreement of general application for employees of undertakings providing cleaning services (Allgemeingültiger Rahmentarifvertrag für die gewerblichen Beschäftigten in der Gebäudereinigung, hereinafter referred to as the RTV).

The RTV provides that

> '[u]nless the contract of employment provides otherwise, the employment relationship shall terminate on the expiry of the month from which the employee may claim a retirement pension [...] at the latest on the expiry of the month in which the employee reaches the age of 65 years.'

The applicant wanted to keep working but was prevented from doing so due to her age. Consequently, she brought the case before the national court, which questioned whether the national law complied with Directive 2000/78/EC and thus requested a preliminary ruling from the Court of Justice. Many aspects of the referred questions and the Court's legal analysis closely resembled, and in some cases were identical to, those in the Villa case; therefore, these points will be omitted in the subsequent discussion.

However, the CJEU has stated, among other things:

The automatic termination mechanism does not allow employers to unilaterally terminate the employment relationship when employees have reached the age at which they can receive a retirement pension. This mechanism is different from termination because it has a contractual basis.

It went on to state that

> 'in the absence of specification in the legislation at issue as to the objective pursued, it is necessary that other circumstances, which are based on the general context of the measure at issue, make it possible to identify the objective underlying it for the purposes of judicial review as to its legitimacy as well as the proportionality and necessity of the means used to attain that objective.'[28]

The automatic termination of an employment contract under the relevant national legislation does not, and should not, automatically force individuals to leave the labor market permanently. This mechanism does not establish a mandatory retirement scheme, nor does it prevent employees who wish to continue working – such as for financial reasons – from practicing their profession beyond the retirement age. The Court considers such a mechanism to be in line with European Union law. Moreover, by implementing a system of automatic employment termination at a certain age, national legislation does not strip employees who have reached retirement age of

28 Decision C-388/07 – Age Concern England.

protection against age discrimination, for instance if they seek to remain employed or find new work.

4.4. Joined Cases C-250/09 and C-268/09 Vasil Ivanov Georgiev v. Tehnicheski Universitet – Sofia, Filial Plovdiv

The applicant Georgiev, who was a professor at a university in Bulgaria, became the subject of a legal dispute when his employment was terminated on the grounds of age after he had reached the statutory retirement age. Bulgaria had a mandatory retirement age for university professors, and Georgiev challenged the decision that automatic termination of employment on the basis of age was contrary to EU law, in particular Directive 2000/78/EC, which prohibits discrimination on the grounds of age.

The legal basis for the CJEU's decision in the Georgiev case is primarily two directives: I) Council Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and II) Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by the European social partners – namely the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC).[29]

The purpose of Directive 1999/70/EC overlaps to a large extent with the purpose of Directive 2000/78/EC, which together with other standards of EU law, forms a relatively coherent system of European Union antidiscrimination law. The purpose of the legislation in Directive 1999/70/EC is both to improve the quality of fixed-term work by applying the principle of equal treatment and also to prevent the illegal practice or abuse of fixed-term employment consisting in the repeated chained conclusion of fixed-term employment contracts and relationships.

4.4.1. Admissibility of Differential Treatment

The common features of Directive 2000/78/EC and Directive 1999/70/EC can also be seen in the permissibility of differential treatment, which is not regarded as discrimination within the meaning of those Directives. Under Article 6(1) of Directive 2000/78/EC, Member States may lawfully implement differential treatment if it is objectively and reasonably justified by a legitimate purpose – such as valid employment, labor market, or training goals – and if the measures used to achieve that purpose are appropriate, necessary, and proportionate. The second sentence of this Article and point of the Directive gives several examples of such differential treatment.

Directive 1999/70/EC allows for differences of treatment on the same objective grounds, but without further specifying them. In determining the scope of the exemptions falling within objective grounds, reference may be made in part to the preamble to the Framework Agreement on fixed-term work, which states that in applying the

29 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

principles and minimum requirements in relation to fixed-term work, account should be taken of relevant national, sectoral and seasonal conditions.

Although Directive 2000/78/EC states in point 25 that 'a distinction must necessarily be drawn between differences in treatment which are justified in particular by legitimate objectives in the field of employment policy, the labour market and vocational training, and discrimination which must be prohibited', the case-law of the Court of Justice confirms that the boundary between legitimate differences of treatment and discriminatory conduct is not clearly defined and is only gradually being shaped by the Court's jurisprudence.

4.4.2. Differential Treatment in the Higher Education Teaching Profession

The ambiguity of the line between differential treatment as an exception on objective grounds and discriminatory conduct, as envisaged by the above-mentioned directives, is confirmed by the very wording of the Court of Justice's decision in Georgiev.

The Court of Justice has held that Directive 2000/78/EC must be interpreted as permitting Member States to adopt national legislation which allows university teachers to continue to work after reaching a certain age only on fixed-term contracts if they make retirement compulsory for university teachers who have reached a certain age; at the same time however, the CJEU stated in the operative part of the judgment that such legislation is permissible only if it pursues a legitimate aim linked in particular to employment and labour market policy objectives and if it achieves that aim in a proportionate and necessary manner.

It can further be inferred from the context of the reasoning of the Georgiev judgment that the Court was not entirely satisfied with the reasoning of the Bulgarian Government, which rather justified the different treatment of university teachers after a certain age in general terms by reference to specific national legislation.

However, in its decision, the Court took into account the comments of the German Government, the Slovak Government and the Commission, which justified the legitimacy of the difference in treatment primarily on the grounds of the objective of ensuring the quality of education and research by renewing the teaching staff, namely by recruiting younger professors and by an optimal distribution of posts ensuring a balance between the generations.[30] The wording of the judgment, which saw the legitimacy of the difference in treatment in particular in terms of promoting access to the profession for young people, is consistent with the intentions of the above.

It is evident from the above that the legitimate aim justifying differential treatment must always be clearly determined based on the specific circumstances of the case, while considering the labour market and employment policies of the relevant Member State. A general reference to employment policy or specific legislation is not sufficient. Such a conclusion is also supported by the case-law of the Court of Justice,

30 Cf. the decision of the Court of Justice of the EU in Case C-411/05 – Palacios de la Villa of 16th October 2007 and the decision of the Court of Justice in Case C341/08 - Petersen of 12th January 2010.

which deals with the justification for the derogation from the prohibition on fixed-term employment in a chain of fixed-term contracts under Directive 1999/70/EC.

In Del Cerro Alonso,[31] the CJEU held that if a certain employment is qualified under national law as being a "service" with certain characteristics that are typical of the public service of the Member State concerned, this cannot automatically be regarded as a relevant "objective reason" justifying the application of an exception to the prohibition on fixed-term contracts of employment in a chain. In Vassilakis,[32] the CJEU further held that Member States cannot justify the possibility of the recurrence of fixed-term contracts of employment merely by reference to a general law or sub-legal provision. Conversely, the concept of objective reasons, as defined by Directive 1999/70/EC, demands justification based on specific facts, particularly those related to the activity concerned and the conditions under which it is carried out. Building on the aforementioned rulings and consistent with established case law, the CJEU in the joined cases of Angelidaki and Others[33] confirmed and emphasised that the public sector cannot rely on objective grounds on the sole ground that fixed-term contracts are based on statutory provisions.

4.5. Other Decisions

We will briefly mention other decisions.

The Mangold ruling (C-144/04): this was a landmark judgment because the Court ruled that the prohibition of discrimination on the grounds of age was a *general principle of EU law* that Member States must respect. The Court ruled that even before the transposition of Directive 2000/78/EC, Member States had an obligation to prevent discrimination on the grounds of age.

Kücükdeveci decision (C-555/07): in this case, the Court of Justice confirmed that the provisions of the directive prohibiting discrimination on the grounds of age were directly effective in situations where national legislation is contrary to EU law. Employees could therefore directly invoke their rights under the Directive before national courts.

Prigge decision (C-447/09): the Court of Justice ruled that the age limit set for pilots to retire could be considered discriminatory if it was not based on safety requirements. In assessing age discrimination, the key issue is whether such a difference in treatment is objectively justified by a legitimate aim and whether the means of achieving that aim are proportionate and necessary. For example, in the case of a compulsory retirement age, the Court may accept that such a measure is justified if its aim is to promote the employment of younger workers or to protect health and safety.

The Fries decision (C-190/16) dealt with age discrimination in employment. The Court assessed whether an employer's policy regarding employee age constituted

31 Decision of the Court of Justice of the EU in Case C-307/05 – Del Cerro Alonso of 13th September 2007.

32 Judgment of the Court of Justice of the EU in Case C-364/07 – Vassilakis of 12th June 2008.

33 Judgment of the Court of Justice of the EU in Joined Cases C-378/07 Angelidaki and Others, C-379/07 Giannoudi and C-380/07 Karabousanos of 23rd April 2009.

discrimination, and if so, whether such discrimination could be justified by legitimate objectives. The ruling emphasised that differential treatment of older employees could be permissible if it aimed to achieve legitimate goals, such as encouraging the employment of younger workers. A crucial aspect of the decision was the Court's approach to the burden of proof, which required the employer to demonstrate that their actions were both necessary and proportionate to the intended objectives. While positive discrimination might be justified under certain circumstances, it remains essential to ensure fair treatment for all employees. This ruling carried significant consequences for the development of employment policies and the safeguarding of older workers' rights within the EU.

The decision in *Dansk Industry (DI) v Estate of Karsten Eigil Rasmussen* (C-441/14) contributed to the understanding of the balance between employees' rights and employers' needs. The CJEU has also addressed issues such as age discrimination and equal treatment, which is important for understanding legal frameworks against discrimination in the EU.

5. Summary of Decisions of the Court of Justice of the European Union

We have already given some outline of the decision-making practice and its contribution above. Nevertheless, with particular reference to the decisions analysed above (and in detail), we provide a summary of the most important conclusions of the decision-making practice.

Directive 2000/78/EC sets out a framework for equal treatment in employment and occupation, prohibiting discrimination on the grounds of age. However, this protection does not apply absolutely – it allows for exceptions if the measures pursue legitimate aims and are proportionate. According to Article 6(1) of Directive 2000/78/EC (Justification of differences of treatment on the grounds of age), such differences of treatment may include, among others: a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young persons, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Finally, recital no. 25 of the Employment Equality Directive contains the phrase '*specific provisions which may vary according to the situation in the Member States*', which implies that it is for the Member States to decide whether to choose, on the basis of political, economic, social considerations, the possibility of prolonging the working lives of employees or, conversely, allowing employers to terminate the employment

of persons who are entitled to retire, either optionally or compulsorily, taking into account the specific situation of the labour market in a particular State.[34]

The CJEU, in line with what has been described above, has held in the decisions referred to, that employment promotion undoubtedly constitutes a legitimate objective of social or employment policy and this must obviously be applied to national labour market policy instruments aimed at improving access to employment and improving the chances of certain categories of workers to enter active life.[35]

We can also analyse in a different way. The counter-argument in favour of upholding discrimination against "older" employees on the basis of age is to hold that such measures are excessively intrusive on the rights and legitimate interests of the persons concerned by discriminating against them. The latter cannot defend themselves; they will lose their jobs and livelihoods. They are discriminated against compared to younger employees. However, it is possible to perceive unequal status and unequal conditions on the other side, namely young/younger jobseekers who have no other material security, or have it only for a certain shorter period of time or at a minimum amount somewhere near the subsistence level. These young jobseekers, despite their qualifications and skills, are often unemployed due to the lack of relevant vacancies, which are filled by persons who would not be in the jobseeker category after leaving employment, as they would be materially secure and legally classified as old-age pensioners. In our view, the situation in question is neither the same nor comparable. The CJEU held in Case C-411/05 Félix Palacios de Villa c/a Cortefiel Servicios SA that

> 'it is not possible to regard as unduly interfering with the legitimate demands of employees who have compulsorily retired because they have reached a fixed age, unless the relevant legislation is based solely on a fixed age, but also takes account of the fact that the persons concerned receive, at the end of their careers, financial compensation in the form of a retirement pension, such as that provided for by the national scheme at issue in the main proceedings, the amount of which cannot be regarded as disproportionate.'

Judgments (e.g. C-411/05 Palacios de la Villa, C-45/09 Rosenbladt, C-250/09 and C-268/09 Georgiev) have confirmed that age limits in employment law can be justified if they pursue legitimate objectives such as (I) the promotion of the employment of younger generations, (II) the stability and balance of pension schemes and, (III) the predictability of employment relationships.

The Court of Justice of the European Union's citation makes it clear, which is also applicable in the Central European context, that as long as the persons in question have financial security from the State after the end of their careers as a substitute

34 Para. 69 of CJEU Ruling C-411/05 – Félix Palacios de Villa c/a Cortefiel Servicios SA.

35 It is essential to improve the chances of graduates, parents of minor children and other categories of jobseekers who, due to certain circumstances, have less access to employment, not least because of the shortage of jobs filled by older people entitled to a retirement pension, to join the labour market.

income due to loss of wages, the provision of the law regulating the termination of employment on the grounds of reaching a certain age and the possibility of retirement is reasonable, objective and justified.

If it is permissible to accept the view that provisions of national legislation of EU Member States which introduce automatic termination of employment upon the employee reaching a certain age and meeting a further condition for the receipt of an old-age pension are compatible with EU law and do not constitute a breach of the principle of equal treatment, the question arises as to whether the same view can be applied to a situation where Member States provide in their legislation for an employer to give notice to such an "older" employee once the conditions for reaching the age limit have been met cumulatively with the entitlement to an old-age pension.[36]

Such a system is not binding on all employers and all employees, but allows employers to decide for themselves whether or not to use this termination ground for a particular employee. Legislation allowing an employer to decide at will whether or not to dismiss an older employee also opens the door for the employer to discriminate in deciding 'which older employee to choose', or to abuse its position as the employer who holds the power to decide whether or not to terminate the employment relationship. Such actions however, constitute a breach of the law, even though it may give such notice to an employee on the grounds of age. It is forbidden by law to act in a discriminatory manner or to abuse one's rights and position in order to obtain other benefits or to (disparagingly or even disgracefully) deepen the subordination between employer and employee, whether or not the employer has the right to terminate the employment relationship on the grounds of reaching the age limit.

Termination of employment on the grounds of age, which is formulated optionally as a reason for termination, may be considered "less discriminatory" than automatic termination, or with less impact on the older employee population in aggregate. An employer, if it needs and wants to continue to employ an older employee, is not obliged to terminate the employment relationship or to accept termination on the grounds of automatic termination due to age. On the contrary, if the employment relationship were automatically terminated with the possibility of re-contracting it, the employer would have a much greater range of negotiating options, in light of the principle of contractual freedom, where if it wished to covertly or even legally "discriminate", it would find it easier to defend its actions than if it had several employees who fulfilled the conditions for the termination of the employment relationship by reaching the age limit, and it decided non-discriminatorily with whom to terminate and with whom not to terminate the employment relationship. Although the invalidity of this ground of termination is difficult to challenge, the employer's conduct before and during the termination of the employment relationship is actionable and the employee's right cannot be restricted.

36 Such as § 63 (1) (f) of the Labour Code of the Slovak Republic, which is being challenged before the Constitutional Court of the Slovak Republic and whose effectiveness is suspended due to suspected incompatibility with the Constitution of the Slovak Republic No. 460/1992 Coll.

We consider the employer's option to dismiss an employee who has reached a certain age to be in line with Directive *2000/78/EC*, as it constitutes a lesser interference with employees' rights than automatic termination. We also argue that the Court of Justice of the EU has stated that Member States have a wide margin of discretion at national level, not only in the choice of pursuing a particular social and employment policy objective, but also in the definition of the measures that can be taken to achieve it.[37]

However, we can also abstract other important conclusions from the decision-making. Measures allowing differential treatment must be *proportionate and necessary*. This means that they must be appropriate to achieve the objective pursued and, at the same time, must not go beyond what is necessary to achieve it. Automatic termination of employment on the grounds of age is only possible if there are sufficient *social security guarantees* (e.g. pension benefits) for the employees concerned. Employees whose employment is terminated on the grounds of age must be guaranteed access to a retirement pension or other social income.

Once a person reaches retirement age and is entitled to social security benefits, they can have more *flexibility in* their employment relationship. An example is *Georgiev*,[38] in which the Court emphasised that employees can be employed on short-term contracts once they reach retirement age. However, such arrangements must not be discriminatory or arbitrary. Flexible employment contracts must be justified by the specific needs of the employer or the company.

The Court pointed to the promotion and need for intergenerational solidarity. In several cases (notably *Rosenbladt and Georgiev*), the Court has stressed the importance of promoting the employment of young people through the compulsory retirement of older workers. This intergenerational solidarity has been identified as a legitimate objective that can justify age restrictions.

These judgments have generalised the principles of non-discrimination on the grounds of age, thus creating a solid basis for protecting employees from age discrimination, while at the same time providing flexibility to Member States in setting their policies.

6. European Union Policy to Support and Protect the Elderly

The ageing population in the European Union (EU) is gaining an increasing amount of attention as the number and proportion of older people grows. The EU and its Member States have put in place a variety of policies and programmes that directly or indirectly aim to support the elderly. The EU promotes active ageing, particularly

37 Decision C-144/04 – Mangold.

38 Together with the Palacios de la Villa and Rosenbladt judgments, it has provided clear guidance as to when an age restriction in employment law is justifiable. It points out that Member States' labour law may contain age limits as long as these measures respect the principles of proportionality and pursue social or economic objectives.

in the area of keeping older people in work, and assists Member States in developing sustainable solutions in the areas of pensions, health and long-term care.

A number of non-legislative/policy documents and strategies have been adopted at European Union level to prohibit age-based discrimination and promote the active participation of older people in life. Some key ones can be mentioned.

6.1. European Year for Active Ageing and Solidarity Between Generations (2012)[39]

Strategy aimed at promoting active participation of older people in economic and social life and ensuring solidarity between generations.

The main objective of this document is to provide opportunities for active ageing and to increase the employment of older workers. The goal is to enhance the quality of life for older individuals and to support their active involvement in both the labour market and society. In this document, the European Commission urges Member States to implement policies that encourage the sustained employment of older workers and create better conditions for their continued participation in the workforce. The strategy also promotes access to education and lifelong learning for older workers, which is expected to improve their adaptation to the changing working environment.

6.2. The European Pillar of Social Rights Action Plan (2021–2030)[40]

This action plan seeks to enhance social inclusion and alleviate poverty among older individuals. Its primary goal is to guarantee that older people can access high-quality social services and to combat their social isolation. The document emphasises the importance of reinforcing social protection, expanding opportunities for active ageing, and developing supportive infrastructures for the elderly.

6.3. Green Paper on Ageing (2021)[41]

This is a challenging document adopted by the European Commission as part of a larger policy package aimed at improving the quality of life of older people in the European Union. It reflects the need to adapt EU policy and legislation to an ageing population that faces challenges such as social isolation, discrimination, lack of access to healthcare and economic hardship.

Its objectives are closely aligned with the *EU Strategy on the Rights of Persons with Disabilities (2021–2030),*[42] which also promotes inclusion, accessibility and the fight against discrimination, thereby contributing to the protection of older persons, including those with age-related disabilities.

The strategy seeks to enhance the social rights and protection of older adults, focusing on the fight against age discrimination. It advocates for equal opportunities

39 European Commission, 2012.
40 European Commission, 2021c.
41 European Commission, 2021b.
42 European Commission, 2021a.

and fairness across all aspects of life, including employment, social security, and healthcare.

The strategy urges Member States to enhance healthcare access for older individuals and to foster conditions that support their active involvement in the labour market and society. A key priority is expanding the availability of social and healthcare services, with a particular focus on improving digital skills to help older people access modern care and support systems. The strategy promotes active ageing and aims to boost the employability of older workers by encouraging lifelong learning and adapting workplaces to their needs. Through these measures, it seeks to combat age discrimination in employment and ensure older individuals can remain active participants in the workforce.

Another key objective is to eliminate poverty among older individuals experiencing financial hardship and social isolation. The strategy advocates for stronger social security systems and improved access to support networks. Ensuring access to age-appropriate housing, as well as to cashless payment options and digital services that simplify daily life for seniors is also emphasised.

The Green Paper on Ageing, adopted by the European Commission in 2021, serves as a consultation document designed to initiate discussions on the challenges and opportunities arising from Europe's ageing population. It invites input from citizens, organisations, and stakeholders on how the EU and its Member States can effectively address these demographic shifts. The paper emphasises improving the quality of life for older adults by fostering their social inclusion and independence. It promotes active ageing, encouraging the participation of older individuals in the labour market and social activities, while ensuring equal access to healthcare, social services, and digital technologies.

6.4. European Action Plan for Mental Health (2021–2030)[43]

The plan highlights the importance of promoting mental health and wellbeing, especially for older adults who are frequently vulnerable to loneliness, social isolation, and psychological distress. It advocates for creating an inclusive environment and ensuring seniors have access to necessary services.

The Action Plan underscores the importance of mental health prevention and promotion across all age groups, with particular attention given to older adults who may face challenges like social isolation, loneliness, depression, or dementia. Seniors can be especially vulnerable to mental health issues, often triggered by factors such as the loss of loved ones, declining health, or insufficient support and services. The plan prioritises the development of support programs aimed at preventing mental health problems among older people.

The Action Plan emphasises active ageing and supporting seniors to access programmes that improve mental wellbeing as well as social engagement. Social integration and prevention of loneliness are key factors in maintaining mental health.

43 European Commission, 2023.

The Action Plan on Mental Health and Well-being is part of a broader EU policy framework that includes the EU Strategy on the Rights of the Elderly and the Green Paper on Ageing. Together, these documents aim to improve the overall quality of life of older people, including their mental and emotional health. The Action Plan also promotes cooperation between Member States, non-profit organisations and health services to develop targeted policies and programmes to promote the mental health of older people.

The European Action Plan on Mental Health and Well-being plays a crucial role in safeguarding seniors by prioritising mental health as a fundamental aspect of their overall wellbeing. The initiatives under this plan aim to enhance access to mental health services and support, fostering senior citizens' social inclusion, independence, and active ageing, thereby strengthening their protective environment across the EU.

6.5. AGE Platform Europe[44]

AGE Platform Europe is a non-profit network comprising organisations that represent the interests of individuals aged over 50 across Europe. Established in 2001, its mission is to promote and safeguard the rights of older persons, emphasising their active inclusion in society, protection from discrimination, and enhancement of living conditions. The organisation addresses a wide range of ageing-related issues, including active ageing, through activities such as advocacy, research, and collaboration with European institutions.

The main objectives of AGE Platform Europe are:

Promoting the rights of older people – The organisation is active in policy-making in the EU and seeks to influence legislation to better reflect the needs of older people.

Improving living conditions – The network addresses issues such as combating age discrimination, access to social protection, healthcare and support for independent living.

Promoting active ageing – AGE Europe platform promotes the active involvement of older people in society and in the labour market, contributing to a longer working life.

Intergenerational Solidarity – The organisation promotes the idea that different generations should work together to improve society as a whole.

AGE Platform Europe engages closely with European institutions, such as the European Parliament and the European Commission, alongside other civil society organisations. The organisation holds a significant role in the formulation and development of policies addressing the challenges of an ageing population across Europe.

44 Age Platform Europe toward a society for all ages, no date.

7. Active Ageing Policy at National Level

Active ageing policies are well established across several EU Member States, with many implementing strategies to promote the employment of older citizens and enhance their quality of life. For instance, Denmark has introduced measures to increase employment flexibility and improve working conditions for older workers. Germany has implemented initiatives to boost older people's employment and foster a more age-friendly labour market. In the Netherlands, programs focus on lifelong learning and adapting workplaces to better suit older employees. Italy supports older workers through various measures, including tax incentives for employers who hire them and retraining and skills development programs. These efforts collectively aim to help older workers adapt to the evolving demands of the labour market.

Policies also address the health of older workers by promoting safe and healthy working environments. Initiatives include training on ergonomic practices and encouraging healthy lifestyles to help prevent workplace accidents.[45]

In Slovakia, several researches have been carried out which show that age discrimination in the working environment persists. Older workers, especially those over 50, are often perceived as less desirable, with employers often hesitant to hire them for full-time or longer-term contracts. Surveys show that up to 83% of the Slovak public perceive older people as discriminated against in the labour market, especially when hiring or firing employees.

The Slovak Republic addresses the issue of the employment of older workers through a number of policies and programmes. Key priorities include extending working lives, introducing flexible forms of work and promoting lifelong learning. These policies also encompass retraining and upskilling programs designed to help older workers adjust to evolving labour market demands. Additionally, they encourage intergenerational cooperation and implement measures to combat age discrimination, aiming to enhance the employability and workforce integration of older individuals.[46]

Historically, various policies and programs have been implemented to support the employment of older workers, often incorporated within broader Active Ageing and Lifelong Learning strategies, though not consolidated under a single framework. These initiatives have included extending working lives, introducing flexible work arrangements, and encouraging retraining. In 2014 the National Programme for Active Ageing was launched, aiming to enhance both the employment opportunities and working conditions of older people. This programme (2014–2020) specifically focused on promoting the employment of older workers and facilitating their integration into the workplace.

45 See more on the research in Davies, 2014.
46 Kafková, 2022, p. 168.

Slovakia is currently implementing this policy through the National Programme for Active Ageing 2021–2030, which concentrates on supporting older workers across four key areas: lifelong learning, improving digital skills, working conditions and legislative changes in the field of retraining.

This programme aims to help older people better adapt to the modern demands of the labour market. Slovakia is also actively investing in improving the digital skills of older people, using funding from the European Recovery Plan to support training courses for older and disadvantaged citizens.[47]

In the area of working conditions, the relevant legislation provides for special conditions for older workers on an exceptional basis. An example is the limitation of overtime for medical employees over 50 years of age in Section 97(12) of Act No 311/2001 Coll. on the Labour Code, as amended.

8. Conclusion

Regardless of how precisely legal provisions are established, it is equally crucial that the bodies responsible for applying the law effectively implement the intentions of the constitution-makers and legislators in practice. From the standpoint of European Union law, the principle of equal treatment is one of the most extensively developed areas, with the Court of Justice of the European Union having issued numerous landmark rulings that have significantly influenced subsequent Union legislation. However, practical enforcement of these principles still varies considerably among Member States. While some jurisdictions have developed a rich body of national case law on discrimination and equality, others, including Slovakia, record relatively few cases in which the principle of equal treatment is invoked before the national courts.

With regards to sanctions for breaches of the prohibition of non-discrimination, secondary Union law has long provided that sanctions must be *effective, proportionate and dissuasive*. Directive 2006/54/EC adds to this by stating that it is appropriate to exclude in advance the fixing of any upper limit for such compensation, except where the employer can prove that the damage caused to the applicant as a result of discrimination within the meaning of that Directive, consists solely of the fact that his or her application for employment was not taken into account.

The necessity for sanctions against discriminatory behavior that are effective, proportionate, and dissuasive is firmly established in the case law of the Court of Justice of the European Union. In the earlier Colson case, the Court ruled that measures adopted by a Member State to address discrimination must provide genuine and effective legal protection, and serve as a real deterrent to those who discriminate. Furthermore, the Court emphasised that when determining appropriate compensation, national courts must interpret and apply legislation implementing EU directives in full accordance with European Union requirements.

47 Határ and Jedličková, 2020, p. 328.

According to EU law and the case-law of the Court of Justice, the provision of appropriate compensation – regarded under EU anti-discrimination directives as a form of sanction – serves not only a compensatory but also a deterrent and punitive function. The goal is not only to provide redress to the victim of discrimination but also to punish the offender for their unlawful actions, which caused harm, and to deter both the offender and others from repeating such behavior in the future. Punitive damages thus fulfill both a penal and a preventive role. European legislation and case law particularly emphasise this second aspect, highlighting the preventive or deterrent function of such sanctions. Therefore, the concept of compensatory damages for non-pecuniary harm can act as an important tool to reinforce protection by enhancing the deterrent effect against discrimination.[48]

When deciding on appropriate compensation, the general national courts often refer to the need to demonstrate *a substantial loss of dignity* and, in the absence of such a demonstration in their view, they often award only an apology without compensation for non-pecuniary damage as appropriate compensation.[49] We cannot agree with such conclusions. It is understandable that discriminatory behavior in employment often occurs privately; in fact, the discriminator's actions are usually known only to a limited group, such as the victim's colleagues, and frequently happen without public attention. While these circumstances are inherent to the nature of the case or the specific situation, they do not lessen the seriousness of the discriminatory act. We believe that general courts should apply a lower threshold when assessing the extent or severity of harm to dignity or social standing in cases of discrimination than they might in other areas, such as personality rights protection.

In fact, real protection of rights appears to be problematic, since filings and lawsuits are at a minimum. It would be naive to think that this is because discrimination does not occur.

The relatively low number of anti-discrimination lawsuits can be attributed to several factors. While some disputes are resolved out of court, it is important to recognise that many individuals facing discrimination are often reluctant to pursue legal action against a person or organisation, largely due to their disadvantaged position. This situation could be improved through education, support from relevant governmental and where appropriate, non-governmental organisations, and changes in enforcement practices. Compensation should not only remedy the harm suffered, but also serve to deter further discriminatory behavior by penalising the offender. Additionally, these measures could encourage those who experience discrimination to come forward and seek justice through legal channels.

At the same time, the evolution of equality law in the European Union cannot ignore the growing impact of digitalisation and the deployment of artificial intelligence

48 Straka, 2012, p. 59.

49 For example, the judgment of the Regional Court in Košice, Case No. 2Co/115/2018 and the judgment of the District Court Dolný Kubín 5C/14/2005. On statistics, see Durbáková et al., 2012, p. 96.

(AI). The introduction of algorithmic systems into employment, social protection and public administration has opened a new dimension of potential discrimination – the so-called *algorithmic bias*. These technologies, often presented as neutral and objective, may inadvertently reproduce historical social prejudices embedded in data, thereby reinforcing structural inequalities among individuals and groups.

From the perspective of EU law, the principle of equal treatment must therefore extend into the digital domain. The proposed *Artificial Intelligence Act* introduces a risk-based regulatory model, establishing specific obligations for high-risk systems to ensure transparency, human oversight and accountability. This development mirrors the logic of anti-discrimination directives: the prevention of unequal treatment, effective legal remedies, and deterrent sanctions. In this sense, the emerging AI regulation can be seen as a continuation of the Union's broader equality acquis, adapted to new technological realities.

If properly implemented, AI regulation may also contribute positively to inclusion. Algorithmic systems designed with fairness and accessibility in mind can improve labour market participation of older workers or persons with disabilities, personalise access to services, and enhance equal opportunities. Thus the interaction between equality law and digital policy represents a new frontier of EU social protection, calling for the coordinated efforts of legislators, courts and supervisory authorities to safeguard equality in both the analogue and digital spheres.

Beyond the legal and judicial dimensions, the future of equality protection in the European Union depends on the effectiveness of national implementation mechanisms and the societal perception of discrimination. Ensuring that victims of discrimination are aware of their rights and have realistic access to remedies is as essential as the existence of the rights themselves.

The European Commission and the Fundamental Rights Agency have repeatedly underlined that a functioning equality framework requires both a strong legal foundation and a proactive institutional culture. From an analytical standpoint, the European approach to equality protection demonstrates an evolution from purely compensatory mechanisms toward a more integrated model of restorative and preventive justice. The Court of Justice has played a central role in shaping this development, gradually expanding the scope of equality beyond traditional grounds such as gender or race, and interpreting the concept of proportionality in a socially sensitive manner. This dynamic evolution indicates that the Court of Justice not only interprets the law but also indirectly contributes to the formulation of social policy through its case-law.

At the same time, it must be acknowledged that legal harmonisation alone cannot eradicate discrimination. The social context, national legal culture, and public attitudes toward vulnerable groups – particularly older workers – remain crucial determinants of the practical impact of EU equality law. Member States with well-established traditions of social dialogue and active labour market policies have demonstrated a higher effectiveness in enforcing anti-discrimination standards.

Conversely, in countries where litigation culture is weak and legal awareness low, the deterrent function of sanctions remains largely theoretical.

Moving forward, further research and policy development should focus on enhancing cross-border consistency in the interpretation and enforcement of equality norms. The introduction of shared indicators to measure the effectiveness of anti-discrimination remedies, coupled with the systematic training of judges and legal practitioners, could significantly improve the coherence of national practices. Moreover, a stronger emphasis on preventive measures – such as awareness campaigns, mediation mechanisms, and workplace equality plans – could reduce the reliance on litigation and foster a culture of voluntary compliance.

In conclusion, the principle of equal treatment under EU law stands as both a legal guarantee and a moral imperative. Its effectiveness however, depends on the readiness of Member States to internalise not only the letter but also the spirit of Union law. Real equality cannot be achieved merely through legislative precision or judicial interpretation; it requires sustained commitment from institutions, employers, and society as a whole. Only through this integrated approach can the European Union ensure that the promise of non-discrimination becomes a lived reality for all its citizens.

Bibliography

Literature

Age. Platform Europe toward a society for all ages (no date) [Online]. Available at: https://www.age-platform.eu (Accessed: 30 September 2024).

Amoretti, G., Spulber, D., Varani, N. (eds.) (2017) *Active Ageing. From Wisdom to Lifelong Learning.* Roma: Carocci editore.

Barancová, H. (2012): *European labour law. Flexibility and security for the 21st century.* Košice: University of Pavol Jozef Šafárik in Košice.

Davies, R. (2014) 'Older people in Europe EU policies and programmes', *Members' Research Service European Parliamentary Research Service*, 6 may 2014. [Online]. Available at: https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140811/LDM_BRI(2014)140811_REV1_EN.pdf (Accessed: 30 September 2024).

Durbáková, V., Holubová, B., Ivanco, Š., Liptáková, S. (2012) *Discrimination in Slovakia. Looking for barriers in access to an effective legal protection against discrimination in Slovakia*. Košice: Poradňa pre občianske a ľudské práva.

European Commission (2008) *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final*, 2 July 2008.

European Commission (2012) *European Year for Active Ageing and Solidarity between Generations: The Way Forward, COM(2012) 83 final*, 23 February 2012.

European Commission (2021a) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030", COM(2021) 101 final*, 3 March 2021.

European Commission (2021b) *Green Paper on Ageing – Fostering Solidarity and Responsibility between Generations, COM(2021) 50 final*, 27 January 2021.

European Commission (2021c) The European Pillar of Social Rights Action Plan, COM(2021) 102 final, 4 March 2021.

European Commission (2023) *Communication on a Comprehensive Approach to Mental Health, COM(2023) 298 final*, 7 June 2023.

Határ, C., Jedličková, P. (2020) 'The issue of active ageing and active old age in the education and social policy of Slovakia, Germany and Spain', *Lifelong Learning*, 10(3), pp. 311–331; https://doi.org/10.11118/lifele20201003311.

Kľučka, J., Mazák, J. (2004) *Fundamentals of European Law.* Bratislava: IURA Edition.

Koldinská, K. (2010) *Gender and social law. Equality between men and women in socio-legal contexts*. 1st edn. Prague: C.H. Beck.

Petery, G.A., Grosch, J.W. (2022) 'Broadening the View of Workplace Ageism', *Work, Aging and Retirement*, 8(4), pp. 379–382; https://doi.org/10.1093/workar/waac015.

Petrova Kafková, M. (2022) 'Active Ageing Index as a Tool for Country Assessment and Comparison: The Case of the Czech Republic and Slovakia', *Sociológia – Slovak Sociological Review,* 54(2), pp. 168–185; https://doi.org/10.31577/sociologia.2022.54.2.7.

Straka, P. (2012) 'Adequate financial compensation', *Legal Aspects of Equal Treatment in Slovak Reality,* pp. 59 ff.

Temming, F. (2007) 'The Palacios Case: Turning Point in Age Discrimination Law?', European Law Reporter, 382, pp 388–390.

The Council of the European Union (2000) 'Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin', *Official Journal L*, 180, pp. 22–26.

Zedler, M.A. (2006) 'Das Verbot der Altersdiskriminierung als allgemeiner Grundsatz des Europarechts: Anmerkung zu EuGH', *Zeitschrift für das Privatrecht der Europäischen Union*, 2006/3.

Case-Law

Case C-144/04, *Mangold v Helm*.

Case C-307/05, *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud*.

Case C-411/05, *Félix Palacios de Villa v Cortefiel Servicios SA*.

Case C-364/07, *Vassilakis and Others v Dimos Kerkyraion*.

Case C-378/07, *Angelidaki and Others v Organismos Nomarkhiaki Aftodioikisi Rethymnis and Others*.

Case C-379/07, *Giannoudi and Others v Dimos Rethymnis*.

Case C-380/07, *Karabousanos and Others v Dimos Rethymnis*.

Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG*.

Case C-388/07, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*.

Case C-341/08, *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*.

Case C-45/09, *Rosenbladt v Oellerking Gebäudereinigungsgesellschaft mbH*.

Case C-447/09, *Prigge and Others v Deutsche Lufthansa AG*.

Case C-441/14, *Dansk Industry acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*.

Case C-190/16, The Fries decision, *Fries v Lufthansa CityLine GmbH*.

The judgment of the Regional Court in Košice Case No. 2Co/115/2018.

The judgment of the District Court Dolný Kubín 5C/14/2005.