

## 0. Introduction: Guiding principles and definitions

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#### COLOR CODE:

<b>ORANGE BOX</b>	<b>INTERNATIONAL AND EU LAW AND STANDARDS</b>
<b>GREEN BOX</b>	<b>NON-BINDING SOURCES</b>
<b>RED BOX</b>	<b>FURTHER INFORMATION AND SOURCES</b>
<b>TEXT</b>	<b>ICJ SUMMARIES AND EXPLANATIONS</b>

## 1. Introduction: Access to justice for migrant children

Migrant children are rights holders. They are entitled to fair procedures, to claim their rights and to obtain a remedy if their rights under national and international law have been violated. Because the rights of migrant children are often violated, it is important that lawyers are aware of the law and procedures applicable to children in order to have their rights respected.

These training materials cover the most relevant international and EU legal standards on the rights of migrant children, applicable in EU Member States.

Under international law, migrant children are entitled to a broad range of rights and safeguards. The reality, however, is that rights are illusory if there is no way to claim their implementation.

Children experience an array of barriers to their access to justice, from being unaware of their rights, and to not knowing where and how they can seek advice and assistance. The justice system can be intimidating for children, and they can often lack the autonomy, financial means or capacity in order to access justice.

A national legal system that can provide effective access to justice and remedies for violations of human rights is therefore essential. The whole apparatus of legal standards, lawyers, judges, prosecutors, legal practitioners and activists must operate effectively to provide migrants with legal remedies for violations of their human rights.

The procedural rights guaranteed by international human rights law have specifics in case of children and should be adapted to them. For instance what are not unduly prolonged proceedings for an adult, might be unduly prolonged for a child. What is not inhuman or degrading treatment for an adult, might be for a child.

The standards cited in these materials differ in their legal status. Some are provisions of treaties; treaty provisions are legally binding on the states that are parties to the treaty. Others are provisions of non-treaty instruments. While non-treaty instruments are not in themselves binding, they represent the consensus of the international community on standards to which states should conform.

### *International law*

#### **Declaration of the high-level meeting of the UN General Assembly on the rule of law at the national and international levels, UN General Assembly Resolution 67/1 , [UN Doc. on A/RES/67/1 (24 September 2012)**

(...) 14. We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.

(...)17. We recognize the importance of the rule of law for the protection of the rights of the child, including legal protection from discrimination, violence, abuse and exploitation, ensuring the best interests of the child in all actions, and recommit to

the full implementation of the rights of the child.

**Report of the UN High Commissioner for Human Rights on [Access to justice for children](#) , UN Doc. A/HRC/25/35), (16 December 2013)**

8. Human rights norms and standards relevant to ensuring access to justice for children are set out in a series of legally binding and non-binding international and regional human rights instruments. (...) Elements of access to justice for children in particular include the rights to relevant information, an effective remedy, a fair trial, to be heard, as well as to enjoy these rights without discrimination. In addition, the responsibility of States Parties to realize the rights of all children requires structural and proactive interventions to enable access to justice.

**[Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), 17 Nov 2010**

(c.) "child-friendly justice" refers to justice systems which guarantee the respect and the effective implementation of all children's rights, giving due consideration to the child's level of maturity and understanding and to the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

**UN Committee on the Rights of the Child, [General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child](#), UN Doc. CRC/GC/2003/5 (27 November 2003)**

V. JUSTICIABILITY OF RIGHTS

24. "(...) States need to give particular attention to ensuring that there are **effective, child-sensitive procedures available to children and their representatives**. These should include the provision of child-sensitive information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. [... In case of violations of rights] there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 [of the Convention]".

**Report of the UN High Commissioner for Human Rights on [Access to justice for children](#), UN Doc. A/HRC/25/35 (16 December 2013 ) paras 14-15**

**III. Barriers to children's access to justice**  
(...)

14. The complexity of justice systems makes them difficult to understand for children. Children are often unaware of their rights and the existence of services, lacking information about where to go and whom to call to benefit from advice and

assistance. Moreover, legislation and procedures concerning the treatment and participation of children in proceedings, including criminal, administrative and civil proceedings, are often not adapted to children's rights and needs or may even be discriminatory towards children based on their age and gender. States have also highlighted that specialized judges, prosecutors, lawyers and other personnel working with children, as well as sufficient resources to provide specialized training, are frequently lacking.

15. The justice system is often intimidating for children. They may be afraid to make complaints out of fear of harassment, further stigmatization, abandonment or reprisals against them or their families. They may also lack trust and confidence that their complaints will be taken seriously and fairly assessed. (...)

**Report of the UN Special Rapporteur on the independence of judges and lawyers, [Protecting children's rights in the justice system](#), UN Doc. A/HRC/29/26 (1 April 2015)**

30. As children are particularly vulnerable to violations of their rights and to abuses of all sorts, their access to justice should be facilitated and reinforced. In reality, while many obstacles impede both adults' and children's access to justice, children are often disproportionately affected. They also face specific barriers owing to their status as minors.
31. Various factors and circumstances impede appropriate and equal access to justice for children; they can be clustered in six categories. First, children can face physical barriers, which include geographical distance from courts or other relevant institutions or lack of adequate facilities at those institutions' premises. Second, psychological factors can also play an important role in undermining children's access to justice. Children may be unable or reluctant to seek justice because they are too young or too traumatized to articulate what happened to them; or they are afraid of, dependent on or love the alleged perpetrator(s); or they do not perceive what happened to them as a violation of their rights. Third, children also face social and/or cultural barriers when trying to access justice; these can be related to their difficulties to communicate, fear of social stigma associated with the formal justice system, dependency on adults, or mistrust of the justice system.
32. Fourth, barriers relating to information also seriously hamper access to justice for children. Information on fundamental rights, available remedies and procedures to follow to claim their rights is not always available and, when available, often difficult to understand, even for adults. Fifth, while children lack financial autonomy and means, court proceedings often represent a heavy financial burden, as can the costs of initiating and pursuing proceedings, including lawyers' fees. Lastly, children encounter legal obstacles on their path to justice, such as lack of legal capacity or standing, lack of legal identity (especially relevant for children who are unregistered migrants, refugees or asylum seekers, or street children), or dependence on parents or a legal guardian. Dependence on adults often compounds the other obstacles for children trying to access justice.

## 2. Definitions

*Objective: to ensure a common understanding of key terms related to the rights of child migrants that are used in these materials and throughout the training modules. The definitions below reflect those used by the International Organization on Migration (IOM) [Glossary on Migration](#) and those used in the ICJ's publication [Migration and International Human Rights Law, Practitioners Guide No. 6, \(2014\)](#), pp 39-40.*

### 2.1 Migration

The movement of a person or a group of persons, from their place of residence either across an international border, or within a State, regardless of the duration of the stay and causes. It includes forced movement of one or more refugees, displaced persons, people who move for economic reasons, and persons moving for other purposes, including family reunification.

### 2.2 Migrant

IOM defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.

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

As was recognised by the Global Commission on International Migration, an individual migrant may belong to one or more [...] categories at the same time. "She or he may move successfully from one category to another in the course of the migratory movement, or may seek to be reclassified from one category to another, as when an economic migrant submits a claim to asylum in the hope of gaining the rights associated with refugee status."<sup>1</sup>

#### 2.2.1 Regular migrants

Migrants who move within or enter a State after having obtained an authorization from the State to do so, whether such authorization is temporary or not, or where no authorization is needed.

#### 2.2.2 Undocumented migrants

Migrants who enter or remain in a State without the documentation or authorization

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<sup>1</sup> *Migration in an interconnected world: New directions for action*, Report of the Global Commission on International Migration, (October 2005), para. 15. See also, UNDP, *Human Development Report 2009*, p. 26.

that is required by regulatory norms of that State. For example this includes people who enter a State without a valid travel document or passport or visa when such is required; and (regular) migrants who overstay the period of time they have been authorized to remain in the State. It must be stressed that the term "irregular" migrant does not express a quality of the person but a mere reference to his or her situation of entry or stay. The use of the terms "irregular migrants" or "undocumented migrants" in these training materials (rather than "illegal migrants") is consistent with the recommendation of the UN General Assembly.<sup>2</sup>

### 2.2.3 Refugee

A refugee is a third country national who enters a country, whether regularly or irregularly, in order to escape persecution in their country of origin as defined by the Geneva Refugee Convention.

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

While not enshrining a right of asylum, the Geneva Convention relating to the status of refugees of 1951, read together with its Additional Protocol of 1967 (Geneva Refugee Convention), contains a set of rights and entitlements that follow from the recognition of refugee status.

*International law*

#### **Geneva Refugee Convention, 1951**

##### **Article 1 - Definition of the term "refugee"**

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) 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;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear,

<sup>2</sup> UN General Assembly (GA) resolution 3449(XXX), *Measures to ensure the human rights and dignity of all migrant workers*, (9 December 1975), para. 2.

is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

### *EU law*

The EU Qualification Directive recast (Article 2(d)) expressly states that the definition also includes stateless persons.

National asylum systems are in place to determine who qualifies for international protection. However, during mass movements of refugees, usually as a result of conflict or violence, it is not always possible or necessary to conduct individual interviews with every asylum seeker who crosses a border. These groups are often called 'prima facie' refugees.

#### **2.2.4 Asylum seeker**

"Asylum seeker" means a person who has applied for asylum under the 1951 Refugee Convention on the Status of Refugees on the ground that if he is returned to his country of origin he has a well-founded fear of persecution on account of race, religion, nationality, political belief or membership of a particular social group. He remains an asylum seeker for so long as his application or an appeal against refusal of his application is pending.

#### **2.2.5 Other migrants needing protection**

This category includes migrants whose status is not well-defined but who are in need of international protection, recognised, to varying extents, by international law. These include stateless persons (whether or not they are asylum-seekers or refugees), unaccompanied children whose status has not been defined, asylum-seekers whose application for international protection on the basis of the Refugee Convention or a human rights ground that prohibits *refoulement* (such as that the individual faces a real risk of torture or other ill-treatment if returned) remains pending.

##### **2.2.5.1 A person eligible for subsidiary protection**

Migrants also include persons, who though not refugees are entitled to subsidiary protection. Under Article 2(f) of the EU **Qualification Directive**<sup>3</sup>, the term 'person eligible for subsidiary protection' means "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual

<sup>3</sup> [EU Qualification Directive \(recast\)](#), Directive 2011/95/EU (13 December 2011).

residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;" (emphasis added)

### 2.2.5.2 Trafficking vs smuggling

People who are smuggled and/or trafficked also fall within the definition of migrants. Often the terms trafficking and smuggling are confused, although these are very different terms. While smuggling refers to the mere move of a person across the border in an illegal way, human trafficking is a complex human rights violation in order to exploit a person and does not necessarily have to happen across the border. Trafficked persons may be subject to smuggling, but not all smuggled persons are trafficked.

The purpose of smuggling is to move a person across a border illegally, and is regarded as a violation of state sovereignty. **Migrant smuggling** is defined as facilitated irregular movement of persons across borders for profit. Usually upon arriving in the country of destination the smuggled person is free.

The purpose of **human trafficking** is to exploit a human being for gain or other benefits and is a violation of that person's freedom and integrity. Unlike migrant smuggling, a trafficker facilitates the movement of the trafficked person for the purpose of exploitation; the movement need not be across an international border it may be within a country or even within a community - for the purpose of exploitation.

Human trafficking of adults, by definition, is a process that involves a form of coercion, abduction, fraud, deception or abuse of power or a position of vulnerability or the giving or receiving payments or benefits to achieve the consent of a person having control over another person.<sup>4</sup> Such means are not necessary when the individual subject to recruitment, transportation, transfer, harbouring or receipt for an exploitative purpose is under the age of 18.

Traffickers frequently force or manipulate trafficked persons to commit crimes and traffickers frequently profit from such crimes. Trafficked persons should not be prosecuted for criminal offences committed as a consequence of being trafficked or that have been caused or directly linked to their being trafficked. Non punishment should extend not only to crimes trafficked persons are forced to commit by their traffickers but also for example to acquiring and using false documentation in an attempt to flee from their traffickers. Instead, trafficked persons should be promptly and properly identified; they should be treated as victims of crime and their rights must be respected and protected.<sup>5</sup>

<sup>4</sup> The full definition of human trafficking which is set out in Article 3 of the [UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children](#) (the Palermo Protocol) is set out in a box, below. The same definition appears in Article 4 of the [Council of Europe Convention on Action against Trafficking in Human Beings](#). The formulation of the definition of human trafficking set out in Article 2 of the [EU Trafficking Directive](#), Directive 2011/36/EU (5 April 2011) differs only slightly. See Anti-Slavery International clarifications [http://www.antislavery.org/english/slavery\\_today/trafficking/](http://www.antislavery.org/english/slavery_today/trafficking/)

<sup>5</sup> See the [OSCE Policy](#) (At INTRO para 1) and Article 26 of the CoE Convention and Article 8 of the [EU Trafficking Directive](#), Directive 2011/36/EU.



*International law*

**HUMAN TRAFFICKING** Definition in Article 3 of the **UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000** (known as the **Palermo Protocol**)

**Article 3**

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

**SMUGGLING** Definition in Article 3 of the **Protocol against the smuggling of migrants by land, sea and air, supplementing the UN Convention Against Transnational Organized Crime, 2000**

**Article 3**

(a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

## 2.3 Child

For the purpose of these training modules on the rights of child migrants, we use the definition of a child set out in the Convention on the Rights of the Child (CRC). It is important to be aware that a different definition may be used in varying national laws, including various laws of the same state, which may use differing definitions of a child or the age in which a person reaches majority.

Under international law, the CRC establishes in its Article 1 that "a child means every human being below the age of eighteen years". Under CoE law, most instruments relating to children adopt the CRC definition of a child. Examples include Article 4 (d) of the Council of Europe Convention on Action against Trafficking in Human Beings or

**Fostering Access to Immigrant Children's Rights (FAIR Project)**

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Article 3 (a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).

Everyone under the age of 18 should be treated as a child, entitled to special care and procedures, despite of national legal provisions.

However it should be noted that the definition of the Convention on the Rights of the Child in addition refers to the law applicable to the child under which she or he might attain majority earlier (*see definition below*).

### *International law*

#### **Council of Europe Convention on Action against Trafficking in Human Beings**

##### **Article 4 (d)**

(d) "Child" shall mean any person under eighteen years of age

#### **Convention on the Rights of the Child (CRC)**

##### **Article 1**

"For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."

### **2.3.1 Vulnerability**

Under international law, children, owing to their physical and mental immaturity are entitled to special legal protection, care, and safeguards. Apart from all human rights being applicable to them, children have rights that are in addition to those of adults. Migrant children often find themselves in a situation of double or even multiple vulnerability, as a child, refugee or migrant child, in addition sometimes unaccompanied or separated from their family, with a disability, being a victim of abuse, etc. **Migrant children frequently face limited access to justice, education, social and health services.**

### *International law*

#### **The Parliamentary Assembly of the Council of Europe [Resolution 1509\(2006\)](#) on the human rights of irregular migrants**

(...)

13.7. All children, but also other vulnerable groups such as the elderly, single mothers

#### **Fostering Access to Immigrant Children's Rights (FAIR Project)**

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and more generally single girls and women, should be given particular protection and attention.

**UN Committee on the Rights of the Child, [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, 29 May 2013](#)**

e) Situation of vulnerability

75. An important element to consider is the child's situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc. The purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the Convention on the Rights of Persons with Disabilities, the Convention relating to the Status of Refugees, among others.

76. The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process.

**UN Committee on the Rights of the Child, [General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/GC/2005/6, \(1 September 2005\)](#)**

**Separated and unaccompanied children**

**Unaccompanied children** (also called unaccompanied minors) are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

**Separated children** are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

**[Council of Europe Strategy for the Rights of the Child 2016-2021](#)**

22. Children on the move and otherwise affected by migration are one of the most vulnerable groups in Europe today. In some countries, they face limited access to justice, education, social and health services. While unaccompanied children face a particularly precarious situation, migrant children at large even when accompanied by parents often suffer persistent violations of their human rights. The principle of the best interests of the child is too often neglected in asylum and immigration procedures. The use of detention instead of child welfare protection, failures in appointing effective guardianship, family separation and demeaning age assessment

procedures are emblematic of the different ways in which migrant children fall through loopholes in child protection frameworks. They are also at high risk of trafficking and exploitation. Children left behind when their parents migrate, as well as stateless children are likewise at a heightened risk of finding their rights violated.

***Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, ECtHR, Application no. 13178/03, (12 October 2006)***

The [separated child]’s position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation.

**Report of the Special Rapporteur on the independence of judges and lawyers – *Protecting children’s rights in the justice system*, 1 April 2015**

24. The principle of non-discrimination is especially relevant when justice systems are dealing with **particularly vulnerable groups of children**, such as street children, children belonging to minorities, migrant children or asylum seekers, children with disabilities, or child soldiers, who may require particular attention, protection and skills from the professionals interacting with them, especially **lawyers, prosecutors and judges**.

***Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)***

**D. Protection from discrimination**

1. The rights of children shall be secured without discrimination on any grounds such as sex, race, colour or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background, status of their parent(s), association with a national minority, property, birth, sexual orientation, gender identity or other status.

2. Specific protection and assistance may need to be granted to more vulnerable children, such as migrant children, refugee and asylum seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions.

### 2.3.2 Age assessment

Given the definition of a child and the entitlement of children to special care and protection, it is important to ensure that individuals who are under 18 are treated as children. In cases of doubt the individual should be treated as a child (unless and until otherwise proven).

Age assessment refers to procedures through which authorities seek to establish the age of a migrant to determine whether the individual is or may be a child and thus whether special procedures and rules applicable to children must be applied, and the individual must receive special care and treatment.

Age assessment for the purpose of determining an individual's procedural and substantive rights, should only be carried out when there is doubt as to whether or not an individual is a child. Including in the context of migration, such assessment must be carried out in a positive, human and expeditious manner, in order to comply with Article 10 of the CRC (see *Box below*). Until otherwise proven, individuals should be treated as a child.

The consent of the child to age assessment procedure is required. Age assessment should be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity. Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals.

There must be an effective opportunity to challenge an age assessment decision through judicial review. Children should be provided with legal and procedural information, including on how a decision can be challenged.

*International law*

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

**Article 10**

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family. (...)

**UN Committee on the Rights of the Child, General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin**

(V)RESPONSE TO GENERAL AND SPECIFIC PROTECTION NEEDS

(a) Initial assessment and measures

31. The best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children. This necessary initial assessment process, in particular, entails the following:

(i) Prioritized identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities (art. 8). Such identification measures include age

assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such; (...)

*EU law*

**Asylum Procedures Directive**

**Article 25 (5), Guarantees for unaccompanied minors:**

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

- (a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;
- (b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and
- (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

In the event of a negative decision, Member States should provide information to clarify the reasons for the decision and explain how it can be challenged. If there is no separate right of appeal of the age assessment decision itself, the opportunity to challenge through judicial review or as part of the consideration of the overall protection claim should be available. The individual should have access to a representative to assist them in the process.

### EU Asylum Procedures Directive

#### **Article 19(1)**

Provision of legal and procedural information free of charge in procedures at first instance

1. In the procedures at first instance provided for in Chapter III, Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances. In the event of a negative decision on an application at first instance, Member States shall also, on request, provide applicants with information — in addition to that given in accordance with Article 11(2) and Article 12(1)(f) — in order to clarify the reasons for such decision and explain how it can be challenged.

#### **Article 25(4)**

4. Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information as referred to in Article 19 also in the procedures for the withdrawal of international protection provided for in Chapter IV.

The key recommendations can be summarised as follows.

- In all actions undertaken the best interests of the child should be a primary consideration.
- Age assessment should only be undertaken where there are doubts about the claimed age, for the legitimate purpose of determining whether an individual is an adult or a child.
- Assessment should take a multidisciplinary and holistic approach.
- Before resorting to medical examination, consideration should first be given to documentary or other forms of evidence available.
- Age assessment should be performed with full respect for the individual's dignity and the least invasive methods should be selected.
- Individuals and/or their representative should consent to the assessment and should be consulted in accordance with their age and level of maturity. Refusal to undergo an age assessment should not, in itself, result in refusal of the claim for protection.
- So that individuals may provide informed consent, they and/or their representative should be provided with information on the method, possible consequences of the result of the examination, as well as the consequences of refusal to undergo medical examination. Such information should be provided free of charge and be communicated in a language which they understand, or can be reasonably supposed to understand.
- If an individual disagrees with the outcome of an assessment there should be an opportunity for them to challenge the decision.
- All individuals involved should be provided with initial and on-going training relevant to their expertise. This should include training on the needs of children.

### 2.3.2.1 Benefit of the doubt

The principle of the benefit of the doubt must be applied when assessing the age of an individual, including a migrant:

1. Until the age assessment has been completed and whilst doubts, remain the individual should be afforded the benefit of the doubt, and treated as a child.
2. In cases where it is the duty of the applicant to substantiate the application for international protection, but the applicant's statements are not supported by documentary or other evidence, in accordance with Article 4(5) of the **Qualification Directive** if:
  - a) the applicant has made a genuine effort to substantiate his [or her] application;
  - b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
  - c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
  - d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
  - e) the general credibility of the applicant has been established.

Consistent with General Comment 6 of the Committee on the Rights of the Child and the EU Asylum Procedures Directive if, following age assessment, uncertainty remains, the individual should be given the benefit of the doubt: if there is a possibility that the individual is a child, she or he should be treated as such.

**Benefit of the doubt is a significant safeguard in the field of age assessment; particularly so, because** no current method of age assessment is able to determine a specific age with certainty.

*EASO Age assessment practice in Europe, p. 24*



### 3. Guiding principles on children's rights

The guiding principles on children's rights are underlying requirements for the realization of all the rights of a child set out in the Convention of the Rights of the Child (CRC). These guiding principles include:

1. Non-discrimination;
2. The best interest of the child;
3. The right to life, survival and development; and
4. The right to participate and to be heard.

This section introduces three guiding principles relevant to the protection of the rights of migrant children in the EU, the best interest of the child and, the right to be heard and the right to be free from discrimination.

#### **UN Committee on the Rights of the Child, [General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child](#)**

12. The development of a children's rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention and, in particular, in the light of the following articles in the Convention identified by the Committee as general principles:

Article 2: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment. A general comment by the Human Rights Committee has underlined the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination.

Article 3 (1): the best interests of the child as a primary consideration in all actions concerning children. The article refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

Article 6: the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child. The Committee expects States to interpret "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.

Article 12: the child's right to express his or her views freely in "all matters affecting the child", those views being given due weight. This principle, which highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights, applies equally to all measures adopted by States to implement the Convention.

### 3.1 The best interest of the child

In all actions concerning children, including migrant children, the principle of the best interests of the child shall be a primary consideration. It is a substantive right, a fundamental interpretative legal principle as well as a rule of procedure which must be based on an assessment of all elements of a child's or children's interests in a specific situation.

States must put in place formal processes to assess and determine the child's best interests for all decisions made by judges or administrative authorities, especially in areas which directly affect the child or children.

#### *International standards*

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

##### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

**UN, Committee on the Rights of the Child, 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)**

6. The Committee of the Child underlines that the child's best interests is **a threefold concept**:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

32. The concept of the child's best interests is complex and its content must be determined on a **case-by-case basis**. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator –, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general. In both cases, assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols.

46. As stated earlier, the "best interests of the child" is a right, a principle and a rule of procedure based on an assessment of all elements of a child's or children's interests in a specific situation. When assessing and determining the best interests of the child in order to make a decision on a specific measure, the following steps should be followed:

(a) First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another;

(b) Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right.

47. Assessment and determination of the child's best interests are two steps to be

followed when required to make a decision. The “best-interests assessment” consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible a multidisciplinary team –, and requires the participation of the child. The “best-interests determination” describes the formal process with strict procedural safeguards designed to determine the child’s best interests on the basis of the best-interests assessment.  
(...)

**Elements to be taken into account when assessing the child’s best interests**

52. Based on these preliminary considerations, the Committee considers that the elements to be taken into account when assessing and determining the child’s best interests, as relevant to the situation in question, are as follows:

- (a) The child’s views (...)
- (b) The child’s identity (...)
- (c) Preservation of the family environment and maintaining relations (...)
- (d) Care, protection and safety of the child (...)
- (e) Situation of vulnerability (...)
- (f) The child’s right to health (...)
- (g) The child’s right to education (...)

(...)

**Procedural safeguards to guarantee the implementation of the child’s best interests**

85. To ensure the correct implementation of the child’s right to have his or her best interests taken as a primary consideration, some child-friendly procedural safeguards must be put in place and followed. As such, the concept of the child’s best interests is a rule of procedure (...).

86. While public authorities and organizations making decisions that concern children must act in conformity with the obligation to assess and determine the child’s best interests, people who make decisions concerning children on a daily basis (e.g. parents, guardians, teachers, etc.) are not expected to follow strictly this two-step procedure, even though decisions made in everyday life must also respect and reflect the child’s best interests.

87. States must put in place formal processes, with strict procedural safeguards, designed to assess and determine the child’s best interests for decisions affecting the child, including mechanisms for evaluating the results. States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children.

**UNHCR, Executive Committee Conclusion No. 47 (XXXVIII) – 1987 – Refugee Children, paragraph (d)**

(...) all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity.

**UN Committee on the Rights of the Child, General Comment No. 10 on Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, (25 April 2007)**

10. In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.

**UN Committee on the Rights of the Child, *General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc. CRC/GC/2005/6, (1 September 2005)**

19. Article 3(1) states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child’s life.

20. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.

**Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice**, Part III Fundamental Principles, paras B.2-3 Best interests of the Child

2. In assessing the best interests of the involved or affected children:

- a. their views and opinions should be given due weight;
- b. all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times;
- c. a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child.

3. The best interests of all children involved in the same procedure or case should be separately assessed and balanced with a view to reconciling possible conflicting interests of the children.

**Ignaccolo-Zenide v. Romania, ECtHR, Application No. 31679/96, (25 January 2000)**

94. (...) However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always an important ingredient. Whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (...).

*EU law*

**Charter on Fundamental Rights of the European Union  
(EU Charter on Fundamental Rights)**

**Article 24 (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."

**3.2 The right to be heard**

States have an obligation, including under Article 12 of the CRC, to respect and protect a child's right to be heard. This means that a child is to be given the opportunity and means to present his or her views and have those views given due weight when decisions are being made which will affect the child. This right is also set out in the EU Charter on Fundamental Rights.

*International law*

**Convention on the Rights of the Child**

**Article 12**

1. 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. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

**Committee on the Rights of the Child, [General Comment No. 12: The right of the child to be heard, UN Doc. CRC/C/GC/12 \(2009\) paras 1, 2, 21, 34 on the right of the child to be heard](#)**

1. Article 12 of the Convention on the Rights of the Child (the Convention) is a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 assures, to every child 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 age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.

2. The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.

(...)

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

- First... full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences;
- Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter;
- Third, States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language;
- Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of

the child.

34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

**Committee on the Rights of the Child, [General Comment No. 10 on Children's rights in juvenile justice, UN Doc. CRC/C/GC/10, \(25 April 2007\), para 12.](#)**

(...)

12. The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice. (...)

*EU law*

**[EU Charter on Fundamental Rights](#)**

**Article 24(1)** 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.

***(Further details on the right to be heard are set out in Training module I.)***



### 3.3 Non-discrimination principle

In accordance with international law, including the Convention on the Rights of the Child, the rights of children shall be secured without discrimination on any grounds such as their or their or their parent(s)' or guardian's sex, race, colour or ethnic background, language, religion, political or other opinion, national or social origin, disability socio-economic background, association with a national minority, property, birth, sexual orientation, gender identity or other status.

#### 3.3.1 State obligations, Direct/indirect discrimination

States must ensure that child migrants are treated with equality both *de facto* and *de jure*, and must eliminate both direct and indirect discrimination against child migrants.

In particular States obligations to ensure equality and non-discrimination include, among other things, the duty to

- Refrain from discriminatory actions that undermine the enjoyment of rights, Eliminate discriminatory laws and practice – and review laws and practice with a view to ensuring that they do not amount to or facilitate discrimination (duty to respect);
- Prevent and protect against discrimination by private actors (duty to protect);
- Take positive proactive steps to ensure the equal enjoyment of human rights (obligation to fulfil).

States must not only eliminate plainly discriminatory laws, policies, and practices but also ensure that seemingly neutral measures do not have a discriminatory effect in real terms. In order to correct situations of inequality and discrimination, a State may also be required to implement temporary special measures necessary in order to (re)establish equality.

#### **Direct/indirect discrimination**

Direct discrimination is differential treatment on grounds such as **race, colour, gender, sex, disability, sexual orientation, or gender identity, religion, language, political or other opinion, national or ethnic origin, property, birth or other status** that is not based on reasonable and objective criteria and is not for the purpose of achieving or proportionate to that aim. Direct discrimination is not justifiable or lawful.

Indirect discrimination is when an apparently neutral provision, criterion or practice, when applied, would put a person sharing a particular characteristic at a disadvantage compared to others similarly situated on grounds such as race, colour, gender, sex, disability, sexual orientation, or gender identity, religion, language, political or other opinion, national or ethnic origin, property, birth or other status, without a legitimate aim or in a disproportionate manner.

A difference in treatment, on grounds such as race, colour, gender, sex, disability, sexual orientation, or gender identity, religion, language, political or other opinion, national or ethnic origin, property, birth or other status, that pursues a legitimate aim and is proportionate to achieving that aim is not discriminatory.

### **Positive measures**

Positive measures may be needed to protect children or certain groups of children against vulnerabilities to discrimination, including on the basis of their age.

The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions, which cause or help to perpetuate discrimination prohibited by international law (e.g. ICCPR). For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the ICCPR (HRC General Comment no. 18, para. 10.).

Although some differences in treatment between nationals and non-nationals are not covered by the provisions of ICERD, the Committee on the Elimination of Racial Discrimination has clarified that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

### *International law*

#### **Convention on the Rights of the Child (CRC)**

##### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective 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.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

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

##### **Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

### Art 24(1)

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to **such measures of protection as are required by his status as a minor, on the part of his family, society and the State.**

### Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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

#### Article 2(2)

The contracting states shall "... undertake to respect and to ensure ... the rights recognized in the present 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."

#### Article 10

The States Parties to the present Covenant recognize that: (...)

3. Special measures of **protection and assistance** should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

### International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Art 1(1) '...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin ...'

### Convention on the Elimination of All Forms of Discrimination against Women CEDAW

#### Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has

the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

### **Convention on the Rights of Persons with Disabilities**

#### **Article 5 Equality and non-discrimination**

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

### **European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR)**

#### **Article 14**

##### **Prohibition of discrimination**

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.

### **Protocol 12 to the European Convention on Human Rights (ECHR)**

#### **Article 1 General prohibition of discrimination**

- 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

### **European Social Charter (revised)**

Part V, Article E

#### **Non-discrimination**

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

### **D.H. and Others v. the Czech Republic, Grand Chamber of the ECtHR,**

Fostering Access to Immigrant Children's Rights (FAIR Project)

28

**Communication No. 57325/00, (13 November 2007)**

In the case of *D.H. and Others v. the Czech Republic*, the government argued that the system of 'special' schools was established in order to assist in the education of Roma children by overcoming language difficulties and redressing the lack of pre-school education. However, the ECtHR found that it was irrelevant whether the policy in question was aimed at Roma children. The Court found that the disproportionate assignment of Roma children in special schools for children with mental disabilities without reasonable and objective justification amounted to indirect discrimination.

The placement was based primarily on the basis of psychological tests and their evaluation that did not take into account the particularities and special characteristics of the Roma Children who sat them. The Court clarified that in cases of alleged indirect discrimination once a claimant establishes rebuttable presumption that the effect of a measure or practice is discriminatory (such as through statistics), the burden shifts to the state to show that the difference in treatment is not discriminatory.

The Court also clarified that in cases in which it is shown that legislation produces a discriminatory effect, it is not necessary to prove an intent on the part of the authorities to discriminate.

**CESCR, Committee on Economic Social and Cultural Rights, [General Comment No. 20](#), on article 2 (2) of the ICESCR, *Non-discrimination in economic social and cultural rights***

8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:

(a) Formal discrimination: Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) Substantive discrimination: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

(...)

10. Both direct and indirect forms of differential treatment can amount to discrimination under Article 2, paragraph 2, of the Covenant:

(a) Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct

discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

**Committee on Economic Social and Cultural Rights, [General Comment No. 16 \(2005\)](#) on Article 3 of the ICESCR : *the equal right of men and women to the enjoyment of all economic, social and cultural rights***

7. The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.

(...)

12. Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.

13. Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory on its face, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.

**CEDAW, [General recommendation No. 25](#), on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, *on temporary special measures***

4. The scope and meaning of article 4, paragraph 1, must be determined in the context of the overall object and purpose of the Convention, which is to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men.

(...)

7. Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States

parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.

**Committee on the Elimination of Racial Discrimination, [General Recommendation No. 32](#), *The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination para 6***

6. The Convention is based on the principles of the dignity and equality of all human beings. The principle of equality underpinned by the Convention combines formal equality before the law with equal protection of the law, with substantive or de facto equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles.

**Human Rights Committee [General Comment no. 32](#), on Article 14 of the ICCPR, *Right to equality before courts and tribunals and to fair trial***

9. Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*EU law*

**[EU Charter on Fundamental Rights](#)**

Article 20 **Equality before the law**

Everyone is equal before the law.

Article 21 **Non-discrimination**

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1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

### **Employment Equality Directive (2000/78/EC)**

#### **Article 2 Concept of discrimination**

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
  - (a) **direct discrimination** shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
  - (b) **indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
    - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
    - (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.
3. **Harassment** shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 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. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An **instruction to discriminate** against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.
5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health



and for the protection of the rights and freedoms of others.

**Other relevant EU laws include:**

- [Racial Equality Directive](#) (Council Directive 2000/43/EC)
- [Gender Equality Directive](#) (Directive 2006/54/EC (recast))
- [Long-term residence Directive](#) (2003/109/EC)
- [Free movement Directive](#) (2004/38/EC)
- [Gender Goods and Services Directive](#) (2004/113/EC)

 **Useful source of information:**

[FRA Handbook on European non-discrimination law](#)

### 3.3.2 Prohibited grounds

As mentioned in the previous section differential treatment is prohibited on grounds such as **race, colour, gender, sex, disability, sexual orientation, or gender identity, religion, language, political or other opinion, national or ethnic origin, property, birth or other status**, unless it is based on reasonable and objective criteria and is not for the purpose of achieving or proportionate to that aim.

In this section, some of the prohibited grounds are explained, however the grounds included below are not an exhaustive list.

**CESCR, [General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights](#) (art. 2, para. 2 of the ICESCR)**

15. Article 2, paragraph 2, lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category. (...)

#### 3.3.2.1 *Race or ethnic origin*

Discrimination on the grounds of race or ethnic origin is prohibited in international and EU law. For instance, where children from a national minority were systematically placed in special schools for children with mental disabilities without reasonable and objective justification, the ECtHR found indirect discrimination.

*International law*

**[International Convention on the Elimination of All Forms of Racial Discrimination \(ICERD\)](#)**

**"Racial discrimination"** is defined in Article 1.1 of ICERD as "any distinction,

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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”.

**Framework Convention for the Protection of National Minorities, 1995**

**Article 4**

1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

(...) from the point of view of persons belonging to national minorities, the Venice Commission observes that differential treatment, including through support by kin-states, may constitute discrimination if it is not objectively and reasonably justified or is not proportionate to the aim pursued.

**Council of Europe, Advisory Committee on the FCNM, Commentary on Education under the Framework Convention for the Protection of National Minorities (2006), ACFC/25DOC(2006)002, pg 19.**

*EU law*

**Racial Equality Directive 2000/43/EC**

**Article 1** Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

**Article 2**

Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur 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.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, 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. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

**3.3.2.2 Nationality and immigration status**

Discrimination on the grounds of nationality and immigration status is prohibited in international and EU law. States must secure human rights and freedoms of everyone within their jurisdiction. Differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

*International law*

**CESCR, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2 of the ICESCR)**

**National or social origin**

24. "National origin" refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights. (...)

### **Nationality**

30. The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.

### **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

#### **Article 1** Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

### **Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 30 (Discrimination against non-citizens)**

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;

### **Ponomaryovi v. Bulgaria, ECtHR, No. 5335/05, (21 June 2011), paras. 60-63**

Discrimination against migrant children on the grounds of nationality/immigration status is prohibited. In this case two Russian nationals, aged 16 and 18, complained that they had been discriminated against because, unlike Bulgarian nationals and aliens having permanent residence permits, they had been required to pay school fees to pursue their secondary education. Both of them had been in possession of a permanent residence permit until their eighteenth birthdays but did not have the money to pay the fees for an independent residence permit, which they needed in order to continue residing in Bulgaria lawfully. According to the Court, the distinction as regards the obligation to pay school fees was due exclusively of their nationality

and immigration status. Although on one hand States are usually allowed a wide margin of appreciation when it comes to general measures of economic or social strategy, on the other hand very weighty reasons have to be put forward to prove difference of treatment based exclusively on the ground of nationality. Strict scrutiny was applied in this case as education is a right that enjoys direct protection under the Convention (Article 2 Protocol 1). The Court found that the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. The Court therefore concluded that the State had violated Article 14 of the European Convention (prohibiting discrimination) taken in conjunction with Article 2 of Protocol No. 1 to the European Convention (the right to education) .

*EU law*

Council **Directive 2003/86/EC of 22 September 2003 on the right to family reunification**

(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need for harmonisation of national legislation on the conditions for admission and residence of third country nationals. In this context, it has in particular stated that the European Union should ensure fair treatment of third country nationals residing lawfully on the territory of the Member States and that a more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union. The European Council accordingly asked the Council rapidly to adopt the legal instruments on the basis of Commission proposals. The need for achieving the objectives defined at Tampere have been reaffirmed by the Laeken European Council on 14 and 15 December 2001.

**3.3.2.3 Age**

States must respect and ensure the rights set forth in the Convention on the Rights of the Child (CRC) of each child within their jurisdiction without discrimination. The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.

The right to non-discrimination also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the CRC. This may require positive measures aimed at redressing a situation of real inequality.

*International law*

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

**Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex,

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language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

**UN Committee on the Rights of the Child (CRC), [General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin](#)**

18. The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender. Measures should also be taken to address possible misperceptions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.

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

41. The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.

### 3.3.2.4 Gender

A range of international standards prohibit discrimination on the grounds of sex and gender including: CRC (Article 2), ICCPR (Article 3), ICESCR (Article 3), CEDAW (Articles 1 and 2).

Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and

fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

This applies equally to girls as well as adult women.

*International law*

**Committee on Economic Social and Cultural Rights, [General Comment No. 16 \(2005\)](#) on Article 3 of the ICESCR : *the equal right of men and women to the enjoyment of all economic, social and cultural rights,***

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world’s population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination. (...)

5. Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.

6. The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. While expressions of formal equality may be found in constitutional provisions, legislation and policies of Governments, article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.

7. The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience. (...)

10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

(a) Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman

who is pregnant);

(b) Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

**CESCR, Committee on Economic Social and Cultural Rights, [General Comment No. 20](#), on article 2 (2) of the ICESCR, *Non-discrimination in economic social and cultural rights***

2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

3. The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

4. The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and article 7 includes the "right to equal remuneration for work of equal value" and "equal opportunity for everyone to be promoted" in employment. Article 10 stipulates that, inter alia, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that "primary education shall be compulsory and available free to all" and provides that "higher education shall be made equally accessible to all".

8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:

(a) Formal discrimination: Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) Substantive discrimination: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal



treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

(...)

10. Both direct and indirect forms of differential treatment can amount to discrimination under Article 2, paragraph 2, of the Covenant:

(a) Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

20. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights. Since the adoption of the Covenant, the notion of the prohibited ground "sex" has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

### 3.3.2.5 Sexual orientation and gender identity

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights all include lists of prohibited grounds of discrimination in their non-discrimination guarantees. These lists do not explicitly include "sexual orientation" or "gender identity", but they all conclude with the words "other status." The use of the phrase "other status" shows that the lists were intended to be open-ended and illustrative: in other words, the grounds of discrimination are not closed.

The European Court of Human Rights, in its judgments in the *Dudgeon v. the United Kingdom* (1981) and *Norris v. Ireland* (1988) cases, held that the maintenance in force of legislation prohibiting homosexual acts in private constituted a continuing interference with the applicant's right to respect for his private life (which included his sexual life) even where the law in question would no longer result in prosecution.

In 1994 the UN Human Rights Committee decided (in the case of *Toonen v. Australia*) that Tasmania's sodomy laws violated Articles 17 (privacy) and 26 (non-

discrimination) of the International Covenant on Civil and Political Rights (ICCPR). In so doing, it rejected Tasmania's public morality justification. Since Toonen, the Human Rights Committee and other UN treaty bodies have repeatedly urged States to decriminalise consensual same-sex sexual conduct.

In the 1999 case of *Salgueiro da Silva Mouta v. Portugal* the Court held that sexual orientation is a concept "undoubtedly" covered by the openended grounds of prohibited discrimination listed in Article 14 of the European Convention. Human Rights Committee jurisprudence includes sexual orientation under Article 26 of the ICCPR.

More modern standards, such as the EU Charter on Fundamental Rights (Article 21) explicitly list sexual orientation as one of the prohibited grounds for discrimination.

**CESCR, Committee on Economic Social and Cultural Rights, [General Comment No. 20](#)**

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.

**For more information please see:**

- [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/LGBT\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/LGBT_en.pdf)
- <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>
- <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>
- ICJ casebook on international law on SOGI rights: <http://www.icj.org/sogi-casebook-introduction/>
- UN docs: <http://www.icj.org/sogi-un-database/>

### 3.3.2.6 Religion and belief

The two Covenants (the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social Cultural and Rights (ICESCR)) entail basic human rights that are to be secured without any discrimination based on i.a. religion (Art. 26 and 2 ICCPR, Art. 2(2) ICESCR).

Equally, the European Convention on Human Rights and the Charter on Fundamental Rights of the EU prohibits discrimination based on religion.

The ECtHR ruled in various occasions that the prohibition of religious symbols/clothes worn by children in schools was not in breach of their freedom of religion (see Box below). Not providing a class instead of religious education, such as ethics, did violate the freedom of religion of a child.

**Dogru v. France and Kervanci v. France, ECtHR, 4 December 2008**

The applicants, both Muslims, were enrolled in the first year of a state secondary school in 1998-1999. On numerous occasions they attended physical education classes wearing their headscarves and refused to take them off, despite repeated requests to do so by their teacher. The school's discipline committee decided to expel them from school for breaching the duty of assiduity by failing to participate actively in those classes, a decision that was upheld by the courts.

The Court held that there had been no violation of Article 9 (freedom of religion) of the Convention in both cases, finding in particular that the conclusion reached by the national authorities that the wearing of a veil, such as the Islamic headscarf, was incompatible with sports classes for reasons of health or safety was not unreasonable. It accepted that the penalty imposed was the consequence of the applicants' refusal to comply with the rules applicable on the school premises – of which they had been properly informed – and not of their religious convictions, as they alleged.

**Grzelak v. Poland, ECtHR, 15 June 2010**

The first two applicants, who are declared agnostics, are parents of the third applicant. In conformity with the wishes of his parents, the latter did not attend religious instruction during his schooling. His parents systematically requested the school authorities to organise a class in ethics for him. However, no such class was provided throughout his entire schooling at primary and secondary level because there were not enough pupils interested. His school reports and certificates contained a straight line instead of a mark for "religion/ethics".

The Court declared the application inadmissible (incompatible *ratione personae*) with respect to the parents and held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 9 (freedom of religion) of the Convention with respect to their child, finding in particular that the absence of a mark for "religion/ethics" on his school certificates throughout the entire period of his schooling had amounted to his unwarranted stigmatisation, in breach of his right not to manifest his religion or convictions.

### **3.3.2.7 Disability**

Children with a disability are considered as a particularly vulnerable group of children (see *UN CRC GC 14, et al. Box in section 2.3.1*).

On 23 December 2010, the [EU ratified the UN Convention on the Rights of People with Disabilities \(UN CRPD\)](#) being the first international organisation to accede to an international treaty on human rights. Once party to the UN CRPD, the EU and its institutions (and the EU Member States when interpreting and applying EU law) are obliged to follow the wide and inclusive approach of the Convention to interpreting the meaning of 'disability'.

Although not expressly featuring in the list of protected grounds of the ECHR, disability has been included by the ECtHR in its interpretation of 'other' grounds under Article 14.

Parents of disabled migrant children are also entitled to special treatment including when taking care of disabled migrant child (See CJEU, *S. Coleman v. Attridge Law and Steve Law* [Grand Chamber of the CJEU, No. C-303/06, (17 July 2008.)

### UN Convention on the Rights of People with Disabilities

#### **Article 1 Purpose**

The purpose of the present Convention 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.

Persons 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.

(...)

#### **Article 5 Equality and non-discrimination**

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

In the case of *Glor v. Switzerland*, the ECtHR found that the applicant, who was a diabetic, could be considered as a person with a disability – irrespective of the fact that national law classified this as a 'minor' disability. The applicant was obliged to pay a tax to compensate for failing to complete his military service, which was payable by all those who were eligible for military service. To be exempted from this tax one either had to have a disability reaching a level of '40%' (considered equivalent to the loss of use of one limb), or be a conscientious objector. Conscientious objectors were obliged to perform a 'civil service'. The applicant's disability was such that he was found unfit to serve in the army, but the disability did not reach the severity threshold required in national law to exempt him from the tax. He had offered to perform the 'civil service' but this was refused. The ECtHR found that the State had treated the applicant comparably with those who had failed to complete their military service without valid justification. This constituted discriminatory treatment since the applicant found himself in a different position (as being rejected for military service but willing and able to perform civil service), and as such the State should have created an exception to the current rules.

DRAFT