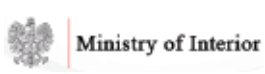
Project funded by
the European Union

UNDERSTANDING MIGRANTS' RIGHTS

A Handbook for the Republic of Moldova



UNDERSTANDING MIGRANTS' RIGHTS

A Handbook for the Republic of Moldova

Prepared by the International Centre for Migration Policy Development, Vienna – Austria and the National Institute of Justice of Moldova

Funded by the European Union

The European Union is made up of 28 Member States who have decided to gradually link together their know-how, resources and destinies. Together, during a period of enlargement of 50 years, they have built a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms.

The European Union is committed to sharing its achievements and its values with countries and peoples beyond its borders.

The European Commission is the EU's executive body.

Chişinău, 2015

Acknowledgements

This publication was drafted by Mr Ciarán Burke, Professor and Chair for International Law at the Friedrich-Schiller-Universität in Jena, Germany. It was prepared with the support of Ms Ecaterina Popa and Ms Mariana Pitic from the National Institute of Justice of Moldova, Ms Rodica Rusu from the Public Administration Academy of the Government of Moldova as well as Ms Martina Silvestri, Ms Maegan Hendow, Ms Veronika Bilger, Ms Jenny Andersson Pucher, Ms Jana Pochová, Ms Diana Hincu, Ms Barbara Cuzuioc-Weiss and Ms Ionela Barba from the International Centre for Migration Policy Development.

International Centre for Migration Policy Development (ICMPD)

Gonzagagasse 1
A-1010 Vienna
Austria
www.icmpd.org

National Institute of Justice (NIJ)

str. S. Lazo, 1
MD 2004, Chişinau
Republic of Moldova
www.inj.md

This handbook has been produced in the framework of the project 'Supporting the Republic of Moldova to Implement the EU-Moldova Action Plan on Visa Liberalisation' (Fighting IRregular Migration in Moldova – FIRMM) with the assistance of the European Union, the Ministry of the Interior (Czech Republic), the Office of Immigration and Nationality (Hungary), the Ministry of the Interior (Poland), the Ministry of Internal Affairs (Romania) and the State Secretariat for Migration (Switzerland). The content of this handbook is the sole responsibility of the National Institute of Justice of Moldova and the International Centre for Migration Policy Development and can in no way be taken to reflect the views of the donors.

Layout, printed and bound in the Republic of Moldova by AQA Event & Project Management

Table of Contents

INTRODUCTION TO THE VOLUME

Countries that wish to respond to the ever-increasing migration flows worldwide require a well thought-out and cogent strategy to deal with this complex and challenging phenomenon. In this respect, in order to satisfy their international legal obligations, it is essential that policy-makers possess a **thorough knowledge of domestic and international law**. Further, it is indispensable that state agents – including public officials, police, prosecutors and the judiciary – are well-versed in these areas, and are aware of the complex web of legal tools at their disposal at the regional and international level, as well as the **legal obligations that are incumbent upon them as they go about their daily work.**

Making generalisations concerning migrants is not an easy task. Many individuals choose to migrate for the purpose of seeking better remuneration or in order to be with their family or relatives. Some move abroad for study purposes. Others seek adventure. However, in reality, a great many migrants choose to leave their countries of origin for reasons connected with persecution for personal, political or ethnic reasons, because they cannot make a living, or because they are fearful for their lives, due to conflicts in their home countries or otherwise. Such individuals, uprooted from all that is familiar and normal, are amongst the most vulnerable in modern society. **As vulnerable persons, it is important that their rights are protected. This is the purpose of the specific framework of rights that has been developed to protect migrants in Europe and around the world.**

Historically, the Republic of Moldova has been a country of emigration, with many Moldovan citizens choosing to leave their country in order to seek a better life elsewhere, while few foreigners came to Moldova to settle. However, **over the past five years**, this picture has slowly begun to change, with an increase of **foreign citizens choosing Moldova as a transit or destination country**. This fact has created a need to provide a framework to deal with such migrants in domestic law, and to **refresh and update the legal knowledge of those public officials who are likely to come into contact with migrants in the course of their duties**, in order to ensure that the rights of such individuals are respected.

The aim of the present handbook is to provide a self-contained, systematic guide to the relevant provisions concerning the rights of migrants in the Republic of Moldova. The handbook will constitute a useful tool for practitioners and officials, such as:

1. **the judiciary**, including judges from regional and central courts, those from first instance courts, courts of appeal, and the Supreme Court, future

judges attending the mandatory course of the National Institute of Justice, and the Magistrates Council;

2. **law enforcement officials**, in particular, the Prosecutors' Office and the police, at both regional and central levels);
3. **the staff of the Bureau for Migration and Asylum**, including the Refugees Accommodation Centre, the Migrants Accommodation Centre and the Border Guards Service; and
4. **non-governmental organisations** providing legal support and counselling to asylum seekers, refugees, and migrants.

The book is structured into five chapters, and approximates a chronology of the situations in which migrants might find themselves. After introducing the international legal framework through which the rights of migrants in Moldova are protected in the first chapter, the second chapter addresses the obligations of the state vis-à-vis migrants at the border. Chapter three then deals with situations in which migrants may be detained, while chapter four is concerned with situations in which migrants may be expelled from Moldovan territory or returned to their country of origin. The fifth and final chapter is devoted to an overview of the rights that are due to migrants during their everyday lives when they are resident in Moldova.

Chapter 1, "International law, human rights, and the legal framework for the protection of the rights of migrants in the Republic of Moldova", starts out by explaining the doctrine of state responsibility as the basis of Moldova's obligation to uphold the rights of migrants. It explains the concept of human rights in international law, and classifies and discusses the regional and international sources, ranging from international treaties to good practices that may be held up as examples that are relevant to developing a full understanding of these rights. Particular focus is placed on the United Nations system with its multitude of treaties protecting migrants, the Council of Europe system of human rights protection with the European Court of Human Rights as the key protective agent, and the European Union as a comparator for good practices and the development of future policies in this area.

Chapter 2, "The rights of migrants at the border" devotes specific attention to the human rights of those individuals who arrive at the frontier of the Moldovan state. In this context, a plethora of practical issues arises, among them the definition, limits, and associated duties of states' jurisdiction at their borders

(including transit regulations and border controls), data protection (including the collection and storage of data), the prohibition upon torture, the principle of non-discrimination and the right to due process of migrants who find themselves at state borders.

Chapter 3, "The rights of migrants in detention", focuses on the human rights that must be accorded to migrants who are detained. The right to life is discussed first, while the following sections deal with other specific human rights issues arising in a situation where the freedom of movement of migrants is restricted, in particular:

a) The prohibition upon torture, describing the circumstances under which detention may be considered as torture or inhuman or degrading treatment, and the minimum international standards with which detention systems must comply;

b) The right to dignity, physical integrity and the right to health and medical assistance during detention;

c) The notion of *habeas corpus* and the prohibition of arbitrary detention, including the conditions under which any restriction to liberty can be considered reasonable, necessary, and proportionate, and any form of detention can be considered non-arbitrary and in accordance with specific procedural requirements. Moreover, cases in with migrants can be lawfully detained are presented;

d) The right to be informed of the reasons for one's detention;

e) The need for the presence of a specific legal process to review the lawfulness of detention; and

f) Categories of migrants who would likely be seriously affected psychologically by detention, therefore constituting vulnerable groups for whom alternative forms of detention should be considered and for whom special protection should be afforded.

Chapter 4, "The rights of migrants during expulsion or when being returned to their country of origin", presents a guide to the rights which must be accorded to migrants when a decision has been taken to return them to their state of origin and/or to expel them from Moldovan territory. In this context, the following human rights issues are addressed:

a) The right to life of the migrants in question is briefly treated;

b) The principle of *non-refoulement* is examined in detail. The chapter describes the international standards concerning the obligation of states to not return a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, and also addresses restrictions to the *non-refoulement* principle;

c) The right to dignity, physical integrity and the right to health and medical assistance during expulsion or forced return are assessed, considering that expulsion must be implemented in a humane and dignified manner and due consideration must be given to the state of health, age and family bonds of the person to be expelled;

d) Due process and judicial review in the context of expulsion and forced return, including the standards prescribed by the international legal framework in order to ensure that migrants are informed of the decision of expulsion and always dispose of an opportunity to appeal against the decision or to have it reviewed by an impartial and independent authority;

e) The right to privacy and family life, including the interests involved in case of expulsion or forced return, the need for balancing those interests, and the cases in which expulsion of regular migrants may be justified;

f) The prohibition of collective expulsions, including the origins of the general prohibition on collective expulsions, and its connection with the procedural safeguards against arbitrary expulsions affirmed via different legal provisions in the international framework; and

g) The right to return to one's homeland, dealing with the need to promote voluntary returns and the practice of concluding readmission agreements at the European level.

Chapter 4, "The rights of migrants in everyday Moldova (economic, social and cultural rights)", first introduces the concept of economic, social and cultural rights in international law. Thereafter, key rights that may be relevant to the treatment of migrants who settle in Moldova as they go about their everyday lives are presented in detail:

a) The right to work, in particular the prohibition upon slavery and forced labour, the right to non-discrimination in working conditions and equal treatment, and the prohibition of child labour;

b) Rights in the workplace that particularly affect migrant workers, concerning safety, health and dignity, fair wages and equal remuneration for work of equal value, protection in case of dismissal, membership of trade unions, limitation of working hours, and the right to rest;

c) The right to an adequate standard of living, including the recent development of social security standards; and

d) The right to health and medical assistance, the right to education and the right to privacy and family life, focusing on specific cases such as the rights of unaccompanied or separated children and the right to family reunification.

Throughout the chapters, the handbook provides key information on the existing legislation related to the rights of migrants within the Republic of Moldova. In each chapter, the relevant rights are presented in order to acquaint the reader with how they protect migrants and constrain state action. In order to add context, the legal provisions upon which these rights are grounded are classified according to the institution that created them. More precisely, the relevant principles and norms are listed on the basis of the following institutional and legal frameworks:

1. The United Nations System;
2. The Council of Europe System;
3. Moldovan law; and
4. European Union Law.

1. **The United Nations System** provides the backbone of the apparatus of global human rights protection. From the 1948 Universal Declaration of Human Rights (which is explicitly referred to in the Moldovan Constitution) onwards, the United Nations has been committed to ensuring a worldwide system of human rights protection, in accordance with the purposes of the UN itself. **Moldova is a member of the United Nations**, and the key conventions in this area include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). **The international conventions that Moldova has ratified are directly applicable, and are capable of creating rights in Moldovan domestic law, in accordance with Article 4 of the Moldovan Constitution.**

2. **The Council of Europe System** represents the most advanced regional system of human rights protection in the world. In addition to an ambitious international convention – the Convention for the Protection of Human Rights and Fundamental Freedoms (colloquially known as the **European Convention on Human Rights** – ECHR) – the Council of Europe has developed an excellent system of protection via an individual appeals procedure to the European Court of Human Rights, which has become a key arbiter of human rights in Europe. **Moldova is a member of the Council of Europe, and individuals have the right to petition the European Court of Human Rights in Strasbourg if they are of the opinion that their rights under the ECHR have been violated. The ECHR is also directly applicable in Moldovan domestic law.**

3. **Moldovan Law**, and its key provisions relating to the rights of migrants, are discussed in detail in this volume. These provisions range from direct constitutional protection through the incorporation of international human rights standards into the domestic legal system, to a range of Moldovan laws that aim to protect human rights generally, or the rights of foreigners in particular.

4. **EU Law** is important in the context of the present volume, although the Republic of Moldova is not a member of the European Union. However, EU law represents a valuable point of comparison in relation to many of the core topics explored in this handbook. The EU's provisions on many rights related to migrants may often be cited as an example of good legal practice and good governance, and indeed, in some cases Moldovan legislation mirrors the provisions of EU law or relies upon specific bilateral agreements with the European Union. Therefore, for the sake of completeness, and to increase the comprehension and aid the understanding of the reader, an overview to several provisions of EU legislation is included in the text. Such standards and practices may also be seen as embodying a number of benchmarks in the promotion and protection of migrants' rights to which Moldova is likely to aspire in the future.

The decisions of various UN Committees on the application of the international provisions related to migrants will be equally included in this Compilation. It will contain a comprehensive list of judgements of the European Court of Human Rights and UN bodies regarding migrants, and will provide links to other pertinent sources for those readers who wish to improve their understanding in particular areas.

Finally, the handbook provides at the end of each sub-section a brief summary of the guiding principles and the main features of each legal tool discussed, together with (when possible or available) an indication of the current state of the art and implementation of the instrument in the Republic of Moldova. Important case-law is identified, when relevant for the evolution of the protection of any of the rights that are treated.

ACRONYMS

CAT	Committee against Torture / Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	Committee on Enforced Disappearances
CEDAW	Committee on the Elimination of Discrimination against Women/ Convention on the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
COE	Council of Europe
CRC	Committee on the Rights of the Child / Convention of the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities / Convention on the Rights of Persons with Disabilities
ESC	European Social Charter
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ILO	International Labour Organisation / International Labour Office
OHCHR	Office of the High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review

GLOSSARY OF IMPORTANT TERMS

Acquis communautaire (or community acquis): The accumulated body of laws, common rights and obligations, binding all the Member States in the framework of the European Union.[1]

Asylum: a legal institution through which the state offers protection to a foreigner by granting refugee status, humanitarian protection, temporary protection or political asylum.[2]

Asylum-seeker: While the grant of asylum is the right of a State to let an alien enter and remain in its territory (political asylum),[3] an asylum-seeker is "someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated"[4]. The concept must not be confused with that of refugee and that of diplomatic asylum.

Border checks: Controls conducted by a State at the legal limit of its full and exclusive territorial sovereignty, in order to facilitate the mobility of legal migrants and to hamper the mobility of those travelling without authorisation or in a criminal manner. In the context of border checks, international standards prohibit disproportionate use of violence, the existence of abuses (both physical and sexual) and arbitrary detention of migrants, as well as discrimination during decisions for entry.

Charter of Fundamental Rights of the European Union [5]: Charter adopted in 2000 in the European Union to promote and protect human rights. It should not be confused with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Collective expulsion: Expulsion *en masse*, prohibited in accordance with the procedural safeguards against arbitrary expulsions.[6]

Compensation: A pecuniary remedy granted to indemnify an injury suffered e.g. in the context of arbitrary detention.

1. http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm
2. See Article 3 of the Law on Asylum in the Republic of Moldova
3. Aust, Anthony, Handbook of International Law, Cambridge University Press, 2010
4. http://www.unhcr.org/pages/49c3646c137.html
5. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02
6. Cf. Article 13 of the ICCPR; Article 4 of Protocol No. 4 to the ECHR

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment[7]: Convention adopted in order to ensure that in each State Party "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction"[8] will be taken. Individuals who claim to be victims of a violation by a State Party of the provisions of the Convention can submit a complaint to the Committee against Torture (CAT).

Convention against Transnational Organized Crime[9]: Adopted in 2000, it is the main international instrument in fighting transnational organised crime. The Convention is supplemented by three protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which entered into force in 2003; the Protocol against the Smuggling of Migrants by Land, Sea and Air, which entered into force in 2004; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

Convention on the Elimination of All Forms of Discrimination against Women[10]: Convention adopted in order to: combat all forms of trafficking in women and sexual exploitation of women, ensure that women and men can participate equally in public and political life, ensure equality in regard to citizenship and education, ensure women's right to work, protect women's health rights, as well as other economic and social rights, and guarantee equality before the law in marriage and in family relations. According to its 1999 Optional Protocol, the Committee on the Elimination of Discrimination against Women (CEDAW) is entitled to accept individual petitions and carry out investigations on violations of women's rights.

Convention on the Rights of the Child[11]: Convention adopted in 1989. By "[r]ecognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, [and] [c]onsidering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit

7. UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85
8. Article 2, Ibid.
9. UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25
10. UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13
11. UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

of peace, dignity, tolerance, freedom, equality and solidarity"[12], this convention promotes specific rights of the child such as the right to life, the right from birth to a name, the right to acquire a nationality, the right to enter or leave a State Party for the purpose of family reunification, and the right to freedom of expression.

Convention relating to the Status of Refugees (Refugee Convention)[13]: Adopted in 1951, in the wake of the post-World War II international refugee crises, together with the 1967 Protocol, this convention is the key legal instrument for the purposes of defining who is a 'refugee', their rights, and the legal obligations of states.

Council of Europe Convention on Action against Trafficking in Human Beings[14]: Treaty adopted in 2005 in the framework of the Council of Europe that aims at: combatting human trafficking, guaranteeing equality between women and men, protecting victims' fundamental rights, creating a comprehensive framework for protecting and assisting victims and witnesses, ensuring efficient investigation and pursuit those who engage in human trafficking, and promoting international cooperation in combatting human trafficking. The Convention also established an independent monitoring mechanism, the Group of Experts on Action against Trafficking in Human Beings (GRETA) to ensure that states observe the Convention's obligations.

Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[15]: Adopted in April 2011 in the framework of the Council of Europe, it aims at preventing violence against women and domestic violence, and requires States parties to organise activities such as awareness-raising campaigns and set up treatment programmes for perpetrators of domestic violence and for sex offenders. The Convention also established an independent monitoring mechanism, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) to ensure that States observe the Convention's obligations.

Council of Europe: International organisation active in Europe mainly through its most important legal instrument, the European Convention on Human Rights, and engaged in the protection and promotion of human rights, democracy and

12. Preamble, Ibid.
13. UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
14. Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197
15. Council of Europe, Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011

the rule of law. Its structure encompasses organs such as the Secretary General, the Committee of Ministers, the Parliamentary Assembly (PACE), and the European Court of Human Rights. The Council of Europe must not be confused with the European Council (an institution of the European Union). Moldova is a member of the Council of Europe.

Country of destination: The State towards which migratory flows are directed, or the state to which the migrant in question migrates.

Country of origin: The State from which migratory flows emanate, or, the state of which the migrant in question is a national.

Customary international law: One of the most relevant sources of international law,[16] deriving from the "general recognition among States of a certain practice as obligatory"[17]. The elements of customary international law are consistency and generality of a practice, and the "conception that the practice is required by, or consistent with, prevailing international law"[18] (*opinio iuris et necessitatis*).

(Lawful) detention: Reasonable, necessary, proportionate and non-arbitrary (legally based in accordance with procedural requirements) deprivation of liberty.[19] In the context of the migration process, detention can be foreseen only in case of unauthorised entry, and pending deportation or extradition. The following rights are connected to detention: the right to be informed of the reasons for detention (including, for example, the right to be informed of any charges in a language which the person understands,[20] and the right to be informed of his or her rights including the process of review or appeal of the decision on detention[21]); the right to judicial review, to examine the lawfulness of detention and undertaken by an independent and impartial judiciary body[22]. Compensation for arbitrary detention must also be ensured.[23]

Domestic (or local) remedies: Remedies provided by the local State that should be exhausted within its own legal order before resort is had to the institution of international proceedings.[24]

16. See Article 38, United Nations, Statute of the International Court of Justice, 18 April 1946
17. J. L. Brierly, Law of Nations, 1963, as cited in Ian, Brownlie, Principles of public International Law, Oxford University Press, 2003.
18. Ian, Brownlie, Principles of Public International Law (op. cit.)
19. Cf. Article 9 of the ICCPR; Article 31 of the 1951 Refugee Convention
20. Cf. Article 9 of the ICCPR
21. Cf. Article 5 of the ECHR
22. Cf. Article 9 of the ICCPR; Article 5 of the ECHR
23. Cf. Article 9 of the ICCPR
24. Malcom N., Shaw, International Law, Cambridge University Press, 2008.

Dublin Regulation (Regulation No. 604/2013): EU legal provision that establishes the criteria for identifying the Member State responsible for the examination of an asylum claim within the European Union, developed mainly "to deter multiple asylum claims and to determine as quickly as possible the responsible Member State to ensure effective access to an asylum procedure"[25].

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[26]: Adopted in 1950 in the framework of the Council of Europe, it grants a series of civil and political rights and freedoms, and also establishes a system to guarantee that the obligations assumed by Member States are observed. It protects the rights to: life; freedom and security; respect for private and family life; freedom of expression; freedom of thought, conscience and religion; vote and the right to stand for election; a fair trial in civil and criminal matters; and property and peaceful enjoyment of possessions. It prohibits: the death penalty (via an additional protocol); torture or inhuman or degrading treatment or punishment; slavery and forced labour; arbitrary and unlawful detention; discrimination in the enjoyment of the rights and freedoms secured by the Convention; and deportation of a state's own nationals or denying them entry; and the collective deportation of foreigners.[27]

European Convention on the Legal Status of Migrant Workers[28]: Adopted in 1977, it applies to migrant workers who are citizens of Council of Europe Member States and aims at regulating the legal status of migrant workers in order to ensure that they are treated no less favourably than workers who are nationals of the receiving state in all aspects of living and working, therefore eliminating any discrimination based on nationality or residence.

European Court of Human Rights: international court established in the framework of the Council of Europe in order to guarantee the right of any person, non-governmental organisation or group of individuals claiming to receive judicial protection against the violation of one the rights included in the ECHR perpetrated by one of its parties. It must not be confused with the International Court of Justice or the Court of Justice of the European Union.

25. http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html
26. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
27. http://human-rights-convention.org/our-rights-and-liberties/
28. Council of Europe, European Convention on the Legal Status of Migrant Workers, 24 November 1977, ETS 93

European Social Charter (ESC)[29]: Adopted in 1961, it supplements the ECHR with regard to economic and social human rights, and establishes a regional European system for their protection.

European Union (EU): "A unique economic and political partnership between 28 European countries"[30]. Its institutions include the European Parliament, directly elected by the European citizens since 1979, the Council of the European Union, which represents the governments of the individual member countries, the European Commission, which represents the interests of the Union as a whole, the Court of Justice of the EU, and the Court of Auditors.[31] Moldova is not a member of the European Union.

Ex officio: Faculty or power that is inherent by virtue of the position held by an individual, which may be exercised without the need for a specific authorization.

Expulsion: Act of a State in the exercise of its sovereignty that secures the removal of a person from its territory.[32] Regular migrants have the right to be informed of the decision of expulsion; appeal against the decision or have it reviewed by an impartial and independent authority; and be represented by a lawyer. The expulsion order may be temporarily suspended pending the review process.

Extradition: Practice that "enables on State to hand over to another State suspected or convicted criminals who have fled to the territory of the former"[33]. Usually, extradition takes place following the conclusion of extradition agreements between States.

Family reunification: "Process whereby family members already separated through forced or voluntary migration regroup in a country other than the one of their origin"[34].

Forced return: "The compulsory return of an individual to the country of origin, transit or third country, on the basis of an administrative or judicial act"[35].

29. Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163
30. http://europa.eu/about-eu/index_en.htm
31. http://europa.eu/about-eu/index_en.htm.
32. IOM, Glossary on Migration, available at: http://publications.iom.int/bookstore/free/IML_1_EN.pdf
33. Malcom N., Shaw, International Law (op. cit.)
34. IOM, Glossary on Migration (op. cit.)
35. IOM, Glossary on Migration (op. cit.)

Foreigner (or alien): "A person belonging to, or owing an allegiance to, another State [than the one in which he is present]"[36].

Freedom of movement: The right to leave any country including one's own (Article 13 UDHR), together with the right to re-enter one's own country (Article 12 ICCPR), and the right to freedom of movement and residence within the country (Article 12 ICCPR).[37] The freedom of movement can be limited only when necessary in order to protect national security, public order, public health or morals or the rights and freedoms of others.

General Assembly (of the UN): UN organ in which all Member States are represented (Article 9 UN Charter) as equal entities (Article 18 UN Charter). The competence of the General Assembly on human rights stems from its general mandate and the provisions of Articles 13 and 15 of the Charter.

Habeas Corpus: "An action before a court to test the legality of detention or imprisonment"[38]. This idea is based upon the *Magna Carta*, the Great Charter of 1215 in England, which restrained the King's power, and is seen as being one of the first ever protections of individual rights in law.

Human Rights Council (HRC): central body within the UN system dealing with human rights issues. It replaced the Commission on Human Rights in 2006.

Human Rights: Rights inherent to all human beings. These rights are universal, inalienable, equal, interrelated, interdependent and indivisible.[39] Universal human rights are often affirmed and protected through international treaties, customary international law, and general principles of international law.[40]

Interim measures: Urgent measures ordered by courts "in accordance with well-established practices and only when there is an imminent risk of irreparable harm"[41].

Internally displaced persons (IDP): Persons who have been forced to leave their habitual residence, "as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural

36. IOM, Glossary on Migration (op. cit.)
37. Cf. Article 2 of Protocol No. 4 of the ECHR; Regulation No. 492/2011 on freedom of movement for workers within the EU; Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States, Schengen Borders Code, established by Regulation (EC) No. 562/2006; Visa Code (Regulation No. 810/2009 on establishing a Community Code of Visas)
38. IOM, Glossary on Migration (op. cit.)
39. Donnelly, Jack, Universal human rights in theory and practice, Cornell University Press, 2013.
40. http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx
41. http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

or human-made disasters, and who have not crossed an internationally recognized State border"[42].

International Convention for the Protection of all Persons from Enforced Disappearance[43]: Adopted in December 2006, it intends to prevent enforced disappearance, by requiring states parties to criminalise the practice, to investigate complaints, and to bring those responsible for it to justice. The complaint mechanism to the Committee on Enforced Disappearances (CED) is operable when the State Party has made the necessary declaration per Article 31. Moldova has signed, but has not ratified, this convention, and has not made the necessary declaration per Article 31.

International Convention on the Elimination of All Forms of Racial Discrimination[44]: Convention adopted in order to eliminate "racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination"[45]. According to the Convention and for the purposes of its application, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[46] Article 14 of the Convention foresees the possibility to submit individual complaints to the Committee on the Elimination of Racial Discrimination (CERD) for the violation of the rights recognised by the Convention.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[47]: Adopted in 1990, it promotes the rights and protection of migrant workers and members of their families, including those in an irregular situation, throughout the entire migration process: the preparation phase, the departure and transit stage, the period of stay and employment in the destination country, and the return to the country of origin.

42. IOM, Glossary on Migration (op. cit.)
43. UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006
44. UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
45. Preamble, Ibid.
46. Article 1, Ibid.
47. UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990

International Convention on the Rights of Persons with Disabilities[48]: Adopted in December 2006, it adopts a broad categorisation of persons with disabilities and reaffirms that all persons, with all types of disabilities, must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations should be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.[49] A complaint mechanism to the Committee on the Rights of Persons with Disabilities (CRPD) is foreseen by the Optional Protocol to the Convention, which entered into force at the same time as the Convention.

International Court of Justice (ICJ): The principal judicial organ of the UN system according to Article 92 UN Charter. It is comprised of 15 judges, elected for 9 years by the General Assembly and the Security Council. While its jurisdiction is not compulsory, the Court has in the past involved itself in a number of cases that touched upon important human rights issues.

International Covenant on Civil and Political Rights (ICCPR)[50]: Adopted in 1966, it has been created to progressively achieve the full realisation of rights such as the right to life, to personal freedom and security, to a non-arbitrary arrest, confinement or exile, and to freedom of movement. The first Protocol of this Covenant entered into force on 23 March 1976 and grants individuals the right to submit a written communication to the Human Rights Committee (CCPR) for consideration.

International Covenant on Economic, Social and Cultural Rights (ICESCR)[51]: Adopted in 1966, it has been created to achieve progressively the full realisation of rights such as the right to work, to fair and favourable conditions for work, to an adequate standard of living, to health, and to education. Through its 2008 Optional Protocol, the Covenant also allows individuals claiming to be victims of a rights violation to inform the Committee on Economic, Social and Cultural Rights (CESCR) of the violation by means of an individual communication.

International Labour Organisation (ILO): Founded in 1919, it became the first specialised agency of the UN in 1946. The main aims of the organisation are “to

48. UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106
49. http://www.un.org/disabilities/default.asp?id=150
50. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
51. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues"[52]. Its actions are based on the cooperation between the parties of a unique tripartite structure composed by workers, employers and governments.[53] The International Labour Organisation conventions contain in total 190 laws, which aim to improve labour standards for people around the world. The ILO has also developed mechanisms to monitor the application of conventions and recommendations in law and in practice following their ratification by states.

Irregular migrant: migrant who lacks legal status in a transit or host country. The status can, for example, derive from illegal entry or from the expiry of a visa.[54]

Jurisdiction: Power of a State to take executive actions as a consequence of the adoption of decisions or rules.[55] It reflects and is connected with the principles of sovereignty, equality of states and non-interference in domestic affairs.[56]

Lex loci laboris: Principle of law according to which the local legislation shall be applied to the individuals (i.e. migrant workers) active in a specific territory. Latin for "the law of the place".

Migrant worker (in the context of the Council of Europe): "a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment"[57].

Nationality (in the context of refugee status): this status includes not only the legal nationality of an individual, but may also be understood so as to include membership of an ethnic or linguistic group. It further includes national origin (even if an individual does not have legal nationality of the state from which they originate) and statelessness.

Office of the High Commissioner for Human Rights (OHCHR): UN agency that works with governments, civil society, national human rights institutions and other United Nations bodies and international organisations in order to promote and protect human rights. Its activities include standard-setting and monitoring through the work of special rapporteurs, independent experts, and working groups, and the promotion of implementation on the ground of those standards

52. http://www.ilo.org/global/about-the-ilo/lang--en/index.htm
53. Malcom N., Shaw, International Law, Cambridge University Press, 2008.
54. IOM, Glossary on Migration (op. cit.)
55. Ian, Brownlie, Principles of public international law (op. cit.)
56. Malcom N., Shaw, International Law, (op. cit.)
57. Article 1, Council of Europe, European Convention on the Legal Status of Migrant Workers, 24 November 1977, ETS 93.

through its presence in the field.[58]

Office of the United Nations High Commissioner for Refugees (UNHCR): UN agency established to "lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide"[59]. It focuses its efforts on protecting refugees and persons forced to flee their country of origin.

Political opinion (in the context of the refugee status): Opinion of an individual that was either expressed or came to the attention of the authorities, or might reasonably become known by the authorities.[60]

Principle of non-discrimination: Principle that prohibits the unjust or prejudicial treatment of human beings with regard to all human rights and freedoms on the basis of factors such as race, colour, sex, religion, political opinion, national extraction or social origin.[61] The principle is deeply connected with the principle of equality,[62] as stated in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."[63]

Principle of non-refoulement: Obligation of states to not return a refugee to 'the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[64] The "territories" mentioned in the definition include both the State of origin of the refugee or asylum-seeker and third States.[65] This principle applies to the return of persons found within the state's territory, both those who have entered legally and those who have entered irregularly, as well as those at the border who have attempted to enter, regularly or irregularly, and have been refused entry.

Readmission agreement: Agreement concluded to regulate the return of aliens in an irregular situation to their country of origin. A distinction should be drawn in this respect between bilateral readmission agreements concluded between two States, on the one hand, and readmission agreements between a State and the

58. http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx
59. http://www.unhcr.org/pages/49c3646c2.html
60. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1, http://www1.umn.edu/humanrts/instree/refugeehandbook.html, para. 82.
61. The factors here listed as examples are derived from the ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958. Cf. Article 14 of the ECHR,
62. http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx
63. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
64. Cf. Article 3 of the Convention against Torture, Article 33 of the 1951 Refugee Convention, Article 7 of the ICCPR, Article 3 of the ECHR.
65. Aust, Anthony. Handbook of international law (op. cit.)

European Union on the other. The latter variety contain specific implementing protocols.[66]

Refugee: According to Article 1 of the Refugee Convention, a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country"[67]. While the definition also applies to stateless persons, the concept of refugee must not be confused with those of asylum-seeker or internally displaced person (IDP).[68]

Religion (in the context of the refugee status): A belief (values about the divine or spiritual destiny of mankind, including atheism), an identity (as a member of a community that shares beliefs, rituals and traditions), or a way of life (where religion is manifested in certain activities, such as the wearing of specific clothing or respecting certain practices).[69]

Right to an adequate standard of living: Right that includes the rights to adequate food, clothing and housing, and to the continuous improvement of living conditions.[70]

Right to education: Right to a free compulsory primary education; secondary education accessible to all, particularly through the progressive introduction of free secondary education; and equal access to higher education, especially through the progressive introduction of free higher education.[71]

Right to health and medical assistance: Right of the migrants to freely control their own health and right to access a health protection system on the basis of the principle of equal opportunity.[72]

Right to social security: Right to "security in the event of unemployment, sick-

66. See Article 19 of the EU-Moldova readmission agreement, which contains protocols treating:
(a) the designation of the competent authorities, border crossing points and exchange of contact points;
(b) the modalities for returns under the accelerated procedure;
(c) conditions for escorted returns, including the transit of third-country nationals and stateless persons under escort;
(d) means and documents relevant to the procedure. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22007A1219(10)&from=EN

67. Article 1, UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

68. Aust, Anthony, Handbook of International Law (op. cit.)

69. Cf. HRC General Comment No. 22, UN Doc. U.N. Doc. HRI/GEN/1/Rev.1 at 35, para. 1

70. Cf. Article 11 of the ICESCR

71. Cf. Article 26 of the UDHR and Articles 13 and 14 of the ICESCR

72. Cf. Article 25 of the UDHR

ness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"[73].

Right to work: Right to free choice of employment, to just and favourable working conditions and to protection against unemployment.[74] In the context of the right to work also the right to non-discrimination and the prohibition of slavery and forced labour are relevant.

Schengen Agreement[75]: Agreement concluded originally between five countries "to achieve the abolition of checks at their common borders on the movement of nationals of the Member States of the European Communities and to facilitate the movement of goods and services at those borders"[76]. The Schengen Area, originated by the application of the agreement includes now the territory of 26 European countries. Moldova is not a member.

Smuggling (of people): "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 of which the person is not a national or a permanent resident".[77]

Social group (in the context of the refugee status): "A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society".[78] For example, women who face persecution based on gender constitute a social group for the purposes of refugee status.

Sovereignty: The power of a state "to wield authority over all the individuals living in the territory"[79] and to freely dispose of the territory under its jurisdiction.

Torture: "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or

73. Article 25 of the UDHR; Cf. Article 22 of the UDHR, Article 9 of the ICESCR, Article 23 of the Refugee Convention
74. Cf. Artcile 23 of the UDHR; Article 6 of the ICESCR, Article 5 of the ICERD; Article 11 of the CEDAW
75. European Union, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement"), 19 June 1990
76. Preamble, Ibid.
77. United Nations Convention on Transnational Organized Crime and its protocol against the smuggling of migrants (Article 3, Smuggling of Migrants Protocol).
78. UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: 'Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, http://www.unhcr.org/3d58de2da.html, para. 11.
79. Antonio, Cassese, International Law, Oxford University Press, 2001

coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"[80]. Torture is prohibited according to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.

Trafficking in persons: "[R]ecruitment, 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"[81].

Transit area: Area in international airports or remote and insular areas where migrants have to station temporarily until a decision is made on their admission to the territory of the state. Generally, in such areas, detention or restriction of free movement is applied to prevent illegal or irregular entry to the territory; fewer guarantees are granted with regard to the accelerated procedure for the assessment of *non-refoulement* and asylum; there is a lack of publicity; and there are minimum provisions for accommodation in order to avoid 'attracting' migrants.

Treaty Monitoring Body: Committee of independent experts that supervise the implementation of international treaties.[82] Notwithstanding their limited decision-making powers, Treaty bodies have in recent years developed complex forms of cooperation with each other and institutions such as the UN High Commissioner for Human Rights.[83] The main treaty bodies are, for example, the Human Rights Committee (CCPR), which monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols and the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (1966).

United Nations High Commissioner for Refugees (UNHCR): UN body that

80. Article 1, Ibid.
81. Article 3, UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000
82. http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx
83. Alston, Philip, and James Crawford, The future of UN human rights treaty monitoring, Cambridge University Press, 2000.

focuses its efforts on protecting refugees and persons forced to flee their country of origin.

United Nations: International organisation founded in 1945 and composed of 193 Member States. Its main organs are: the General Assembly, the main "deliberative, policymaking and representative organ of the UN"[84]; the Security Council, composed of 5 permanent and 10 non-permanent members that together cooperate in order to promote the maintenance of international peace and security; the Economic and Social Council; the Trusteeship Council; the International Court of Justice, as principal judicial organ of the United Nations; and the Secretariat. The aims of the organisation include the maintenance of international peace and security, the promotion of friendly relations among its members, the promotion of international cooperation and human rights.[85] Moldova is a Member State.

Universal Declaration of Human Rights: Adopted in 1948 by the UN General Assembly, is the first international document to define the rights and freedoms that are to be granted to all human beings, thus establishing a unitary conception of human rights and freedoms. Although it has no international legal force in and of itself, it is considered to represent customary international law.

Universal Periodic Review (UPR): Created in 2006, it consists in a process designed to provide the opportunity for each State to "declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations"[86]. Such activities are conducted under the auspices of the Human Rights Council.

Voluntary return (right to return): Return to the country of origin based on the free will of the returnee. As a corollary of freedom of movement, States are bound to admit their nationals, and cannot compel any other state to keep them through measures such as denationalisation (stripping individuals of their nationality).

84. http://www.un.org/en/sections/about-un/main-organs/index.html
85. See Article 1, United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI
86. http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

CHAPTER I

INTERNATIONAL LAW, HUMAN RIGHTS, AND THE LEGAL FRAMEWORK FOR THE PROTECTION OF THE RIGHTS OF MIGRANTS IN THE REPUBLIC OF MOLDOVA

This chapter introduces the reader to the legal regime governing the rights of migrants in the Republic of Moldova. While subsequent chapters deal with the rights of migrants in concrete and identifiable situations – at the border, in detention, during expulsion or return, and during their everyday lives – the purpose of this chapter is to provide the reader with a detailed, but understandable, overview of the main provisions that are pertinent to regulating the rights of migrants in Moldova. The chapter gathers together the relevant information pertinent to international protection of migrants' rights, and is thus useful in creating a background for the reader, highlighting the multi-layered nature of the existing legal regime. In particular, the section distinguishes between instruments, conventions and monitoring mechanisms established under the United Nations, the Council of Europe, and the European Union, as well as those accessible via the national legislation of Moldova.

In this respect, the chapter begins by explaining so-called **Monist doctrine**, a legal principle that governs Moldovan law, entailing that, in the field of human rights at least, treaties that the state has ratified and other **international legal obligations may impact upon the understanding of domestic law**, resulting in legal rights and obligations being due on the basis of international law, even if the domestic legislator (the Moldovan parliament) has not enacted any legislation to this effect. This section will explain that Monist doctrine means that the analysis of the rights of migrants in the Republic of Moldova cannot be confined to domestic law alone, and that it will also be necessary to have regard to international legal norms, in order to garner a proper understanding of the legal regime concerning the rights of migrants in the country. Thereafter, an overview of the main further provisions of Moldovan domestic law will be provided.

The second section undertakes an examination of the duties of the state towards migrants, acquainting the reader with the idea of the **universality of human rights**. The idea underpinning this principle is that certain rights are applicable to all human beings, inalienable, and must be respected at all times. Further, the principle of **State responsibility** will also be discussed in this section. State responsibility is relevant in the present context because it establishes the principle that the State is responsible for those persons who are within its jurisdiction, whether they are citizens of that State or otherwise. A State may not eschew responsibility for the human rights of those individuals within its jurisdiction – generally understood as on its territory – on the mere basis that they are not nationals of the State in question.

The third section devotes specific attention to the **field of migration and its links with human rights**. In this respect, the situation of migrants – many of whom

may be vulnerable persons – will be discussed in detail. It will be noted that while migration law aims to provide specific protection for migrants, categorising such individuals according to their particular situation and circumstances and endeavouring to ensure that they are afforded certain protection, human rights law goes further, prohibiting certain forms of treatment that may not be explicitly excluded by migration law, and placing migrants – in some respects at least – on a footing of parity with citizens of the State.

The fourth section provides an overview of the **international legal framework that regulates the rights of migrants in the Republic of Moldova**. The different sources of international law, how they interact with one another, and how they impact upon Moldovan domestic law will be discussed, in order to give the reader an impression of the dynamics governing the interaction between different sources of law in this regard.

The fifth section, provides an overview of the **United Nations system, and the main international conventions** (treaties) governing the area of migration and human rights that are applicable globally. In this respect, a sub-section will be devoted to an examination of **customary international law**, as a source of human rights norms, while the unique position of the Universal Declaration of Human Rights will be highlighted.

The penultimate section will introduce the reader to the Council of Europe and its system of protection of human rights. In this respect, the most important source of rights is undoubtedly the Convention for the Protection of Human Rights and Fundamental Freedoms (colloquially known as the **European Convention on Human Rights** – ECHR). Representing the most advanced regional system of human rights protection in the world, the Council of Europe has developed an excellent system of protection via an individual appeals procedure to the European Court of Human Rights, which has become a key arbiter of human rights in Europe.

The final section of this chapter will acquaint the reader with the **European Union** (EU) legal system and its protection of human rights. Although the Republic of Moldova is not a member of the European Union, EU law represents a valuable point of comparison in relation to many of the core topics related to migration and human rights. The EU's provisions on many rights related to migrants may often be cited as an example of good legal practice and good governance, and indeed, in some cases Moldovan legislation mirrors the provisions of EU law or relies upon specific bilateral agreements with the European Union.

A) Why is international law important? Monism and the moldovan legal system

Article 4 of the Moldovan Constitution provides:

Human rights and freedoms

1. *Constitutional provisions on human rights and freedoms shall be interpreted and enforced in accordance with the Universal Declaration of Human Rights, other conventions and treaties to which the Republic of Moldova is a party.*

2. *Wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations.*[87]

The above represents the Moldovan iteration of **Monist doctrine** (Monism). Monist doctrine is one of the two ways in which States regulate the relationship between their domestic laws and international legal obligations (the other being Dualism).

International law, broadly understood, may be classified as creating obligations between States. These obligations may include the obligation for each State to protect the human rights of those persons within its jurisdiction. However, whether these obligations, including the obligation of each State not to violate the human rights of those individuals living in its territory, are enforceable in domestic law, is another matter entirely. Whether this will be the case will depend, to some degree, upon Monism and Dualism.

In a Monist State, international law does not need to be transposed and implemented into national law via domestic legislation. It is automatically incorporated and effects automatically upon national or domestic laws. The act of ratifying an international treaty immediately incorporates the law into national law; and customary international law is also treated as domestic law.

In a Dualist State, by contrast, a strict separation is maintained between domestic and international law. While the State may have ratified international treaties with other States, these treaties will not give rise to any rights in domestic law unless and until such treaties are transposed and implemented into national law via domestic legislation. Customary international law is also without legal force

87. See more at: http://www.presedinte.md/titlul1#sthash.hHR6Ybzo.dpuf

in domestic law unless and until it is directly implemented into the national legal system via legislation.

Article 4 of the Constitution of the Republic of Moldova provides that constitutional provisions on human rights and freedoms are interpreted and applied according to the Universal Declaration of Human Rights and international treaties the Republic of Moldova is party to. It also provides that international rules on human rights are given priority over internal rules. This represents **Moldova's particular version of monism**, restricted to the field of human rights. While there is no general provision in the Moldovan Constitution providing that norms of international law shall be directly applicable in the domestic legal system, Article 4 provides that, **in the specific field of human rights**, when conflicts arise between domestic rules governing human rights and the treaties to which Moldova is a party, the latter shall prevail, whether or not they have been transposed into domestic law via legislation. Moreover, even provisions of the Moldovan Constitution concerning human rights are to be interpreted in accordance with the international treaties on the subject to which Moldova is a party, as well as the Universal Declaration of Human Rights (UDHR). No specific role is accorded to customary international law, although the provisions of the UDHR are generally considered to be reflective of the latter.

It is important to highlight that, by granting international legal rules precedence over Moldovan domestic and constitutional law concerning human rights, Article 4 entails that international law (rather than domestic law) provides the most far-reaching and important protection for human rights in the Republic of Moldova.

It also creates an incentive for domestic legislators (the Moldovan Parliament) to devise domestic laws that are in accordance with the UDHR and international human rights treaties, to ensure that the laws they promulgate are not struck down or overruled for non-compliance with international law by the Moldovan courts at a later date.

Some further relevant norms of Moldovan domestic law pertaining to the human rights of migrants are discussed in brief in the remainder of this section, and are examined in greater detail in subsequent chapters.

Moldovan constitutional law

Beyond the provisions of Article 4, the Republic of Moldova guarantees the rights and freedoms prescribed by the Constitution of the Republic of Moldova **"with the exceptions provided by law"** (Article 19) for citizens, foreigners and stateless persons resident on its territory. On this basis, foreign and stateless citizens are granted the following rights:

1. the right to enter, move and reside in Moldova;
2. the right to residence for work purposes, studies, family reunification, humanitarian activities or religious activities;
3. the right to work and to protection of labour standards;
4. the right to health care;
5. the right to pension benefits, allowances and other types of social insurance;
6. the right to a household;
7. the right to private property; the right to education; and
8. the right to approach the competent law courts or public authorities if their rights, freedoms or vested interests are violated.

The Constitution is based on the principle of equality for all citizens before the law and public authorities, irrespective of their race, nationality, language, religion, gender, opinion, political affiliation, wealth or social origin, ensuring free access to justice and ensuring the right to claim, as well as the right to compensation if the state causes damages by means of criminal pursuit (by judicial or other public authorities).

Legislation on foreigners

Law No. 200 of 16 July 2010 on the regime concerning foreigners in the Republic of Moldova regulates the entry to, stay in and exit from the territory of the Republic of Moldova, including granting and prolonging the right to stay, repatriation and the required documents. It also stipulates coercive measures for non-observance of the laws regarding residence and specific measures for immigration records, **according to obligations assumed by the Republic of Moldova through the international treaties to which it is a party.** Here,

again, the influence of Monist doctrine is visible, with explicit reference to the international legal obligations of the Moldovan State in the domestic legal provisions.

According to the Law, a foreigner is defined as a person not possessing Moldovan citizenship or who is a stateless person. Foreigners illegally staying in the Republic of Moldova enjoy the same rights and freedoms as Moldovan citizens, as guaranteed by the Constitution of the Republic of Moldova and other laws, as well as by international treaties to which the Republic of Moldova is party. However, much like Moldovan citizens, foreigners are also subject to administrative and criminal liability for violating Moldova's laws, and their period of stay in the Republic of Moldova can be curtailed if they are found to have broken the law. They may be expelled if their entry and stay are in violation of the legislation in force or if their presence on the territory prejudices national security, public order, public health or ethics. However, **they can only be extradited on the basis of an international agreement or on the grounds of a court decision.**

B) The duties of the state towards migrants

States have the obligation to promote and protect human rights,[88] which includes migrants' rights. Moreover, since certain human rights principles are recognised as customary international law, and are non-derogable in nature, they constitute a limit upon state sovereignty: the latter stops where human rights start, and states are bound to respect and uphold these rights in all circumstances. This is doubly the case when States have ratified international treaties that protect human rights. Public authorities, as emanations of the state, are obliged to perform their duties taking into account the obligations incumbent upon States vis-à-vis individuals who are within their jurisdiction.

All persons enjoy universal human rights, even if they are outside the jurisdiction of the state of which they are citizens. This principle is embodied in most relevant treaties on human rights.[89] Although standards are set at the international level, 'the State', as a party to international treaties on human rights, is the main entity responsible for ensuring that human rights are observed, including vis-à-vis non-nationals on its territory. As regards women's and children's rights, special international legal instruments providing for protection have been implemented widely, particularly in Europe. However, there has been less progress in terms of

88. Articles 55, 56 UN Charter; Buergenthal, Human Rights, MPEPIL, para. 8; ICJ, Barcelona Traction, paras. 33-34; ICJ, South West Africa Advisory Opinion, para. 131.
89. Examples include the UN Charter, the ICCPR and the ECHR.

the recognition and protection of the rights of migrants specifically. Nonetheless, migrants are protected via general human rights treaties.

Universal human rights are equally applicable to all, irrespective of citizenship and location.

The State is the main entity responsible for ensuring that human rights are observed, including vis-à-vis non-nationals on its territory.

State responsibility includes the obligation to take proactive measures to ensure that human rights are protected. Such measures include punishing those who violate the rights of persons on the state's territory, as well as providing efficient means of redress for persons whose rights are violated.

According to international law, some rights may be limited by the state under certain limited conditions (i.e. if a person is found guilty of an offence, after due process of law, the state may limit that person's freedom of movement through incarceration). Restrictions upon civil and political rights may be imposed only when this is prescribed by law and only for ethical, public order or general welfare reasons.[90] Economic, social and cultural rights may be limited by law, but only when such limits are consistent with the nature of those rights and are necessary to ensure general welfare.[91]

Many human rights norms are non-derogable (for example, the prohibition upon torture, inhuman and degrading treatment), and must thus be upheld and protected in all circumstances.

The Moldovan judicial system and the right to due process

The Moldovan legal system is well designed for the purposes of human rights protection. Monist doctrine (discussed above) ensures that, even if the parliament fails to enact laws that adequately protect the human rights of migrants, such protection will nonetheless flow directly from the international treaties to which Moldova is a party, as well as from the UDHR, which reflects many of the core customary international law provisions concerning human rights. However, any legal system requires adjudication and enforcement mechanisms in order to be effective for the purpose of ensuring that its laws are respected. In this regard, it is germane to have regard to the judicial system of the Republic

90. Cf. Article 12(3) ICCPR.
91. Cf. e.g. Article 8(1)(a) ICESCR.

of Moldova, in order to examine how individuals – and migrants in particular – may make use of the courts in order to uphold and protect their rights.

Law No. 190 on petitions of 19 July 1994 guarantees foreign citizens and stateless persons the right to petition competent bodies if their rights or legitimate interests are violated in the Republic of Moldova.

The judicial system of the Republic of Moldova,[92] as well as its jurisdiction, its procedures, and the organisation and functioning of the Supreme Court, are regulated by the following laws:

1. Law No. 514-XIII of 6 July 1995 concerning judicial organisation (republished in 2012);
2. Law No. 544-XIII of 20 July 1995 on the status of the judge (with subsequent amendments);
3. Law No. 789-XIII of 26 March 1996 regarding the Supreme Court of Justice (republished in 2013); and
4. Law No. 947-XIII of 19 July 1996 regarding the Superior Council of Magistracy (republished in 2013).[93]

The Moldovan judicial system includes district courts, courts of appeal, the Supreme Court and the Constitutional Court. The latter is the ultimate authority on matters of constitutional interpretation. The Law on the status of the judge states that 'judges of the courts shall be independent, impartial and immovable and shall only obey the law' and that judges shall make decisions independently and impartially and shall act without any direct or indirect restrictions, influence, pressure, threats or interventions from any authority, including other judicial authorities. **This is in accordance with Article 13 ECHR, providing for the right to an effective remedy.**

The examination and decision process in the courts are carried out on the basis of the Constitution's principles: equality before the law and public authorities of all citizens of the Republic of Moldova (Article 16); free access to justice (Article 20); the presumption of innocence (Article 21); the right of defence (Article 26); fair administration of justice (Article 114); independence, impartiality and security of tenure of judges sitting in the courts of law (Article 116);

92. www.justice.gov.md.
93. The reorganisation of the judiciary was carried out based on Law No. 853-XIII of 29 May 1996 (with subsequent amendments) and in accordance with Article 114 of the Constitution of the Republic of Moldova: 'Justice shall be administered in the name of the law by courts of law only'.

the public character of legal proceedings (Article 117); the use of appropriate language in hearings and right to use an interpreter (Article 118); the right to appeal (Article 119); and the compulsory character of sentences and of other final legal rulings (Article 120). Furthermore, any person whose rights have been infringed in any way by a public authority is entitled to obtain recognition of those rights, the cancellation of the original ruling, and the payment of damages (Article 53 of the Constitution). **These constitutional provisions again reflect the international obligations of the Republic of Moldova with respect to due process per the UDHR and ECHR.**

Foreigners and stateless persons have the right to effective protection by competent courts and other public authorities against any acts that violate their legitimate rights, freedoms and interests. They have the right to submit requests to the ombudsman when their legitimate rights and interests are violated in Moldova. Foreigners and stateless persons enjoy the same procedural rights in trials as Moldovan citizens.

C) Migration and human rights

Human rights are characterised by their universality, as they are equally applicable to all human beings irrespective of their location, gender, race or any other distinct feature.[94] The universal character of human rights is reflected in the fact that customary law (as well as the UDHR) requires all states to adhere to these norms, and to transpose them into their domestic legal systems (though for Moldova, this effectively happens even without parliamentary intervention, by virtue of Article 4 of the Constitution). No derogations from human rights norms are permitted, except in particular, strictly defined circumstances.

Human rights are indivisible, as they are interdependent, and the violation of one right would affect the others. Thus, restrictions on civil rights also often violate or limit related economic, social and cultural rights. These characteristics, and in particular the **principle of non-discrimination**, are of greater importance when specific provisions concerning certain defined groups, such as women, children or migrants, are brought into the discussion. The issue of the rights of migrants is currently in receipt of a great deal of attention, due to pronounced concern over frequent violations of migrants' human rights and the human rights of those attempting to traverse national borders.[95]

94. Nollkaemper, Universality, Max Planck Encyclopedia of Public International Law (MPEPIL), para. 5.
95. The ongoing situation in the Mediterranean Sea may be used by way of an example in this regard.

Migration certainly brings opportunities, but also challenges, including vulnerability and discrimination. If migrants lack access to human rights, their ability to benefit from migration and prosper in their new environment is compromised, as is their potential contribution to the development of the societies in which they live or with which they are connected, as well as their capacity to effectively integrate. Protecting human rights is important, in order to promote the social inclusion and integration of migrants, thus enabling them to lead economically productive as well as culturally and socially enriching lives.[96]

Although there is a dearth of international human rights treaties specifically addressing the question of the rights of migrants, it is nonetheless the case that a number of rights protected by global and regional human rights treaties are of particular importance vis-à-vis migrants.[97] The legal and normative framework of human rights standards affecting migrants cannot be found in a single treaty or mechanism, but is instead diffused through a rich set of instruments and related principles and standards, which are explained in detail in subsequent sections.

Simply put, all human beings are entitled to all human rights. Beyond this, certain legal protection regimes have been created for groups of non-nationals, including refugees, trafficked persons and migrant workers, to address particular situations and specific vulnerabilities. As the High-Level Panel of Eminent Persons on the post-2015 development agenda has pointed out; “the United Nations has a central normative and convening role” in addressing challenges related to global migration.[98] However, within Europe – including Moldova – as shall be discussed anon, the Council of Europe system would seem to provide better, or at least more immediate and effective, protection.

96. See UN OHCR, Migration and human rights, Improving Human Rights Based Governance of International Migration, 2015, 10

97. A more detailed description of the legal and normative framework of international migration can be found in Global Migration Group, International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights, October 2008, ISBN: 9780897149006.

98. The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, A new global partnership: eradicate poverty and transform economies through sustainable development, 2013, 11.

D) The international legal framework

As regards migrants' rights, there is no single instrument at the international level regulating the entire migration process or the protection of rights for all persons involved therein. On the contrary, rules regulating the rights of migrants can be found in a variety of different treaties and international agreements, as well as in customary international law.

In this respect, **the situation in Moldova must be conceived of as a multi-layered, multifaceted one**. Bearing in mind Moldova's particular conception of Monism as provided for in Article 4 of the Constitution, it is clear that while not all international treaties to which Moldova is a party are directly applicable in Moldovan domestic law – and therefore enforceable via the courts – treaties that contain a human rights component are directly applicable, and will trump any contrary domestic legal provisions. This entails that any public officials who wish to garner a thorough understanding of the rights of migrants in the Republic of Moldova will need to devote as much – if not more – attention to international law than to domestic legal provisions.

The picture in this regard is complicated somewhat by the fact that **different layers of protection are envisaged at international level**. International law cannot be conceived of as one homogeneous whole, but rather as a series of overlapping obligations based upon a patchwork – rather than a framework – of international treaties, many of which contain similar provisions. Also relevant in the Moldovan context is the unique position the Constitution accords to the UDHR, which, although not binding in and of itself in international law, is generally reflective of customary international law. Moreover, the Constitution affords it effective parity with international treaties, in providing, at Article 4, that the obligations incumbent upon the State by virtue of the UDHR shall trump those that arise on the basis of domestic law and even the Constitution itself in case of conflict.

One weakness that the global system – largely regulated by the UN – displays, however, is that the rights contained in the various treaties and the UDHR are not generally justiciable at international level. While it has been noted above that the Moldovan judicial system, providing for access to justice for migrants, would seem to involve sufficient guarantees for migrants to assert their rights via a court, the question arises as to what may happen if the domestic courts do not provide sufficient protection vis-à-vis a specific right. While some monitoring bodies at UN level do exist, these are not courts in the true sense of the word.

This weakness is rectified in Europe by the presence of the European Court of Human Rights (ECtHR), which examines cases involving alleged violations of the European Convention on Human Rights (ECHR), and which allows individual petition from persons in the Member States of the Council of Europe, including Moldova, when they have exhausted domestic remedies via the national courts, and have still not received the justice they seek. The ECHR contains few provisions expressly mentioning foreigners or limiting certain rights to nationals or lawful residents (for example, Articles 2, 3 and 4 of Protocol 4 to the ECHR and Article 1 of Protocol 7). However, issues pertaining to migration have generated a lot of the ECtHR's work, particularly in asylum cases. Article 13 ECHR requires states to provide remedies at domestic level for complaints made under the Convention. The principle of subsidiarity places the primary responsibility on states to ensure their compliance with obligations under the ECHR, leaving recourse to the ECtHR as a last resort. **However, the presence of this mechanism ensures a layer of procedural protection beyond the Moldovan courts system, and represents the most advanced regional system of human rights protection in the world**.

Finally, Moldova borders the European Union, which has taken its own initiatives to regulate and improve the protection of human rights in general, and the rights of migrants in particular, within the jurisdiction of the EU Member States. An overview of the measures taken in this regard shall be provided at the end of this chapter.

E) The United Nations system and international conventions

In 1945, after the Second World War, the Charter of the United Nations (UN Charter) was signed. As stated in Article 1 of the Charter, one of the mandates of the organisation is to achieve international cooperation by 'promoting and encouraging respect for human rights and for fundamental freedoms.'

The main bodies that actively participate in the efforts of the United Nations (UN) to promote and protect human rights and fundamental freedoms are:

1. The **General Assembly**, where all UN Member States are represented (Article 9 UN Charter) as equal entities (Article 18 UN Charter) is one of the most important UN organs. The competence of the General Assembly on human rights stems from its general mandate and the provisions of Articles 13 and 15 of the Charter.

2. The **International Court of Justice (ICJ)**, according to Article 92 UN Charter, is the principal judicial organ of the UN system. It is comprised of 15 judges, elected for 9 years by the General Assembly and the Security Council. While its jurisdiction is not compulsory, the Court has in the past involved itself in a number of cases that touched upon important human rights issues.[99]

3. The **Human Rights Council (HRC)**, which replaced the Commission on Human Rights on 15 June 2006, is the central body within the UN system dealing with human rights issues.

4. The **Office of the High Commissioner for Human Rights (OHCHR)** provides expertise and advice to the different human rights monitoring bodies in the UN system. The OHCHR's main task is to promote and protect human rights by cooperating with all relevant actors in identifying and responding to current challenges in the field of human rights.[100]

5. The **United Nations High Commissioner for Refugees (UNHCR)** focuses its efforts on protecting refugees and persons forced to flee their country of origin.

Since it was founded, the UN has played an essential role in the establishment of international standards by drafting treaties and other legal instruments that have

99. See, for example, Corfu Channel Case (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4, 22; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States [1986] ICJ Rep 1
100. GA Res. 48/141, UN Doc. A/RES/48/141, para. 3.

helped to bring about the universal recognition of human rights.

This section will describe the different conventions adopted by the UN General Assembly to protect and promote human rights to which the Republic of Moldova is party and which are relevant to the rights of migrants, including:

1. the Convention relating to the Status of Refugees;
2. the International Covenant on Civil and Political Rights (ICCPR);
3. the International Covenant on Economic, Social and Cultural Rights (IC-ESCR); and
4. several further conventions, with specific provisions relating to migrants' rights.

A number of monitoring mechanisms have been established to control the correct implementation of these human rights treaties. The **Treaty Monitoring Bodies** (international committees of independent experts) will also be discussed further below. Furthermore, international monitoring mechanisms established independently of the various conventions will also be examined. [101] Finally, reference will be made to the **unique position of the UDHR**, a non-binding declaration in international law, which creates binding rights in Moldovan law, and its connection to customary international law as a further normative category.

Convention relating to the Status of Refugees

The Convention relating to the Status of Refugees (Refugee Convention) was adopted in 1951, in the wake of the post-World War II international refugee crises. It was amended by a 1967 Protocol, which removed its geographic and temporal limits. The Refugee Convention and the 1967 Protocol are the **key documents in defining who is a 'refugee', their rights, and the legal obligations of states regarding refugees**.

When acceding to the Convention and/or its Protocol, a state may be exempted from certain provisions by making reservations. However, exemptions may not be granted concerning the provisions of: Article 1 (definition of the term 'refugee'), Article 3 (non-discrimination with respect to race, religion or country of origin), Article 4 (freedom of religion), Article 16 (1) (access to courts), Article 33 (*non-refoulement*) or Articles 36-46 (information on national legislation and final

101. Specific information regarding Moldova's reporting cycles and all related documentation are available online. See http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx.

clauses).

> **The Convention underlines a number of fundamental principles, most notably non-discrimination, non-penalisation and *non-refoulement.***
>
> **Moreover, the Convention is a rights-based instrument, to be applied without discrimination as to race, religion, country of origin, sex, age, disability, or sexuality**.

Indeed, refugees should receive the same treatment as nationals with respect to work-related rights and rights related to freedom of movement. In particular, all refugees should be provided with identity papers and travel documents that allow them to leave the country (Articles 26, 27 and 28).

The Republic of Moldova acceded to the 1951 Refugee Convention and its Protocol though Law No. 677/XV of 23 November 2001, with a number of reservations.[102]

On 3 December 1949, the UN General Assembly decided to establish as of 1 January 1951 the **UNHCR**, the body entrusted with the protection of refugees.

---

102. In acceding to the Convention, the Republic of Moldova made the following declarations and reservations:

1. According to paragraph 1, article 40 of the Convention, the Republic of Moldova declares that, until the full restoration of the territorial integrity of the Republic of Moldova, the provisions of this Convention are applicable only in the territory where the jurisdiction of the Republic of Moldova is exercised.
2. The Republic of Moldova shall apply the provisions of this convention with no discrimination generally not only as to race, religion or country of origin as stipulated in Article 3 of the Convention.
3. For the purposes of this Convention by the notion "residence" shall be understood the permanent and lawful domicile.
4. According to paragraph 1 of Article 42 of the Convention, the Republic of Moldova reserves the right that the provisions of the Convention, according to which refugees shall be accorded treatment not less favorable than hat accorded aliens generally, are not interpreted as an obligation to offer refugees a regime similar to that accorded to the citizens of the states with which the Republic of Moldova has signed regional customs, economic, political and social security treaties.
5. According to paragraph 1 of Article 42 of the Convention, the Republic of Moldova reserves the right to consider the provisions of Article 13 as recommendations and not as obligations.
6. According to paragraph 1 of Article 42 of the Convention, the Republic of Moldova reserves the right to consider the provisions of Article 17 (2) as recommendations and not as obligations.
7. According to paragraph 1 of Article 42 of the Convention, the Republic of Moldova interprets the provisions of Article 21 of the Convention as not obliged to accord housing to refugees.
8. The Government of the Republic of Moldova reserves the right to apply the provisions of Article 24 so that they do not infringe upon the constitutional and domestic legislation provisions regarding the right to labor and social protection.
9. According to paragraph 1 of Article 42 of the Convention, in implementing Article 26 of this Convention, the Republic of Moldova reserves the right to establish the place of residence for certain refugees or groups of refugees in the interest of the state and society.
10. The Republic of Moldova shall apply the provisions of Article 31 of the Convention as of the date of the entry into force of the Law on Refugee Status.

See https://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en

The body was formally established through the Statute of the Office of the United Nations High Commissioner for Refugees.[103]

Definition of Refugee and Asylum

Through the adoption of the 1951 Refugee Convention, the concept of international protection evolved from one based upon diplomatic and consular protection to a broader notion, concerned with the protection of human rights. Per Article 1(A)(2) of the Convention, the term **'refugee'** applies to any person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

The phrase **'and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country'** reinforces the fact that a refugee is always someone who does not enjoy the protection of his or her state of origin. The expression **'well-founded fear of being persecuted'** is considered the key component of the definition, and represents its objective element. There may be various reasons for a person to experience fear and decide to leave his or her country (poverty, famine, natural disasters, etc.), but only a 'well-founded fear of being persecuted' for the reasons mentioned in the definition enables a person to be recognised as a refugee. Economic reasons and poverty do not qualify.

> In the case R v. Secretary of State for the Home Department,[104] the UK Court of Appeal stated that the requirement for an applicant for refugee status to have a 'well-founded' fear of persecution if they returned to their own country meant that it had to be demonstrated that there was a reasonable degree of likelihood that they would be persecuted.

An applicant for refugee status must demonstrate a well-founded fear of being persecuted for at least one of the grounds specified in the definition: 'race, religion, nationality, membership of a particular social group or political opinion'.

103. Annex to Resolution 428 (V), adopted by the UN General Assembly on 14 December 1950.
104. Queen on the Application of Ruslanas Bagdanavicius, Renata Bagdanaviciene v. Secretary of State for the Home Department, [2003] EWCA Civ 1605, United Kingdom: Court of Appeal (England and Wales), 11 November 2003, available at: http://www.refworld.org/docid/416299c24.html

1. The term **'race'** can be broadly understood as including not only a narrow conception of race, but also colour, descent, or national or ethnic origin.[105]

2. The term **'religion'** is considered to have three possible features: a belief (values about the divine or spiritual destiny of mankind, including atheism), an identity (as a member of a community that shares beliefs, rituals and traditions), or a way of life (where religion is manifested in certain activities, such as the wearing of specific clothing or respecting certain practices).[106]

3. The term **'nationality'** should not be understood only as 'citizenship'. It also refers to membership of an ethnic or linguistic group, and includes national origin and statelessness.

4. The term **'social group'** must be considered as encompassing an evolving concept. To identify a social group, the UNHCR adopted the following standard: 'a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society'.[107] Women who face persecution based on gender constitute a social group for the purposes of refugee status. Lesbian, gay, bisexual and transgender individuals facing discrimination based on their sexual orientation or gender identity are also part of a social group. The size of the group is not a relevant factor.

5. The term **'political opinion'** should be understood in the context of an individual holding an opinion that was either expressed or came to the attention of the authorities, or might reasonably become known by the authorities.[108] There may also be instances where a person is persecuted because authorities suspect that they have a certain political opinion.

105. Van Boven, Racial and Religious Discrimination; MPEPIL, para. 13.
106. Cf. HRC General Comment No. 22, UN Doc. U.N. Doc. HRI/GEN/1/Rev.1 at 35, para. 1.
107. UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, http://www.unhcr.org/3d58de2da.html, para. 11.
108. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1, http://www1.umn.edu/humanrts/instree/refugeehandbook.html, para. 82.
109. A and Another v Minister for Immigration and Ethnic Affairs and Another, [1997], Australia: High Court, 24 February 1997, available at: http://www.refworld.org/docid/3ae6b7180.html

In A v. Minister for Immigration & Ethnic Affairs,[109] the High Court of Australia rejected the asylum claim of Chinese nationals who claimed to have a well-founded fear of persecution because they wanted to have a second child despite China's one-child policy. The asylum applicants claimed that they were afraid of being subjected to forced sterilisation and argued that they were members of a particular social group that consisted of 'those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised'. The Court rejected this argument as circular because it was not independent of the persecution feared.

There are situations where a person was not a refugee at the time they left the country, but became a refugee later due to events that occurred in the country during their absence (e.g. in the cases of diplomats, students or migrant workers). Such persons are referred to as **refugees 'sur place'**. The general rule in granting refugee status is that the applicant must be outside the country of their nationality, as international protection cannot be applied as long as a person is within the territorial jurisdiction of their country of origin. Moreover, some refugees are also stateless persons. **Stateless persons**[110] face a difficult situation since they are not considered a national by any state. They could be outside their country of origin and unable to avail themselves of the protection of that country, while simultaneously being unable to acquire the nationality of the state of residence.

Clauses on the **termination of refugee status** define the conditions under which a refugee may lose this status. Generally, a refugee can lose his or her refugee status if it is no longer justified. Termination of the refugee status can be initiated by the refugee if the individual in question acquires a new status (voluntarily receiving the protection of the country of origin, voluntarily regaining citizenship, acquiring a new citizenship, or voluntarily re-establishing residence in the country where they previously feared persecution) or if the circumstances which prompted the request for protection no longer exist.

Asylum is a legal mechanism through which the state offers protection to a foreigner by granting refugee status, humanitarian protection, temporary protection or political asylum.[111] The grant of asylum is the right of a State to let an alien enter and remain in its territory for a number of specific reasons defined by law (usually connected to political or religious justifications). By virtue of its

110. The key legal instruments in the protection of stateless people are the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.
111. See Article 3 of the Law on Asylum in the Republic of Moldova

sovereignty, establishing the basis for granting asylum is at the discretion of the receiving state. Neither asylum nor refugee status should generally be given to persons who have committed crimes against peace and humanity, war crimes or other acts contrary to the principles of the UN.

According to Article 14 UDHR, 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' The UN elaborated on this in a special statement on asylum[112] adopted by the UN General Assembly in 1967. Granting asylum is an act deriving from a state's sovereignty and thus cannot constitute the basis for legal objections from another state. It is also a peaceful and humanitarian act, and should not be considered hostile to another state, especially the state of origin of the individual claiming asylum.

Moldova has largely transposed the international legal provisions listed above into its domestic legal system, which also apply by virtue of Moldova's ratification of the 1951 Refugee Convention and its 1967 Protocol.

Article 3 of Law No. 270-XVI of 18 December 2008 on asylum in the Republic of Moldova provides that asylum is the legal institution through which the state offers protection to a foreigner by granting them refugee status, humanitarian protection, temporary protection or political asylum, or to an asylum seeker who submitted an application for asylum on which no final decision has been taken yet According to the provisions of the Law on asylum in the Republic of Moldova, which are similar to those of the 1951 Refugee Convention, refugee status is accorded upon request to a foreigner who, having a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of their nationality and is unable or, owing to such fear, is unwilling to avail him or herself of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence, as a result of such events, is unable or, owing to such fear, unwilling to return to it.

The provisions of national legislation apply to all asylum seekers and beneficiaries of a form of protection without any discrimination, irrespective of race, citizenship, ethnicity, political affiliation, social class, convictions, gender, sexual orientation or age. Moreover, asylum seekers enjoy the following rights:

1. not to be returned or expelled until a decision on their application for asylum has been taken;

112. Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

2. to stay in Moldova until the end of the 15-day term from the moment the decision on the application rejection was declared irrevocable;
3. to be informed in writing on their rights and duties during the asylum procedure; to benefit from legal assistance in any phase of the asylum procedure, according to law;
4. to be issued a temporary identity document free of charge; to work;
5. to be housed in an accommodation centre during the procedure;
6. to receive primary and emergency medical assistance; and
7. to have access to universal obligatory education (minor applicants).

In parallel with the abovementioned rights, the asylum seeker is obliged to present all relevant elements of the asylum application; to tell the truth and co-operate with the eligibility adviser; to submit the required identity documents, including those for travel; to answer the questions of officers with competence in the field of asylum; to leave the territory of the Republic of Moldova by the end of the 15-day term from the moment the decision on the application rejection was declared irrevocable; and to observe the legislation in force.

Refugee status grants the beneficiaries all rights provided by the legislation concerning foreigners and stateless persons, as well as the following special rights:

1. the right to be informed about their rights and obligations;
2. the right to remain on the territory of the Republic of Moldova and obtain the respective documents for confirming their identity and allowing them to cross the border;
3. the right to choose a place of residence and move freely subject to the conditions set out in the legislation concerning foreigners; the right to be employed by legal or natural persons, exercise freely professions, and carry out entrepreneurial activities, pursuant to the provisions of the legislation in force;
4. the right to receive wages and benefit from the other material rights resulting from the activities performed, as well as the right to social insurance;
5. the right to be enrolled in compulsory general education;

6. in case of a family with children, as well as that of an unaccompanied minor, the right to benefit from the same types of social assistance provided by law to children of citizens of the Republic of Moldova;
7. the right to benefit from the same treatment offered to citizens of the Republic of Moldova with regard to freedom of practicing their religion and the right to provide their children with religious education;
8. the right to enjoy the same rights regarding the system of compulsory medical insurance as citizens of the Republic of Moldova;
9. the right of protection of personal data and any other details in connection with their case;
10. the right to have unhindered access to courts and administrative assistance; the right to not be returned or expelled;
11. the right to be placed in an accommodation centre for a certain period of time if determined to be socially vulnerable; and
12. upon request, the right to participate in programmes of social integration.

In Moldova, a beneficiary of refugee status also disposes of the right to financial aid, and can receive it for a period of six months. This assistance is subject to the following conditions:

1. submission of an application;
2. signing of an agreement that commits the beneficiary to reimburse the amounts received; and
3. availability of state funds.

Every refugee shall be issued an identity card for a period of five years. Refugees may receive, upon request, travel documents allowing them to travel outside Moldovan territory, unless this poses a threat to national security or public order.

The person recognised as a refugee or to whom humanitarian protection was granted may be expelled or returned from the territory of the Republic of Moldova if:

a. the person is a danger to state security;
b. the person is convicted for a serious offence as per the criminal code of the Republic of Moldova, or

c. a definitive legal decision was issued and the person represents a risk to public order.

Parliament Decision No. 1386 on Approving the Migration Policy Concept of the Republic of Moldova of 31 October 2002 aims at efficiently regulating the migratory process and border security; building a database on all migrant categories; ensuring foreign and stateless persons' records in the Republic of Moldova; facilitating the procedure of registration and recording of registrations; forecasting migratory flows; and fighting illegal migration and trafficking in human beings. This normative act presents the objectives, principles and guidelines to regulate and develop the migration process in the Republic of Moldova. The document lists the public authorities with competences in migration management, as well as their tasks and the expected results from the application of the policies on migration.

The competent authority for asylum issues is the Refugee Directorate of the Bureau for Migration and Asylum under the direction of Ministry of Internal Affairs of Moldova. The ministry is responsible for asylum seekers and refugees, as well as persons granted humanitarian and temporary protection. In addition, it oversees the application of the provisions of the law. The ministry is also responsible for the accommodation centres.[113]

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR grants *'all members of the human family'*[114] the civil and political freedoms listed in the UDHR, except the right to property and the right to asylum, the latter being covered by the Refugee Convention. It also confers additional rights, such as detainees' rights (Article 10) and minority rights (Article 27). Particular attention must be paid to the provisions of Articles 2 and 3, which require states to ensure and observe the rights covered in the Covenant without discrimination.

The first Protocol of this Covenant entered into force on 23 March 1976 and grants individuals the right to submit a written communication to the **Human Rights Committee** (CCPR) for consideration.

113. The National Strategy on Migration and Asylum (2011–2020) (http://www.registru.md/img/law/legi/HG_655_md.pdf) was adopted on 8 September 2011. This is an important policy tool to manage migration flows. The Strategy identifies the objectives and defines the principles that will ensure the full and consistent implementation of policies. It also assigned the Government Commission for Coordination of Certain Activities Relating to the Migration Process the role of coordinating the activities related to the migration process.

114. Preamble of the International Covenant on Civil and Political Rights.

The most important civil and political rights are:

1. **the right to life;**
2. **the right to personal freedom and security;**
3. **the right to a non-arbitrary arrest, confinement or exile; and**
4. **the right to freedom of movement.**

The Covenant prohibits discrimination between citizens and non-citizens with a few exceptions (rights explicitly guaranteed to citizens – Article 25).

The Republic of Moldova ratified the ICCPR via Parliament Decision No. 217-XII on 28 July 1990. Through Law No. 260 of 6 December 2007, Moldova ratified the Optional Protocol to the International Covenant on Civil and Political Rights. The Protocol entered into force on 23 April 2008. Moldova has not made any reservations concerning the ICCPR or its protocol.

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

The ICESCR was adopted in 1966. It differs from the ICCPR in that it emphasises the **principle of progressive achievement with regard to economic, social and cultural rights**, rather than stipulating specific prohibitions and prescriptions. This is reflected in Article 2, which provides that states parties to the ICESCR must take steps to progressively achieve the full realisation of the rights recognised in the Covenant according to their constitutional procedures and the Covenant's provisions.

Through its 2008 Optional Protocol, the Covenant also allows individuals claiming to be victims of a rights violation to inform the **Committee on Economic, Social and Cultural Rights** (CESCR) of the violation by means of an individual communication.

The most important economic, social and cultural rights are:

1. **the right to work;**
2. **the right to fair and favourable conditions for work;**
3. **the right to an adequate standard of living;**
4. **the right to health; and**
5. **the right to education.**

The ICESCR prohibits any discrimination based on national origin in the exercise of economic, social and cultural rights.

The Republic of Moldova ratified the ICESCR via Parliament Decision No. 217-XII on 28 July 1990. Moldova has not yet ratified the Optional Protocol; therefore, the right to file individual complaints to the CESCR is currently inapplicable.

International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the UN General Assembly in 1965. After formulating the definition of racial discrimination, the Convention lists the obligations of the states parties. It also reiterates the human rights – civil, political, economic, social and cultural – listed in the UDHR, which must be guaranteed without any discrimination on grounds of race. Per the Convention, '*the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*'[115]

Article 1 of the Convention permits distinctions between citizens and non-citizens, on the condition that these distinctions do not lead to discrimination against a certain group and that these distinctions do not affect the equality in rights guaranteed to all human beings by international human rights instruments.

115. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Article 14 of the Convention foresees the possibility to submit individual complaints to the **Committee on the Elimination of Racial Discrimination** (CERD) for the violation of the rights recognised by the Convention.

The Republic of Moldova acceded to the International Convention on the Elimination of All Forms of Racial Discrimination by Decision of the Parliament No. 707 on 10 September 1991. On 5 March 2013, the Moldovan government notified its ratification of Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[116]

With regard to domestic transposition of this convention, Law No. 121 on ensuring equality of 25 May 2012 aims at preventing and fighting discrimination, as well as ensuring equal treatment for all persons in the Republic of Moldova, in political, economic, social and cultural spheres, irrespective of their race, colour, nationality, ethnic origin, language, religion, convictions, gender, age, disability, opinion, political affiliation or any other similar criterion. The law defines three forms of discrimination: **discrimination** (any distinction, exclusion, restriction or preference in the rights and freedoms of a person or group of persons, as well as discriminatory behaviour); **direct discrimination** (treating a person, based on any prohibitive criterion, in a less favourable manner compared to another person in a similar situation); and **indirect discrimination** (any provision, action, criterion or practice apparently neutral but having the effect of disadvantaging a person against another person, apart from when that provision, action, criterion or practice is impartially justified by means of a legitimate aim and if the means of achieving that aim are proportional, adequate and necessary). Special provisions are included as regards the prohibition of discrimination in work, in access to public services and goods, and in education.

Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979 and entered into force on 3 September 1981. After providing a definition of '*discrimination against women*'[117], the first Articles oblige States

116. This will allow the UN Committee on the Elimination of Racial Discrimination to review individual complaints and petitions, provided that the individuals filing the complaints have exhausted all internal remedies and that the complaints or petitions are not under review by any other international body.
117. "Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of

Parties to adopt legal measures to prohibit any discrimination against women and to ensure the legal protection of women's rights. The Convention also explicitly calls for states to:

1. combat all forms of trafficking in women and sexual exploitation of women;
2. ensure that women and men can participate equally in public and political life;
3. ensure equality in regard to citizenship and education;
4. ensure women's right to work;
5. protect women's health rights, as well as other economic and social rights; and
6. guarantee equality before the law in marriage and in family relations.

The Convention also has an Optional Protocol, adopted in 1999, that enables the **Committee on the Elimination of Discrimination against Women** (CEDAW) to accept individual petitions and carry out investigations on violations of women's rights.

The Republic of Moldova ratified the Convention via Decision No. 87-XII from 28 April 1994. Through Law No. 318-XVI of 15 December 2005, Moldova acceded to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

The first case in CEDAW involving the Moldovan government was R.L. v. Moldova (registered on 14 November 2012). The plaintiff, R.L., a victim of domestic violence, alleged that the state was complicit in her mistreatment and gender discrimination, which prevented her from benefiting from the protection of the law. According to R.L., she was regularly beaten by her husband. He was aggressive both to the plaintiff and their minor children. She complained repeatedly to the police. The complaints filed with the police did not result in any response in favour of the victim; on the contrary, the police drew up administrative minutes and imposed fines on the plaintiff. Moreover, the police, who were angry with R.L. because she often lodged complaints, entered her into police records as a familiar troublemaker.

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" (Article 1).

> All administrative and police responses ignored the real situation, namely the instances of domestic violence that R.L. suffered. In the end, the plaintiff had to leave her house. The numerous complaints filed with the police and the prosecution did not offer R.L. the necessary protection, while the protection order issued by a domestic court, according to which the aggressor was forced to leave the shared residence, was never enforced.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The CAT was adopted in 1984. Article 3 provides that no state may expel, return ('refouler') or extradite a person to another state if there are substantial grounds for believing that they would be in danger of being subjected to torture.[118]

The prohibition upon torture is absolute, and the Convention obliges states parties to criminalise and prevent torture. In order for this proscription to be effective, Articles 4 and 5 oblige states to ensure that torture is a punishable offense in cases of their nationals committing acts abroad as well as cases of foreigners perpetrating torturous acts on the state's territory.

Individuals who claim to be victims of a violation by a state party of the provisions of the Convention can submit a complaint to the **Committee against Torture** (Article 22). The Optional Protocol to the Convention was adopted in 2002, and entered into force in June 2006, establishing the **Subcommittee on Prevention of Torture** (SPT) to advise and assist states parties to the Convention in developing national prevention mechanisms.

The Convention applies the principle of '*non-refoulement*' when there are serious reasons to believe that a person is at risk of being tortured or submitted to other cruel, inhuman or degrading treatment or punishment in another state.

Through Parliament Decision No. 473 of 31 May 1995, Moldova ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moldova ratified the Optional Protocol to the Convention against Torture on 30 March 2006.

118. For further detail in this regard, please see Chapters 2.1 and 4.1, infra.

However, the **Moldovan Criminal Code provisions are only partially reflective of the demands of Article 4 CAT**. This has resulted in a number of inconsistencies, i.e. inadequate penalties applicable to acts of torture, the possibility to conditionally suspend prosecution, and the possibility to suspend the sentence of the offender.

Thus far, the Committee against Torture has issued two Final Observations for Moldova, one on 27 May 2003 and one on 19 November 2009 (CAT/C/MDA/CO/2).

Convention on the Rights of the Child (CRC)

The CRC was adopted on 20 November 1989 and defines a child as any person under 18 years of age.[119] According to the Convention's provisions, the state is obliged to ensure the necessary conditions for the child's development, to respect the child's rights and to ensure the child's protection. The rights detailed in this Convention must be granted to every child, without discrimination.

The CRC establishes that all children subject to the jurisdiction of a State Party to the Convention shall be entitled to a name and citizenship, as the state has the obligation to guarantee these rights, especially for stateless children. Furthermore, the state shall ensure to the child the protection and care necessary for their well-being.

The Convention has two optional protocols. The Protocol on Trade in Children provides a legal framework for the prevention and punishment of trade in children, child prostitution and infantile pornography. The Optional Protocol on Involving Children in Armed Conflict obliges states to take all necessary measures to prevent the participation of persons under 18 years of age in hostilities.

The complaint mechanism to the **Committee on the Rights of the Child** has not yet entered into force.

The Republic of Moldova acceded to the Convention on the Rights of the Child by Decision of the Parliament No. 408 from 12 December 1990. Moldova has not made any declarations regarding the Convention.[120]

119. Article 1 CRC.

120. In 2008 and 2009, two groups advocating for the rights of Moldovan children issued reports on the observance of children's rights. (1) Life through the children's eyes. Children's report on how the Convention on the Rights of the Child is observed in Moldova, 2008. Available at: http://www.childrights.md/files/publications/ochii13jun_mictip1.pdf (2) Truth told by children. Children's report on how the Convention on the Rights of the Child is observed in Moldova, 2009. Available at: http://www.childrights.md/ro/publications/Raportul_Copiilor_2009_Ro.pdf

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Moldova has not ratified this Convention. As such, as is the case with European Union law, it is examined within this volume purely for comparative purposes. However, it is relevant to note that much of the content of this convention is in any case reflective of customary international law, with which Moldova is obliged to comply.

> The Convention has thus far been ratified by a small number of states – mainly states from which migrants originate (states of origin). The Convention highlights the applicability of other international conventions to migrants.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted in December 1990. The Convention promotes the rights and protection of migrant workers and members of their family, including those in an irregular situation, throughout the entire migration process: the preparation phase, the departure and transit stage, the period of stay and employment in the destination country, and the return to the country of origin. One of the Convention's features is its 'indivisibility', i.e. the states parties to the Convention are obliged to apply the provisions to all migrant worker categories without exception (Article 88).

When defining migrant workers' civil and political rights, the Convention reiterates those established by the ICCPR, but also takes into account the particular situation of migrant workers (e.g. specific provisions on the breaking of migration law, the destruction of identity documents, and the prohibition of collective expulsion). The Convention broadly defines the notion of family by including spouses as well as persons in a relationship with migrant workers, and those who, according to the applicable legislation, have a relationship similar to marriage. Children who are supported and other dependents are also recognised as family members by the legislation in force.

Convention on the Rights of Persons with Disabilities

The International Convention on the Rights of Persons with Disabilities was adopted in December 2006. The Convention is intended as a human rights instrument with an explicit social development dimension. It adopts a broad categorisation of persons with disabilities and reaffirms that all persons, with all types of disabilities, must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations should be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.[121]

Article 18 of the Convention recognises the freedom of movement of persons with disabilities, including the right to leave any country and to enter their own country. It also provides for the right to a nationality, access to documentation, and relevant processes, such as those involved in immigration proceedings.

The complaint mechanism to the **Committee on the Rights of Persons with Disabilities** (CRPD) was foreseen by the Optional Protocol to the Convention, which entered into force at the same time as the Convention. The CRPD can also undertake inquiries in the case of reliable evidence of grave and systematic violations of the Convention.

> **Like any other person, persons with disabilities have the right to a nationality, to freedom of movement, to leave any country and enter their own, and to undergo immigration proceedings.**

Moldova ratified the Convention on the Rights of Persons with Disabilities via Law No. 166 of 9 July 2010. In 2014, Moldova developed indicators for monitoring the implementation of the CRPD, with the purpose of providing the state and society an instrument to measure the effectiveness of the process and the extent to which the CRPD is being implemented.[122]

121. http://www.un.org/disabilities/default.asp?id=150
122. Moldova's initial state report on implementing the Convention is available at: http://particip.gov.md/public/documente/139/ro_539_Raport-initial-privind-implementarea-Conventiei-ONU-privind-drepturile-persoanelor-cu-dizabilitati.pdfhttp://particip.gov.md/public/documente/139/ro_539_Raport-initial-privind-implementarea-Conventiei-ONU-privind-drepturile-persoanelor-cu-dizabilitati.pdf

International Convention for the Protection of all Persons from Enforced Disappearance

The International Convention for the Protection of All Persons from Enforced Disappearance was adopted in December 2006. The Convention intends to prevent enforced disappearance, by requiring states parties to criminalise the practice, to investigate complaints, and to bring those responsible for it to justice.

Article 16 of the Convention forbids returning a person to their own country when they are in danger of being subjected to enforced disappearance. The Convention restates the principle of *non-refoulement* in cases where an individual is in danger of being subjected to enforced disappearance.

The complaint mechanism to the **Committee on Enforced Disappearances** (CED) is operable when the state party has made the necessary declaration per Article 31.

On 6 February 2007, Moldova signed the International Convention for the Protection of All Persons from Enforced Disappearance, but has yet to ratify it. As a signatory, however, Moldova is still obliged not to frustrate the object and purpose of the Convention, meaning that while compliance with the specific provisions is not mandatory, Moldova must nonetheless act in the general spirit of the Convention.

Convention against Transnational Organized Crime

The UN Convention against Transnational Organized Crime, adopted in 2000, is the principal international instrument in fighting transnational organised crime. The Convention is supplemented by three protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which entered into force in 2003; the Protocol against the Smuggling of Migrants by Land, Sea and Air, which entered into force in 2004; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children provides an agreed definition of “trafficking in persons”[123]

123. “The recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of 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,

and a framework for protection and assistance of victims of trafficking in persons with full respect with their human rights.

The Protocol against the Smuggling of Migrants by Land, Sea and Air aims at preventing and combatting the smuggling of migrants,[124] as well as promoting cooperation among states parties, while protecting the rights of smuggled migrants and preventing their exploitation.

The Republic of Moldova ratified the Convention against Transnational Organized Crime by Law No. 15 of 17 February 2005, the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children by Law No. 17 of 17 February 2005, and the Protocol against the Smuggling of Migrants by Land, Sea and Air by Law No. 16 of 17 February 2005, while making a number of reservations and declarations.[125]

Moldovan law also replicates many of the core provisions of the convention. Article 165 of the criminal code defines **trafficking in human beings** as the recruitment, transport, transfer, accommodation or hosting of a person, with or without his or her consent, for: commercial or non-commercial sexual exploitation; labour or forced services; begging, slavery or similar conditions; use in armed conflicts or criminal activities; organs, textures and/or corpuscles; or the use of a woman as a surrogate, and committed by threatening a person with psychological violence, kidnapping or document seizure. It is also defined as servitude, aiming at returning a debt of an unreasonable quantum; the threat to disclose confidential information to the victim's family or other natural and legal persons; fraud; abuse of vulnerability or power; or giving or receiving payments or benefits in order to obtain the consent of a person controlling an-

---

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" (Article 3).

124. "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" (Article 3).

125. 'Until the full restoration of the territorial integrity of the Republic of Moldova, the provisions of the Convention shall only apply to the territory controlled by the Moldovan authorities.'

'In accordance with Article 16(5a) of the Convention, the Republic of Moldova considers the Convention as a legal basis to cooperate with other States Parties on extradition. The Republic of Moldova does not consider the Convention as the legal basis for the extradition of nationals and persons who were granted political asylum in the country, according to its domestic laws.'

'Pursuant to Article 18(13) of the Convention, the Republic of Moldova designates the following central authorities as receivers of legal aid applications:

1. the Prosecutor General – in the stage of prosecution
2. the Ministry of Justice – in the stage of trial or sentence execution.'

'In accordance with Article 18(14) of the Convention, the languages acceptable for requests for legal aid and for the attached documents are: Moldovan, English or Russian.'

'In accordance with Article 35(3) of the Convention, the Republic of Moldova does not consider itself bound by Article 35(2) of the Convention.'

other person.[126] **Child trafficking**, per Article 206 of the Criminal Code, is the recruitment, transport, transfer, accommodating or hosting of a child, as well as giving or receiving payments or benefits in order to obtain the consent of a person controlling the child, with the purpose of: sexual exploitation, commercial and non-commercial prostitution, or pornographic activity; labour exploitation or forced services; slavery or similar conditions, including illegal adoption; use in armed conflicts; use in criminal activities; organ and texture sampling for transplants; or abandonment abroad.

International Labour Organisation (ILO) conventions

The International Labour Organisation (ILO) was founded in 1919 and became a specialised UN agency in 1946 with a tripartite structure (governments, employer organisations and trade unions). Currently, 185 states, including Moldova,[127] are members of the ILO. The strategic objective of the ILO is '*to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity*'[128]. The ILO conventions comprise a total of 190 legal instruments, which aim to improve labour standards for people around the world. There are eight fundamental conventions that are binding for every ILO member country:

1. the Forced Labour Convention, 1930 (No. 29);
2. the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
3. the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
4. the Equal Remuneration Convention, 1951 (No. 100);
5. the Abolition of Forced Labour Convention, 1957 (No. 105);
6. the Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
7. the Minimum Age Convention, 1973 (No. 138); and
8. the Worst Forms of Child Labour Convention, 1999 (No. 182).

126. See also Law No. 241-XVI on preventing and combating trafficking in human beings of 20 October 2000 (Article 812), which repeats this formulation almost verbatim.
127. http://www.ilo.org/public/english/standards/relm/country.htm.
128. Juan Somavia, ILO Director-General, http://www.ilo.org/public/english/support/lib/century/index6.htm.

In 1998, the **ILO Declaration on Fundamental Principles and Rights at Work** was adopted. It prescribed that all members, even if they did not ratify the respective conventions, have the obligation – resulting from simple affiliation to the organisation – to observe and promote in good faith and according to the ILO Constitution the fundamental rights granted in these conventions. These rights are:

1. the freedom of association and the effective recognition of the right to collective bargaining;
2. the elimination of all forms of forced or compulsory labour;
3. the effective abolition of child labour; and
4. the elimination of discrimination in employment.

The following international instruments, binding for the states that ratified them, particularly address issues related to migration and migrants and members of their family:

1. the Migration for Employment Convention (as revised), 1949 (No. 97);
2. the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and their recommendations; and
3. the Convention concerning Decent Work for Domestic Workers, 2011 (No. 189).

Generally, all the conventions and recommendations adopted by the ILO cover both citizens and non-citizens, except when otherwise provided.

Although not explicitly covered, the principles enshrined in the ILO instruments provide the necessary basis for a policy on labour migration, which includes protecting migrant workers. The conventions contain measures aimed at:

1. regulating employment conditions for migrant workers;
2. combating irregular migration for the purposes of employment; and
3. recognising, under certain circumstances, the work of irregular migrants and some basic labour rights in order to prevent abuses by employers.

There are also important instruments containing provisions that specifically address migrants' status. These include the ILO instruments on **equal treatment:**

1. Convention No. 19 concerning Equality of Treatment for National and For-

eign Workers as regards Workmen's Compensation for Accidents;

2. Convention No. 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security;

…on access to **social security**:

1. Convention No. 102 concerning Minimum Standards of Social Security;
2. Convention No. 121 concerning Benefits in the Case of Employment Injury;
3. Convention No. 157 concerning the Establishment of an International System for the Maintenance of Rights in Social Security; and

…and on **protection measures**:

1. Convention No. 95 concerning the Protection of Wages;
2. Convention No. 155 concerning Occupational Safety and Health and the Working Environment;
3. Convention No. 167 concerning Safety and Health in Construction;
4. Convention No. 172 concerning Working Conditions in Hotels, Restaurants and Similar Establishments;
5. Convention No. 176 concerning Safety and Health in Mines;
6. Convention No. 183 concerning the Revision of the Maternity Protection Convention (Revised); and
7. Convention No. 184 concerning Safety and Health in Agriculture.

The ILO provides international labour standards, prescribing basic principles and rights for workers. The conventions do not affect the sovereign right of each Member State to allow or reject the entry of a foreigner to its territory. The application of the ILO conventions' provisions does not depend on their mutual application in the state of origin of the individual (if migrants are involved). The ILO conventions call for the equal treatment of workers, regardless of citizenship. The conventions are also generally applicable to migrants, except where explicitly stated otherwise. They also recognise some basic labour rights for irregular migrants.

The Republic of Moldova has ratified more than 39 ILO conventions, the 12 most important being:

1. the Forced Labour Convention, 1930 (No. 29) by Parliament Decision No. 610-XIV of 1 October 1999;
2. the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) by Parliament Decision No. 593-XIII of 26 September 1995;
3. the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) by Parliament Decision No. 593-XIII of 26 September 1995;
4. the Equal Remuneration Convention, 1951 (No. 100) by Parliament Decision No. 610-XIV of 1 October 1999;
5. the Abolition of Forced Labour Convention, 1957 (No. 105) by Parliament Decision No. 707-XII of 10 September 1991;
6. the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by Parliament Decision No. 593-XIII of 26 September 1995;
7. the Minimum Age Convention, 1973 (No. 138) by Parliament Decision No. 519-XIV of 15 July 1999;
8. the Worst Forms of Child Labour Convention, 1999 (No. 182) by Law No. 849-XV of 14 February 2002;
9. the Migration for Employment Convention (Revised), 1949 (No. 97) by Law No. 209-XVI of 29 July 2005;
10. Minimum Wage Fixing Convention, especially in Developing Countries, 1970 (No. 131) by Parliament Decision No. 610-XIV of 1 October 1999;
11. Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) by Law No. 72 of 26 November 2009; and
12. Maternity Protection Convention (Revised), 1952, revised in 2000 (No. 183) by Law No. 87-XVI of 20 April 2006.

ILO MONITORING MECHANISMS

The ILO has also developed mechanisms to monitor the application of conventions and recommendations in law and in practice following their ratification by states. There are two types of monitoring mechanisms: the **regular monitoring system** to supervise the application of standards, and **special procedures**.[129]

The **regular system** is based on the examination by two ILO bodies of reports on the application of the conventions and recommendations in law and in practice sent by Member States and reports on observations made by workers' and employers' organisations:

1. the **Committee of Experts on the Application of Conventions and Recommendations** (CEACR) examines the annual reports submitted by the states parties and provides an impartial evaluation of the application of the respective international labour standards; and
2. the **Conference Committee on the Application of Standards**, composed of governments, employers, and workers, draws up conclusions recommending that governments take specific steps to remedy a problem or invite ILO missions or request technical assistance.[130]

The **special procedures** are based on the submission of a representation or a complaint concerning specific alleged violations of convention provisions. There are three special procedures:

1. the procedure for representations on the application of ratified conventions;
2. the procedure for complaints over the application of ratified conventions; and
3. the procedure for complaints regarding freedom of association (Freedom of Association Committee).[131]

129. Further information at: http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm.
130. Moldova references: http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102695.
131. http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm

International Monitoring mechanisms not resulting from conventions

In addition to the treaty-based committees mentioned in the preceding paragraphs, a number of control mechanisms exist that are not linked to specific conventions, but that have rather been established by the UN Human Rights Council.

The **Universal Periodic Review** (UPR) was created to review, every four years, on a universal basis, the human rights situation in each of the 193 UN Member States (including Moldova). The review is carried out in its first phase by the UPR Working Group, which is composed of HRC members. A group of three states (the 'troika'), chosen by drawing lots, has the role of rapporteur. The universal character of the UPR goes beyond the scope of a monitoring committee mechanism that is limited to the states that ratified a particular Convention.

Another non-compulsory mechanism is the **special procedures** system. Special procedures are a basic HRC instrument, and are carried out by either an individual (called the 'Special Rapporteur' or 'Independent Expert') or a working group that fulfils specific tasks set by the HRC through resolutions adopted by its members. The current structure consists of 37 thematic mandates and 14 geographic mandates. Special procedures can carry out 'country visits' or send letters and make emergency calls to governments to ask for clarifications related to a specific situation. The mandate of the **Special Rapporteur on the Human Rights of Migrants** has been established in 1999.

Finally, there is a procedure for the **review of claims** on serious and systematic violations of human rights. Communications may be sent by natural persons, groups of persons or NGOs, and are reviewed in a first phase by the Working Group on Communications (composed of five members of the Advisory Committee). If the Working Group on Communications considers the claim to be valid, it transmits to the Working Group on Situations (composed of five persons) all admissible communications and recommendations. The Working Group on Situations then presents a report on the violations to the Council, and provides recommendations on the course of action to take.

Customary international law

Finally, with regard to general international law, mention should be made of customary international law. Recognised as one of the principal sources of inter-

national law,[132] deriving from the "general recognition among States of a certain practice as obligatory"[133]. The elements of customary international law are consistency and generality of a practice, and the "conception that the practice is required by, or consistent with, prevailing international law"[134] (*opinio iuris et necessitatis*). In the international legal sphere, customary obligations are equally as binding as – and enjoy normative parity with – norms deriving from international treaties.

The situation in many Monist States is that the international legal obligations incumbent upon that State – whether by virtue of treaties duly ratified or because of customary international law – are applicable in domestic law, independent of their transposition by the legislature.

In Moldova, however, this situation is somewhat different. While Article 4 of the Constitution provides for Monism in the specific domain of human rights treaties, it makes no mention of customary international law. The exception in this regard is the Universal Declaration of Human Rights (UDHR), which is mentioned explicitly in the first paragraph of that article. The UDHR – a mere declaration, and not a binding treaty – while not customary international law in and of itself, is considered to be entirely reflective of customary international law, with its provisions thus enjoying binding force in international law. Moreover, as it is explicitly mentioned in the Moldovan Constitution, it is germane to examine it in the context of the present discussion.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights, adopted on 10 December 1948 by the UN General Assembly, was the first international document to define the rights and freedoms that are to be granted to all human beings, thus establishing a unitary conception of human rights and freedoms. The Declaration is not an international treaty, and does not impose obligations upon states. Nevertheless, the vast bulk of the rights it seeks to protect have been incorporated into international law through the inclusion of its provisions in states' constitutions and particularly its incorporation into customary international law through state practice and *opinio iuris*.

132. See Article 38, United Nations, Statute of the International Court of Justice, 18 April 1946
133. J. L. Brierly, Law of Nations, 1963, as cited in Ian, Brownlie, Principles of public International Law, Oxford University Press, 2003.
134. Ian, Brownlie, Principles of Public International Law (op. cit.)

The provisions of the UDHR that are of relevance to migrants are largely replicated by the International **Covenant on Civil and Political Rights** (ICCPR), the **International Covenant on Economic, Social and Cultural Rights** (ICESCR) and other conventions listed above.

However, the fact that it is explicitly referred to in the Moldovan Constitution adds extra weight to its importance in Moldovan domestic law.

> **The rights and freedoms stipulated in the Universal Declaration of Human Rights apply equally to all persons, regardless of citizenship or location.**

F) Regional protection – the Council of Europe system and the European Convention on Human Rights (ECHR)

Founded in 1949, the Council of Europe (CoE) currently has 47 members (including Moldova), of which 28 are also Member States of the European Union. The Statute of the Council of Europe lays out the foundations for a supranational political organisation for intergovernmental and parliamentary cooperation. The basic tenets of the CoE[135] are:

1. pluralist democracy;
2. human rights; and
3. observation of the rule of law.

The organisation's objectives have progressed over time, but the two most important documents devised by the organisation remain the two adopted at the beginning of the CoE's history:

1. the Convention for the Protection of Human Rights and Fundamental Freedoms (colloquially known as the European Convention on Human Rights – ECHR); and
2. the European Social Charter (ESC).

These two treaties are extremely important in the European context, providing for a wide range of protection, as well as for an individual appeals procedure – for the ECHR – via the European Court of Human Rights.

Moreover, the CoE has adopted more than 200 treaties that are binding for the

135. Memorandum of Understanding between the Council of Europe and the European Union, http://ec.europa.eu/justice/international-relations/files/mou_2007_en.pdf, p. 3.

States that have ratified them. Of these, this section, besides providing an overview of the ECHR and the European Social Charter, will examine the three following conventions that contain provisions specifically concerning migrants, victims of trafficking and asylum seekers[136]:

1. the European Convention on the Legal Status of Migrant Workers;
2. the Council of Europe Convention on Action against Trafficking in Human Beings; and
3. the Council of Europe Convention on preventing and combating violence against women and domestic violence (which Moldova has not yet signed or ratified).

Refugees are also specifically addressed in the following CoE treaties:

1. the European Agreement on the Abolition of Visas for Refugees;
2. the Protocol to the European Convention on Consular Functions concerning the Protection of Refugees; and
3. the European Agreement on Transfer of Responsibility for Refugees.

Finally, several Resolutions and Recommendations of the **Committee of Ministers** (CoM)[137] and the **Parliamentary Assembly** (PACE)[138] explicitly deal with

136. Other conventions are also of relevance to migrants and will be mentioned in the following chapters, when appropriate: the European Convention on Extradition, the European Code of Social Security, the European Convention on Social Security, the European Convention on the Suppression of Terrorism, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

137. Committee of Ministers (1978), Resolution (78) 33 on the reunion of families of migrant workers in Council of Europe Member States, adopted on 8 June 1978 at the 289th meeting of the Ministers' Deputies; Recommendation No. R (1999) 23 on family reunion for refugees and other persons in need of international protection, adopted on 15 December 1999 at the 692nd meeting of the Ministers' Deputies; Committee of Ministers (2002), Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification, adopted on 26 March 2002 at the 790th meeting of the Ministers' Deputies; Committee of Ministers (2004), Activities of the International Organisation for Migration (IOM), 1998-2002 – Parliamentary Assembly Recommendation 1607 (2003), adopted on 21 January 2004 at the 869th Meeting of the Ministers' Deputies, CM/AS(2004)Rec1607 final; Committee of Ministers (2005), 'Twenty guidelines on forced return', adopted on 4 May 2005 at the 925th meeting of the Ministers' Deputies; Committee of Ministers (2009), 'Guidelines on human rights protection in the context of accelerated asylum procedures', adopted on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies.

138. PACE (1994), Recommendation 1237 (1994) on the situation of asylum-seekers whose asylum applications have been rejected, adopted on 12 April 1994 (11th Sitting); PACE (1997), Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, adopted on 24 April 1997 (14th Sitting); PACE (2000a), Recommendation 1440 (2000) on the restrictions on asylum in the Member States of the Council of Europe and the European Union, adopted on 25 January 2000 (3rd Sitting); PACE (2000b), Recommendation 1470 (2000) on the situation of gays and lesbians and their partners in respect of asylum and immigration in the Member States of the Council of Europe, adopted on 30 June 2000 (24th Sitting); PACE (2004), Recommendation 1686 (2004) on human mobility and the right to family reunion, adopted on 23 November 2004; PACE (2011a), Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return, adopted on 15 April 2011 (14th Sitting); PACE

migration and refugee-related issues. Proper reference will be made to these documents in the course of the following sections, when analysing the different aspects of the migration process.

The Republic of Moldova has been a Member State of the Council of Europe since 1995. As of February 2015, Moldova has signed and ratified 83 treaties of the Council of Europe. Fourteen further treaties have been signed but not ratified.

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

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted in 1950 and entered into force in September 1953. The Convention and its Protocols grant a series of civil and political rights and freedoms and also establishes a system to guarantee that the obligations assumed by Member States are observed. The Convention obliges States Parties to guarantee human rights to all persons under their jurisdiction.

The Convention protects the rights to:

1. life, freedom and security (Articles 2 and 5);
2. respect for private and family life (Article 8);
3. freedom of expression (Article 10);
4. freedom of thought, conscience and religion (Article 9);
5. vote and stand for election (Article 3 of Protocol 1);
6. a fair trial in civil and criminal matters (Article 6); and
7. property and peaceful enjoyment of possessions (Article 1 of Protocol 1).

The Convention prohibits:

1. the death penalty (Article 2);
2. torture or inhuman or degrading treatment or punishment (Article 3);
3. slavery and forced labour (Article 4);

(2011b), Recommendation 1985 (2011) on undocumented migrant children in an irregular situation: a real cause for concern, adopted on 7 October 2011 (36th Sitting).

4. arbitrary and unlawful detention (Article 5);

5. discrimination in the enjoyment of the rights and freedoms secured by the Convention (Article 14); and

6. deportation of a state's own nationals or denying them entry and the collective deportation of foreigners (Articles 3 and 4 of Protocol 4 and Article 1 of Protocol 7).[139]

Some of these provisions specifically deal with foreigners. Article 1 of the ECHR requires states to "secure" the Convention rights to "everyone within their jurisdiction". In certain cases, the concept of jurisdiction can extend beyond the territory of a state. A State Party to the ECHR is responsible under Article 1 of the ECHR for all acts and omissions of its organs, regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.[140]

Furthermore, the case-law of the European Court of Human Rights (ECtHR) has touched upon a wide range of rights that are applicable to migrants. In this context, the principle of non-discrimination based upon several criteria, including nationality, has played a significant role in combination with Articles 3, 5, 8 and 13.

In the Okpisz v. Germany case,[141] the ECtHR stated that, in order for a difference in treatment not to be discriminatory, it must be justified by objective and reasonable grounds.

The moment a state joins the CoE, it is required to ratify the whole ECHR without exception, and it is responsible before the ECtHR for the violation of rights granted by the Convention that took place subsequent to its accession.

Moldova ratified the ECHR via Decision No. 1298-XIII of 24 July 1997, making a declaration thereto.[142]

139. Council of Europe Website: http://human-rights-convention.org/our-rights-and-liberties/
140. ECtHR, Matthews v. the United Kingdom [GC], No. 24833/94, ECHR 1999-I, para. 32; ECtHR, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], No. 45036/98, ECHR 2005-VI, para. 153.
141. Okpisz v. Germany, Application No. 59140/00, Judgment of 25 October 2005.
142. Article 1 – The Republic of Moldova has ratified the Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as amended by Protocols 3 of 6 May 1963, 5 of 20 January 1966 and 8 of 19 March 1985, as supplemented with Protocol 2 of 6 May 1963, conferring upon the European Court of Human Rights the competence to give advisory opinions, which are an integral part thereof, as well as the First Protocol to the Convention signed in Paris on 20 March 1952, Protocol 4 securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto signed in Strasbourg on 16 September 1963, Protocol 6 concerning the Abolition of the Death

European Court of Human Rights

The ECtHR is the main body that monitors the respect for human rights recognised by the ECHR. Article 34 ECHR guarantees the right of 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto' to appeal to the Court. This right is an essential element of the control mechanism of the CoE and is crucial for the system's efficacy.

The **application** to the Court must be lodged by the victim of the violation. Over time the term "victim" has been broadly interpreted by the ECtHR, to also include 'indirect victims', namely those who have a specific and personal connection with the direct victim, such as the victim's wife[143] or mother[144]. Moreover, the application must also fulfil a series of requirements related to the procedure, the merit of the case or the jurisdiction of the court, as detailed in the provisions of Articles 32, 34 and 35.[145]

Penalty signed in Strasbourg on 28 April 1983, Protocol 7 signed in Strasbourg on 22 November 1984 and Protocol 11 on restructuring the control machinery established by the Convention signed in Strasbourg on 11 May 1994, with the following declarations and reservations:

1. The Republic of Moldova declares that it cannot ensure the observance of the Convention as regards the omissions and acts committed by the bodies of the self-proclaimed Transnistrian Republic on the territory effectively controlled by them until the final settlement of the dispute in this area.
2. Under Article 64 of the Convention, the Republic of Moldova makes a reservation to Article 4, having the effect of keeping the possibility to apply criminal punishment in the form of correctional labour without imprisonment, as provided by article 27 of the Criminal Code, and to impose an administrative penalty in the form of correctional labour, as provided by article 30 of the Code of Administrative Offenses. The reservation shall take effect during the year following the entry into force of the Convention in Moldova.
3. Under Article 64 of the Convention, the Republic of Moldova makes a reservation to Article 5(3), having the effect of continued issuance of an arrest warrant by the prosecutor, as provided by article 25 of the Constitution, article 78 of the Criminal Procedure Code and article 25 of Law No. 902-XII of 29 January 1992 on the Prosecutor's Office. The reservation shall take effect during the 6 months following the entry into force of the Convention in Moldova.
4. Under Article 64 of the Convention, the Republic of Moldova makes a reservation to Article 5, having the effect of keeping the possibility to apply disciplinary sanctions to servicemen in the form of arrest by higher commanders, as provided by articles 46, 51–55, 57–61 and 63–66 of the Disciplinary Regulations of the Armed Forces, approved by Law No. 776-XIII of 13 March 1996.
5. The Republic of Moldova interprets the provisions of the second sentence of Article 2 of the First Protocol to the Convention as not imposing additional financial obligations on the state regarding the educational institutions with a philosophical or religious orientation, other than those stipulated by the domestic laws. Article 2 – Under Articles 25 and 46 of the Convention on Human Rights and Fundamental Freedoms, the Republic of Moldova recognises the right of individual appeal to the European Commission of Human Rights and the compulsory jurisdiction of the European Court of Human Rights, without any special agreement and with the condition of reciprocity of parties for all cases concerning the interpretation and application of the Convention and Protocols 4 and 7 to any cases where the rights guaranteed by these instruments are violated after their entry into force in Moldova.

143. ECtHR, McCann and Others v. United Kingdom, Application No. 18984/91, Judgment of 27 September 1995.
144. Ibid., Kurt v. Turkey, Case No. 15/1997/799/1002, Judgment of 25 May 1998.
145. For further information see: http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

Requirements of a **procedural** nature include:

1. the **exhaustion of domestic remedies** (Article 35 para. 1)
2. the lapse of no more than **six months** from the date on which the final decision was taken (Article 35 para. 1)
3. the inadmissibility of an **anonymous application** (Article 35 para. 2)
4. the inadmissibility of a **redundant application** (Article 35 para. 2)
5. the inadmissibility of an application **already submitted to another international body** (Article 35 para. 2)
6. the prohibition of **abuse of the right of individual application** (Article 35 para. 3, lett. a)

Requirements concerning the Court's **jurisdiction**:

1. compatibility *ratione personae*, prescribes that the alleged violation must have been committed by a contracting state;
2. compatibility *ratione loci*, prescribes that the violation must have occurred within the territorial jurisdiction of the respondent state, including territories controlled by the latter (such as military bases abroad);
3. compatibility *ratione temporis*, covers only violations that took place in the period after the ratification of the Convention or the Protocols;
4. compatibility *ratione materiae*, covers only violations of the rights protected by the Convention.

Requirements referring to the **merits** of the case:

1. Inadmissibility of manifestly ill-founded applications (Article 35 para. 3, lit. a)
2. Inadmissibility of applications where the applicant has not suffered a significant disadvantage (Article 35 para. 3, lit. b)

The **procedures** for a case that is admissible envisage the active participation of the parties (the applicant [individual] and the respondent State) and require them to submit relevant documentations and observations to the Court.

According to Rule 39 of the Rules of Court (Interim measures), states can be asked to take temporary measures "in the interests of the parties or of the proper

conduct of the proceedings"[146]. This provision is of crucial importance to prevent expulsion of migrants, when there is an imminent risk of irreparable harm.[147]

The ECtHR/ECHR combination ensures the most advanced regional system of human rights protection in the world, while Council of Europe has developed an excellent system of protection via an individual petition procedure to the European Court of Human Rights, which has become a key arbiter of human rights in Europe.

The victim of a human rights violation can lodge an individual application to the ECtHR. The state can be requested to suspend the expulsion of a migrant pending a final judgment by the ECtHR when there is a real and serious risk of irreparable harm. The final decision of the Court is binding for the states involved.

European Social Charter (ESC)

The European Social Charter (ESC) was adopted in 1961, and its revised version entered into force in 1999. It supplements the ECHR with respect to economic and social human rights, and establishes a regional European system for the protection of fundamental rights in the fields of:

1. housing;
2. health;
3. education;
4. employment;
5. legal and Social Protection;
6. free movement of persons; and
7. non-discrimination.

In terms of migrants' rights, the revised Charter includes provisions aiming to:

1. prevent any misleading propaganda on migration;

146. http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf
147. http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

2. guarantee adequate conditions to facilitate the departure, transport and hosting of migrant workers and their families; and

3. guarantee that workers who are legally staying receive no less favourable treatment than nationals regarding remuneration and other employment conditions, affiliation to trade unions, and advantages provided by collective agreements.

States can decide to accept only part of the Charter and its monitoring system.

Through Law No. 484-XV of 28 September 2001, Moldova ratified partially the Social Charter (Revised). In so doing, Moldova made a specific declaration.[148]

Thus far, Moldova has accepted 63 of the 98 provisions of the Revised Charter. Moldova has not accepted the Additional Protocol of 1995, which provides for a system of collective complaints, as well as some of the most important articles, such as Article 14 (the right to benefit from social services), Article 23 (the right of elderly persons to social protection), and Article 30 (the right to protection against poverty and social exclusion).

Between 2004 and 2014, Moldova submitted 10 reports on the implementation of the Revised Charter. The European Committee of Social Rights monitors States Parties' compliance with the Charter. It examines the reports and decides if the situation in the countries concerned is compliant with the Charter or otherwise.

148. Article 2 – According to Article A(1) of Part III of the Revised European Social Charter, the Republic of Moldova recognises as a policy objective the realisation of the principles and rights listed in Part I of the Charter, by using all appropriate means, and remains bound by the provisions of Articles 1, 2, 5, 6, 8, 9, 11, 12, 16, 17, 20, 21, 24, 26, 28, 29, and partly by Article 3(1–3), Article 4(3–5), Article 7(1–4, 7–10), Article 13(1–3), Article 15(1, 2), Article 18(3, 4), Article 19(7, 8) and Article 27(2).
Article 3 – The Republic of Moldova agrees that the compliance with the legal commitments assumed by the partial ratification of the Revised European Social Charter is subject to the monitoring mechanism provided for in Part IV of the European Social Charter adopted in Turin on 18 October 1961.

The European Social Charter monitoring mechanism

The correct implementation of the ESC in national law and practice is monitored through via two procedures:

1. **the reporting procedure**, requiring the States Parties to regularly submit a report indicating how they implement the provisions of the Charter; and
2. **the collective complaints procedure**, providing for a complaints mechanism for alleged violations of the Charter. The right to lodge collective claims is granted to trade unions, national employer organisations, as well as European employer organisations and some NGOs.

There are three bodies involved in the monitoring of the implementation of the ESC:

1. **The European Committee of Social Rights** is the main body ruling on the conformity of national law and practice with the Charter. It is composed of nine independent experts and is assisted by an observer from the ILO.
2. **The CoM** can intervene in the last stage of both procedures, adopting recommendations or resolutions.
3. **The Governmental Committee** reports to the CoM on a yearly basis, advising for specific recommendations to be taken.

European Convention on the Legal Status of Migrant Workers

The Convention was adopted in 1977 and applies to migrant workers who are citizens of CoE Member States. A "migrant worker" is defined in the Convention as '*a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment*' (Article 1).

The Convention aims at regulating the legal status of migrant workers in order to ensure that they are treated no less favourably than workers who are nationals of the receiving state in all aspects of life and work, including the right to exit and return to the state of origin (Article 4), while maintaining the social security rights and benefits obtained abroad (Article 30). For all provisions, the specific legislation applicable is based on the *lex locis laboris* principle, which means that the legislation applied is that of the state where workers perform activities.

The Convention provides for equal treatment of migrant workers with nationals of the respective country, eliminating any discrimination based on nationality or residence. It also reaffirmed the principle of the right to leave and return to the country of origin (Article 4). Amongst its provisions are those that relate to recruitment, medical examinations, travel, and work and residence permits. It also includes provisions on family reunification, housing, savings transfers, employment contract expiry, resignations, dismissals, et cetera. The applicable legislation is determined on the basis of *lex locis laboris*. It introduces the maintenance of rights acquired or in in the process of being acquired and the provision of benefits abroad.

The Convention applies to migrant workers that are nationals of Council of Europe Member States. Thus far, only 11 states have ratified the Convention (Albania, France, Italy, Moldova, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey and Ukraine).[149]

Through Law No. 20 of 10 February 2006, Moldova ratified the Convention, with some limited declarations and reservations.[150]

Council of Europe Convention on Action against Trafficking in Human Beings

This treaty entered into force on 1 February 2008, and aims at:

1. combatting human trafficking;
2. guaranteeing equality between women and men;
3. protecting victims' fundamental rights;
4. creating a comprehensive framework for protecting and assisting victims and witnesses;
5. ensuring efficient investigation and pursuit those who engage in human trafficking; and
6. promoting international cooperation in combatting human trafficking.

149. http://Conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=093&CM=4&DF=&CL=ENG.
150. 'Until the full restoration of the territorial integrity of the Republic of Moldova, the provisions of the Convention shall only apply to the territory actually controlled by the Moldovan authorities.'
'In accordance with Article 36 of the Convention, Moldova does not consider itself bound by the provisions of Articles 7, 10, 13, 14, 15, 18, 19, 22 and 27 of the Convention.'

While the UN Convention against Transnational Organized Crime and the Protocols thereto primarily aim at combating criminal activities of a transnational nature and offences committed by organised criminal groups, the provisions of the CoE Convention explicitly addresses trafficking at both the national and the international level, and with or without a connection to organised crime (Article 2).[151]

The CoE Convention stresses the importance of States taking measures to protect and assist victims of trafficking within a system of rules based on the observation of fundamental rights and freedoms and gender equality. It is noteworthy that the CoE Convention, unlike the UN Trafficking Protocol, also considers persons criminally liable who employ or use services of victims of trafficking (Article 19).

The Convention:

1. defines trafficking in human beings (including internal trafficking – not only transnational);
2. criminalises persons who employ and exploit victims of trafficking;
3. provides a comprehensive framework for protecting and assisting victims and witnesses; and
4. provides rules for efficient investigation and criminal proceedings.

The Convention also establishes an independent monitoring mechanism, the Group of Experts on Action against Trafficking in Human Beings (GRETA) to ensure that states observe the Convention's obligations.[152]

The Republic of Moldova signed the Convention on Action against Trafficking in Human Beings on 16 May 2005 and ratified it through Law No. 67 of 30 March 2006 on 19 May 2006. The Convention entered into force for the Republic of Moldova on 1 February 2008. The Convention was ratified with a declaration stating that pending the full restoration of the territorial integrity of the Republic of Moldova, the Convention shall only apply to the territory controlled by the Moldovan authorities.

Trafficking in human beings has become an important issue on the political agenda of the Republic of Moldova. In this regard, one may observe the di-

151. See http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm
152. Moldova was one of the first group of 10 countries assessed by GRETA. For this purpose, a delegation of GRETA was in Moldova from 10–13 May 2011. The final report is available at: http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2011_25_FGR_MDA_en.pdf

versity of legal instruments adopted on the prevention of, as well as sanctions against, trafficking in human beings. The main legal instruments are the Criminal Code of the Republic of Moldova (Law No. 985-XV of 18 April 2002 – Articles 165 and 206) and Law No. 241-XVI on preventing and combating trafficking in human beings of 20 October 2005 (Article 2), which was adopted immediately subsequent to Moldova's ratification of the CoE Convention. Moldovan legislation also sets measures to combat and punish trafficking in human beings (prison, deprivation of the right to hold some positions or perform a specific activity, fines or dissolution in the case of legal persons).

Council of Europe Convention on preventing and combating violence against women and domestic violence

Moldova has neither signed nor ratified this Convention. As such, as is the case with European Union law, it is examined within this volume purely for comparative purposes. [153] However, some of its provisions may be reflective of customary international law, with which Moldova is obliged to comply. It is also the case that Moldova certainly has problems in this area, and ratification of such a convention could represent a sensible step in the future.[154]

Adopted in April 2011, this Convention entered into force in August 2014. It aims at preventing violence against women and domestic violence, and requires States parties to:

The Convention aims to:

1. protect women against all forms of violence and discrimination, and prevent, prosecute and eliminate violence against women and domestic violence;
2. specifically address violence against migrant women and women refugees or asylum seekers; and
3. design a comprehensive framework for the protection of and assistance to all victims of violence against women and domestic violence.[155]

153. Relevant for this issue is the following source, which contains the text of the Convention and the Moldova cases at the ECHR on this subject; the plaintiffs were Moldovan citizens: Domestic violence in the Republic of Moldova. Judicial practice and national and European legislation, Chisinau, 2014, http://www.osce.org/ro/moldova/121520?download=true.
154. See Domestic violence in the Republic of Moldova. Judicial practice and national and European legislation. Chisinau, 2014. Available at: http://www.osce.org/ro/moldova/121520?download=true
155. http://www.coe.int/t/dghl/standardsetting/convention-violence/brief_en.asp

Migrant women, with or without documents, and women seeking asylum are particularly vulnerable to gender-based violence.[156] For this reason, the Convention prohibits discrimination on the grounds of migrant or refugee status when it comes to implementing its provisions (Article 4 para. 3). Moreover, the Convention devotes its entire Chapter VII to women migrants and asylum seekers facing gender-based violence.

The Convention also established an independent monitoring mechanism, the **Group of Experts on Action against Violence against Women and Domestic Violence** (GREVIO) to ensure that States observe the Convention's obligations.

CoE Mechanisms for monitoring human rights

The Council of Europe has the most refined and advanced contemporary institutional system to protect human rights, which consists of several bodies[157]:

1. the **Committee of Ministers** monitors the execution of judgments of the ECtHR;
2. the **Parliamentary Assembly** is responsible for verifying that Member States are in compliance with the Statutes of the Council of Europe, the ECHR and all other CoE conventions to which they are parties;
3. the Congress of Local and Regional Authorities;
4. **Treaty-based Monitoring Bodies**:
    a. the **ECtHR** (examined in detail above), active since 1959, is composed of one judge from each Member State, and is the most important guardian of the rights enshrined in the ECHR. States that have ratified the ECHR are obliged to implement the decisions of the Court;
    b. the **European Committee of Social Rights** (ECSR) (also examined in detail above);
    c. the **Group of Experts on Action against Trafficking in Human Beings** (GRETA) is a multidisciplinary group of 15 independent experts from States parties to the Council of Europe Convention on Action against Trafficking in Human Beings. It issues assessment reports on the monitored party's progress in putting into practice the Convention

156. See e.g. https://www.du.edu/korbel/hrhw/researchdigest/minority/Africa.pdf.
157. http://www.coe.int/t/dg3/children/monitoring/introduction_en.asp

and on further action. Based on these reports, the Committee of the Parties, as a political pillar of the monitoring mechanism, may issue recommendations[158] on measures to be taken according to GRETA's conclusions;

d. the **Group of Experts on Action against Violence against Women and Domestic Violence** (GREVIO), is expected to meet for the first time in the first half of 2015 and will function in a similar manner to the GRETA[159];

e. other committees established by specific Conventions, such as the **Consultative Committee of the European Convention on the Legal Status of Migrant Workers**, whose duties are to present opinions, recommendations and proposals to amend the Convention or to facilitate or improve its application. The Committee produces periodic reports containing information regarding the laws and regulations in force in the states parties to the Convention; and

f. Other independent human rights monitoring bodies, namely:

   i. the European Commissioner for Human Rights; and

   ii. the European Commission against Racism and Intolerance.

158. Recommendations for the Republic of Moldova 2012, http://www.coe.int/t/dghl/monitoring/trafficking/Docs/CommitteeParties/Recommendations/CP_2012_6_rec_MDA_en.pdf.

159. It should be reiterated that the work of this group does not concern Moldova, as Moldova has not ratified this convention. http://www.coe.int/t/dghl/standardsetting/convention-violence/AboutMonitoring_en.asp

G) The European Union as a comparator and example of good practices

Although the Republic of Moldova is not a member of the European Union, EU law represents a valuable comparator in relation to a number of issues related to the rights of migrants. The EU legal regime on many such rights may often be cited as an example of good legal practice and good governance, and indeed, in certain cases, Moldovan legislation mirrors EU law or relies upon bilateral agreements with the Union.

The policy of the European Union concerning human rights today encompasses civil, political, economic, social and cultural aspects. It also aims at the promotion of the rights of women, children, minorities and displaced persons. Furthermore, all commercial exchanges and cooperation agreements with third countries contain a clause stipulating that human rights represent a fundamental element of relations between the parties.

The EU is based on four fundamental freedoms guaranteed throughout its territory: free movement of goods, capital, persons and services. The free movement of persons, enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU) is therefore an essential element of the EU legal framework, although this freedom is limited to European Union citizens. The first directive on freedom of movement for workers, Directive 1968/360/EEC, recognised the right to freedom of movement not only for workers, but also for workers' family members, irrespective of their nationality. At the EU level, a complex legal system on social security, medical assistance, and reciprocal recognition of qualifications, which addresses both EU citizens and third country nationals, was also developed.

Originally, the concept of freedom of movement was intended to enable the European working population to freely travel and settle in any EU state. A breakthrough occurred in 1985 with the Schengen Agreement, which gradually abolished checks at common borders.[160] Currently, the Schengen area includes all EU Member States except Croatia, Bulgaria, Romania, Cyprus, Ireland and the UK,[161] as well as the four EFTA States (Norway, Iceland, Liechtenstein and Switzerland). The EU attributes great importance to human rights when it comes to asylum, immigration, and the fight against xenophobia, racism, and other forms of discrimination not only to citizens of the EU but also to third country nationals.

160. Official summary of the Schengen agreement at:
http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1420638657515&uri=URISERV:l33020
161. It should be noted that of the six EU Member States that do not participate in Schengen, all but the UK and Ireland are legally obliged to join the area, and wish to do so in the future.

While Moldova is not a Member State of the EU, much of its legislation covering human rights and migration issues often mirrors core provisions of EU norms.

Charter of Fundamental rights of the European Union

Human rights, democracy and the rule of law are essential values of the EU. While mentioned in the Union's founding treaties, they assumed additional importance once the Charter of Fundamental Rights (CFR) was adopted in 2000. They were then consolidated when the Charter obtained compulsory legal force with the Treaty of Lisbon, which entered into force in 2009. However, the Charter applies only to EU institutions, as well as to EU Member States when they are implementing EU law (Article 51). Moreover, all new countries joining the EU must respect the rights and obligations enshrined in the ECHR and the CFR. The Lisbon Treaty, which entered into force in 2009, provides for eventual EU accession to the ECHR.

From a legal perspective, the CFR both reaffirmed and further developed the fundamental international rules on human rights. These rules mainly result from constitutional traditions, common international obligations of Member States of the ECHR, and from the case law of the ECJ and the ECtHR.

The Charter consists of a preamble and 54 articles, grouped into six chapters titled: Dignity, Freedoms, Equality, Solidarity, Citizenship and Justice. The preamble affirms the EU's mandate to promote a balanced and sustainable development of Europe based on the observation of indivisible and universal values of human dignity, freedom, equality, and solidarity, and the strengthening of the protection of fundamental rights in the light of changes in society and scientific and technological developments. Through these six chapters and the preamble, and by being more innovative than most traditional constitutions, the Charter distinguishes more explicitly between 'citizens' rights' and the 'rights of all individuals' residing on the EU's territory.[162] The Charter is also innovative in terms of its content, being much broader than the ECHR, and includes topics such as the right to good governance, the social rights of workers, the protection of personal goods, bioethics and data protection.

162. It should be noted that this is not entirely unique. For example, the German Grundgesetz has always differentiated between fundamental rights granted to everyone and fundamental rights only granted to Germans. See e.g. Article 5 para. 1: "Jeder hat das Recht …" vs. Article 8 para. 1: „Alle Deutschen haben das Recht …"

The legal value of the CFR was established by Article 6 of the Treaty of Lisbon; however, the provisions in the Charter do not extend the competences of the Union as defined in the Treaty. The Charter's provisions offer EU citizens the possibility to bring before the ECJ and the Court of First Instance, as well as before the national courts of Member States, cases concerning the violation of fundamental rights, thus ensuring a double level of protection for individuals, in addition to that offered by the ECtHR. Therefore, if EU citizens do not win their case before the ECJ, they could (also) address the ECtHR, claiming an infringement of the ECHR.

Fundamental rights enshrined in the Charter apply to "everyone", with the exception of a small number of provisions:

1. **Article 15, para. 2**, which reserves to EU citizens the right 'to seek employment, to work, to exercise the right of establishment and to provide services in any Member State'; while **para. 3** mentions that 'Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union';

2. **Article 34**, which limits the right to social security and social assistance to 'everyone residing and moving legally within the European Union';

3. **Chapter V**, entirely dedicated to EU citizens' rights, such as the right to vote **(Articles 39 and 40)** or the freedom of movement **(Article 45)**. Nevertheless, certain provisions refer also to 'any natural or legal person residing or having its registered office in a Member State'. In this regard, persons not possessing EU citizenship may have access to documents, address the European Ombudsman or exercise the right to petition **(Articles 42, 43 and 44)**.

The Charter both reaffirmed and further developed the fundamental international rules on human rights. It explicitly distinguishes between 'citizens' rights' and the rights of all individuals residing on the EU's territory. Fundamental rights are generally open to all persons, including third country nationals, with few exceptions. The right to asylum is guaranteed by Article 18, which makes reference to the Refugee Convention.

The EU approach to migration intends to seize the opportunities raised and respond to the challenges posed by the migratory phenomenon in a way that is beneficial to all parties involved (Member States, countries of origin, and migrants). In order to achieve this ambitious objective, the European Council developed a comprehensive concept based on the following milestones:

1. the European Council of Tampere in 1999;
2. the Hague Programme of 2004; and
3. the Global Approach to Migration adopted by the European Council in 2005 and 2006.

The basic principles of the EU system may be summarised as follows:

1. to fight irregular migration and human trafficking;
2. to ensure respect for human rights and fundamental freedoms of migrants;
3. to facilitate legal and labour migration;
4. to eliminate the root causes of migration; and
5. to create an effective asylum system.

Regarding **refugees and asylum seekers**, the EU developed the **Common European Asylum System** (CEAS), which is based on the integrated and global application of the 1951 Refugee Convention and on duties resulting from other human rights instruments. It enables EU Member States to guarantee a high level of protection for persons intending to obtain refugee status in the EU.

The recast **Dublin Regulation**, which entered into force in July 2013, established a set of criteria for identifying the Member State responsible for the examination of an asylum claim in the EU. If it is not clear which Member State should examine the application, responsibility is assigned to the Member State through which the asylum seeker first entered, or the Member State responsible for her entry into the territory of the EU, or Norway, Iceland, Liechtenstein and Switzerland. The Regulation ensures that one Member State is responsible for the examination of an asylum application, deters multiple asylum claims, and enables access to an asylum procedure. It also provides improved procedural safeguards, such as the right to information, a personal interview, and access to remedies, as well as a mechanism for early warning, preparedness and crisis management.

Together with the recast Dublin Regulation, two other legal instruments constitute the **'Dublin System'**:

1. Regulation (EU) No. 603/2013 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the recast Dublin Regulation; and
2. Regulation (EU) No. 118/2014, which amends Regulation (EC) No. 1560/2003 and prescribes detailed rules for the application of the recast Dublin Regulation.

In addition, there are three other important directives concerning asylum:

1. **Council Directive 2004/83/EC** (the **'Qualification Directive'**) defines the criteria for determining who qualifies as a beneficiary of international protection;
2. **Council Directive 2003/9/EC** defines the minimum standards for reception conditions for asylum applicants. The aim is to ensure that applicants have a dignified standard of living and that comparable living conditions are afforded to them in all Member States. At the same time, the Directive also limits asylum applicants' secondary movements; and
3. **Directive 2013/32/EU** on common procedures for granting and withdrawing international protection.

Again, it should be reiterated that, while Moldova is not a Member State of the EU, much of its legislation covering human rights and migration issues is based at least in part on EU norms.

Finally, it should be noted that, there have been some efforts to achieve limited legal integration between Moldova and the EU:

1. **The EU-Moldova Action Plan (PAUEM)** established the objectives of strategic cooperation between Moldova and the EU. One of the PAEUM's objectives refers to the management of migratory flows. Points 44, 45 and 47 of the PAUEM contain provisions on the efficient management of migratory flows in, through, and from Moldova.
2. **The EU-Moldova Association Agreement** provides for the strengthening of measures to secure borders and other measures in this area in the context of the signing of the agreement between the EU and Moldova on a liberalised visa regime.

H) Regimes in Action: Freedom of Movement in THe Republic of Moldova

Freedom of movement provides an excellent example of how the overlapping normative regimes provide for multi-layered protection of a core right – and derogations thereto –that is deeply relevant for migrants. While subsequent chapters will present the rights of migrants in a variety of situations in which they are likely to interact with Moldovan authorities, and will examine the legal provisions governing these situations in turn, this section aims to present a synopsis of a right that is pertinent to the entire handbook, which will be returned to repeatedly in subsequent chapters.

Freedom of movement applies to all persons and encompasses:

1. **the right to leave a country;**
2. **the right to enter their own country; and**
3. **the freedom of movement within a country.**

States must ensure these rights, in particular by providing travel documents without unnecessary delay. However, states can also limit these rights, under certain circumstances.

States remain free to decide to whom they grant the right to enter their territory.

Freedom of movement is regulated at global level by the UN, and at regional level by the Council of Europe. Both are directly relevant for Moldovan law by virtue of Monism. In addition, a number of further provisions regarding freedom of movement exist in the Moldovan domestic legal system. All three are examined hereunder. Further, a synopsis of EU law provision concerning freedom of movement is also provided for comparative purposes and as an example of good practice.

1. The UN System

The **right to leave any country**, including one's own, together with the right to **freedom of movement and residence** within a country are prescribed, respectively, by Article 13 UDHR and Article 12 ICCPR. According to these articles, all

persons have this right, irrespective of their nationality.

The UN Human Rights Committee, in its General Comment No. 27 on Freedom of Movement, specifies that states may not restrict the freedom to leave a country by limiting it to any specific purpose or to a certain period of time for residing abroad. Moreover, the state must issue individual travel documents.[163] The Committee outlines a number of practices used by states that obstruct their citizens' enjoyment of the right to leave the country.[164] These include the imposition of bureaucratic obstacles to exit the country such as restricting the access of applicants to the competent authorities, unreasonable delays in issuing travel documents and requiring a return ticket or a repatriation document.

> In the Samuel Lichtensztejn v. Uruguay case,[165] the Human Rights Committee determined that Uruguay infringed Article 12 ICCPR by refusing to issue the claimant's passport without any justification.

Article 21 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention) requires states to criminalise the confiscation and destruction of identity documents, such as passports and residence or work papers, by anyone other than a public official authorised to do so by law. The UN Human Rights Committee has also expressed concern that where foreign nationals, due to employment, possess information relating to state secrets, '*the right of foreign nationals to freedom of movement may be restricted on grounds not compatible with the Covenant. (...) Provisions which restrict freedom of movement in a manner incompatible with Article 12 of the Covenant should be repealed.*'[166]

The right to leave any country is also found in other UN human rights treaties,[167] such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

> In the Observations on Belarus and Ukraine, the Committee on the Elimination of Racial Discrimination (CERD) asserted that the requirement of a visa for departure is an infringement of Article 12 ICCPR.[168]

163. General Comment No. 27, paras. 8 and 9.
164. General Comment No. 27, para. 17.
165. Samuel Lichtensztejn v. Uruguay, Communication No. 77/1980, U.N. Doc. CCPR/C/OP/2 at 102 (1990).
166. Concluding Observations of the Human Rights Committee, Lithuania, U.N. Doc. CCPR/C/79.
167. Namely: Article 5 of the CERD; Article 2(c) of the Convention on the Suppression and Punishment of the Crime of Apartheid; Article 10(2) of the CRC; and Article 8(1) of the Migrant Workers Convention.
168. Concluding Observations, Belarus, ICCPR, A/47/40 (1992) 124, para. 561, http://www.bayefsky.com/themes/leave_concluding-observations.php.

However, this **right is not absolute.** The freedom of movement and right to leave any country **can be limited when necessary in order to protect national security, public order, public health or morals or the rights and freedoms of others.**

These restrictions are included in the UDHR, the ICCPR, the Convention on the Rights of the Child and the Migrant Workers Convention.

> In the Ismet Celepli v. Sweden case, the CCPR concluded that in applying restrictions on freedom of movement based on national security concerns, Sweden did not infringe Article 12 ICCPR.[169]

Article 12(4) of the ICCPR states: 'No one shall be arbitrarily deprived of the **right to enter his/her own country**'. General Comment No. 27 clarifies that this article makes no distinction between nationals and foreigners. The concept is not limited to citizenship in a formal sense, but also includes persons who, due to their special links to a certain country, cannot merely be considered as foreigners. To define these links, a number of different factors are taken into account and their importance varies from one case to another, including: the habitual residence of the person concerned, their interests, family connections, participation in public life, and demonstrated affinity for the country. This right is extended to those coming to a country for the first time, even if they were born elsewhere, as long as they have a '**genuine and effective link**' with the country.

All of the previously highlighted conventions are applicable to **women and men alike**, but the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) again explicitly guarantees women the same rights as men regarding freedom of movement. Consequently, any restrictions based on sex – or which disadvantage women – amount to gender discrimination and are prohibited. In its General Recommendation on Equality in Marriage and Family Relations,[170], the CEDAW Committee explained that '*domicile, like nationality, should be capable of change at will by an adult woman regardless of her marital status. Any restrictions on a woman's right to choose a domicile on the same basis as a man may limit her access to the courts in the country in which she lives or prevent her from entering and leaving a country freely and in her own right.' The Committee then stated that 'migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them*'. [171]

169. Celepli v. Sweden, Communication No. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991 (1994).
170. http://www.refworld.org/docid/48abd52c0.html.
171. In its General Comment on Freedom of Movement, the UN Human Rights Committee underlined the

In the case of parents and **children** residing in different countries, the right to leave and return of both is further protected by the Convention on the Rights of the Child, which forbids the forced separation of families. The CRC establishes a child's '*right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents*'.[172] Consequently, the CRC requires states parties to '*respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country*'. Moreover, the CRC maintains that states parties must respond to applications for travel '*for the purpose of family reunification (…) in a positive, humane and expeditious manner*', while also forbidding restrictions on the right to enter one's home country for the purpose of family reunification. As previously noted, however, this right can be restricted for reasons of national security, public order, public health or morals, or to ensure the rights and freedoms of others.[173]

Refugees also have the right to freedom of movement within a state. Aside from the right to enter their own country, freedom of movement into and out of the place of stay or camp is also essential. Article 12 ICCPR and Article 26 of the 1951 Refugee Convention oblige states to afford refugees the right to choose their place of residence within the territory and to move freely within the state. The UN Human Rights Committee has also highlighted that restrictions on the freedom of movement of asylum seekers do not comply with Article 12 ICCPR, and that failure to observe such restrictions should not result in a rejection of the asylum claim.[174] Moreover, per Article 28 of the 1951 Refugee Convention, '[t]he Contracting States shall issue to refugees lawfully staying in their territory **travel documents** for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require…' In order to ensure that all refugees have some personal documentation, the Convention stipulates in Article 27, that '[t]he Contracting States shall issue **identity papers** to any refugee in their territory who does not possess a valid travel document.' Although there is no prescribed format for refugee identity documents, there are certain practical requirements that must be satisfied so that the papers in question serve the purpose of identification. One of the annexes to the 1951 Refugee Convention, the specifications for Convention Travel Documents,[175] for example,

importance of this right for women, noting that it is incompatible with Article 12 ICCPR that a woman's right to move freely be made subject to the decision of another person. Human Rights Committee, General Comment No. 27, 1999. It also highlighted in another General Comment (General Comment on the Equality of Rights between Men and Women) the importance of a woman's ability to obtain identity documents, such as a passport and travel papers. General Comment No. 28, 2000.

172. Convention on the Rights of the Child, Article 10(2).

173. Convention on the Rights of the Child, Article 10(2).

174. Concluding Observations of the Human Rights Committee, Lithuania, U.N. Doc. CCPR/C/79.

175. 1951 Refugee Convention, Annex, available at http://www.unhcr.org/3b66c2aa10.html

recommends the use of forms printed on special paper, which makes it possible for any alteration to be detected. Finally, Article 31 of the Convention provides as follows: '[t]he Contracting States shall **not impose penalties**, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened […], enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

In Alias Khaboka v. Secretary of State for the Home Department,[176] the Court of Appeal of England and Wales considered that the term 'refugee' should be interpreted so as to include an asylum seeker whose application has not yet been determined, and who is subject to the limitations laid down in Article 31 of the 1951 Refugee Convention.

In R. v. Uxbridge Magistrates' Court and Another, ex parte Adimi,[177] the Divisional Court in the United Kingdom observed: '[t]hat Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt. Nor is it disputed that Article 31's protection can apply equally to those using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely.'

176. Khaboka v. Secretary of State for the Home Department, [1993] Imm AR 484, United Kingdom: Court of Appeal (England and Wales), 25 March 1993, available at: http://www.refworld.org/docid/3ae6b6210.html.

177. R v. Uxbridge Magistrates Court and Another, Ex parte Adimi, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, available at: http://www.refworld.org/docid/3ae6b6b41c.html .

2. The Council of Europe System

The principle of **freedom of movement** was introduced in Article 2 of Protocol No. 4 ECHR, mirroring the language of other international conventions, including the UDHR and ICCPR. The rights obtaining in the international conventions discussed above are largely replicated within the ECHR system.

> In the Omwenyeke v. Germany case,[178] the ECtHR stated that Article 2 of Protocol No. 4 guarantees freedom of movement to 'everyone lawfully within the territory of a State'. Foreigners temporarily admitted to a certain area of the state may be considered to be 'lawful' as long as they observe the conditions required for their admission or stay. Since the applicant repeatedly left the district in which he was ordered to stay without obtaining the necessary permission from the authorities, he was not 'lawfully' on the German territory and, therefore, could not invoke the right to freedom of movement provided by Article 2 of Protocol No. 4.
>
> In Riener v. Bulgaria[179], the ECtHR considered that the withdrawal of travel documents, which results in an individual being unable to leave a state lawfully, is a breach of Article 2 of Protocol No. 4 to the Convention, unless the state can justify its actions on permissible grounds and demonstrate that it is necessary to protect a specific interest (e.g. national security).

The **ability to obtain identity documents**, such as a passport and travel papers, is essential for stateless persons, and as such, is considered to impact upon the freedom of movement.

> In the case Tatishvili v. Russia[180], the applicant held the citizenship of the former USSR until the year 2000 when she became a stateless person. The ECtHR found that the Russian authorities' arbitrary refusal to certify her residence at her chosen address, substantially complicating her daily life and rendering uncertain her access to medical care, was not in accordance with the law and constituted a breach of the right to freedom of movement (Article 2 of Protocol No. 4).

178. ECtHR, Omwenyeke v. Germany, Application No. 44294/04, Judgment of 20 November 2007.
179. ECtHR, European Commission on Human Rights, The right to leave a country, October 2013, available at: http://www.refworld.org/docid/52848e724.html
180. Tatishvili v. Russia, 1509/02, Council of Europe: European Court of Human Rights, 22 February 2007, available at: http://www.refworld.org/docid/4667e2912.html

The ECtHR took the **prohibition of penalisation for illegal entry of refugees** (also covered by Article 31 of the Refugee Convention) into account in various decisions, such as in Amuur v. France, a case where it considered the general issue of detention: In view of the internationally recognised immunity from penalty to which persons falling within the scope of Article 31 of the 1951 Convention are entitled, to institute criminal proceedings without regard to their claim to refugee status and/or without allowing an opportunity to make such a claim may be considered to violate human rights. As a matter of principle, also, it would follow that a carrier should not be penalised for bringing in an 'undocumented' passenger, where that person is subsequently determined to be in need of international protection. Notwithstanding the formal provisions of the legislation and individual court rulings, the practice of States and national administrations does not always conform to the obligations accepted under Article 31.'[181]

3. Moldovan Law

The provisions listed above – at global level via the UN system, and at regional level via the Council of Europe system – **apply as Moldovan domestic law** (due to Article 4 of the Constitution) and are **directly enforceable in Moldova** via the Moldovan judicial apparatus. In addition, a number of specific provisions are provided for in Moldovan domestic law, which are examined in brief in the present section.

Article 27 of the Constitution regulates freedom of movement. Paragraph 1 guarantees the freedom of movement throughout the country for all persons, whether they are Moldovan citizens, stateless persons or foreign citizens. Paragraph 2 grants citizens of the right to settle anywhere within the national territory, to travel in and out of the country, and to emigrate. Similarly, the Law on the legal status of foreign citizens and stateless persons recognises the right of foreign citizens and stateless persons legally present on the state territory to freely move and settle throughout Moldova.

Law No. 269 of 9 November 1994 regarding Exit from and Entry to the Republic of Moldova guarantees Moldovan citizens, foreigners and stateless persons the right to exit and enter the Republic of Moldova, establishes temporary restrictions to this right, and regulates the issuance of exit and entry documents and the resolution of disputes on the issuance of these documents. The Law also prohibits violations of the freedom of movement. According to

181. Convention and protocol relating to the status of refugees available at: http://www.unhcr.org/3b66c2aa10.html

the Law, citizens of the Republic of Moldova have the right to exit and enter the country using their passports, and stateless persons, refugees and beneficiaries of humanitarian protection using their travel documents issued by competent authorities. Minors have the right to cross the state border only if accompanied by one of their legal representatives.[182]

Article 11(4) of the Law stipulates that a passport or travel document may be obtained in order to emigrate.[183] However, the delivery of the passport or travel document or the extension of its validity may be limited in case the applicant represents a threat to national security, has committed crimes against humanity, has been issued a sentence by a court or is responsible for a crime, has violated the rules for import-export activities, has carried out military service in a foreign army or as a soldier of fortune, or has deliberately communicated false information about themselves.

Per Article 22 of **Law No. 270-XVI of 2008 on Asylum in the Republic of Moldova**, the Refugee Directorate takes the necessary measures to provide persons enjoying temporary protection with the necessary documents for the duration of the protection period. Each beneficiary of temporary protection is issued an identity document allowing them to stay in Moldova. Article 9 of the same law states that asylum seekers shall not be sanctioned for illegal entry or stay on Moldovan territory. Such persons shall be treated in accordance with international human rights standards.

4. Provisions under European Union Law (provided for comparative purposes)

While **all members of the European Union are also Council of Europe Member States, and are thus subject to the jurisdiction of the ECtHR on the basis of the ECHR** – thus being subject to identical obligations as the Republic of Moldova, it is clear that **freedom of movement is protected to a greater degree, and has achieved a deeper level of integration, within the EU.** The following section will provide an overview of the main provisions in this regard.

182. Minors who are at least 14 years old and are enrolled in a study programme at an educational institution of another state may cross the border by showing the document of transfer to the relevant educational institution and the notary-certified statement of one of the parents.
183. "Cetățenii Republica Moldova, apatrizii, refugiații şi beneficiarii de protecție umanitară domiciliați în Republica Moldova care vor să se domicilieze în alte țări obțin paşaportul sau documentul de călătorie după ce şi-au onorat obligațiunile patrimoniale față de alte persoane fizice şi juridice, în conformitate cu legislația în vigoare."

a) Nationals of EU Member States and their family members

For all nationals of EU Member States and their family members of any nationality, EU law provides a right to move freely and reside anywhere in the EU.[184] **Freedom of movement** is one of the founding principles of the EU. The rights of EU citizens to freedom of movement and residence can only be limited for reasons of public policy, public security or public health.[185]

The main EU Directives and Regulations enabling freedom of movement are:

1. Regulation No. 492/2011 on freedom of movement for workers within the EU; and
2. Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States.

In the Jipa case,[186] the CJEU held that, as a Romanian national, Mr Jipa enjoyed the status of a citizen of the EU and had the right to move and reside freely within the territory of the member states. However, this right was not unconditional, and might be subject to the limitations and conditions imposed by the Treaty on the Functioning of the European Union and by the measures adopted to enforce the Treaty, derived in particular from Article 27(1) of Directive 2004/38/EC. The Court noted that while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, those requirements must be strictly interpreted.[187]

b) The Schengen regime: EU and third country nationals

The Schengen regime has established an area of free movement for all persons, including both **EU and third country nationals**, within the Schengen Area. The Schengen Area is an area composed of 26 European countries, of which 22 are EU Member States.

184. Treaty on the Functioning of the European Union, Article 20(2).
185. Ibid., Article 21(1).
186. Case C-33/07, Ministerul Administrației şi Internelor - Direcția Generală de Paşapoarte Bucureşti v. Gheorghe Jipa, Judgment of 10 July 2008.
187. Additional cases: C-430/10 Gaydarov, C-434/10 Aladzhov.

Signed in 1985, the Schengen Agreement was complemented in 1990 by the **Schengen Convention**, which entered into force in 1995, and abolished controls at the internal borders of the Schengen states. The Convention also provided common rules regarding visas, sanctions against carriers, police cooperation, liaison officers, the right of asylum, and checks at the EU's external borders.[188] Border posts and checks have been removed between Schengen states and a common Schengen visa was established. To achieve this aim, several measures had to be adopted: among others, the development of various databases to be used in border control, such as the Visa Information System (VIS) and the Schengen Information System (SIS).

The **Schengen Borders Code**, established by Regulation (EC) No. 562/2006, governs the movement of persons across borders, and prescribes common rules for border checks and surveillance, entry requirements and refusal of entry. The Code obliges border guards to respect human dignity and the principle of non-discrimination when conducting border checks, sets out the principle of *non-refoulement* and specifically highlights that the regulation observes the principles recognised by the Charter of Fundamental Rights of the EU.

The **Visa Code** (Regulation No. 810/2009 on establishing a Community Code of Visas) refers to the establishment of conditions and procedures for issuing visas for a short-term stay (a maximum of 90 days during a period of 180 days) in, and for transiting, the Schengen Area. Visas for a longer period remain subject to national law.

> In the case Rahmanian Koushkaki v. the Federal Republic of Germany,[189] the CJEU stated that Member States cannot refuse to issue a visa unless one of the grounds for refusal outlined in the Visa Code can be applied to the applicant.

EU Council Regulation 539/2001 further sets out those third countries whose nationals must have a visa in order to enter the Schengen Area, and those third countries that are exempt.[190] Third country nationals who are not required to

188. Eventually, the Amsterdam Treaty incorporated the Schengen *acquis* into the EU legal order *(acquis communautaire)*. This has meant that all new EU Member States must join Schengen and implement the accordant rules, together with the implementation of all other rules of EU law. Conversely, those EU Member States that had previously opted out of the Schengen Agreement (United Kingdom and Ireland) remain non-Schengen. The EFTA/EEA States (Iceland, Norway and Liechtenstein) as well as Switzerland, are also Schengen members.
189. CJEU, Rahmanian Koushkaki v. Bundesrepublik Deutschland, C-84/12, Judgment of 19 December 2013.
190. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0539:20110111:EN:PDF.

obtain a visa (visa exempt) may freely move on the territories of the contracting parties within 180 days after entry for a maximum of 90 days, if they fulfil the entry requirements.[191]

Finally, EU legislation foresees the possibility for **family members** of third country nationals lawfully residing in the EU to enter and reside in an EU country. Common rules on the right to family reunification are defined by the **Council Directive 2003/86/EC**.[192]

c) The fight against irregular migration, smuggling and trafficking in persons

In accordance with EU legislation, Member States are entitled to take measures to prevent unauthorised persons' access to their territory.

> In the ANAFE v. Ministère de l'Interieur, de l'Outre-mer, des Collectivités territoriales et de l'immigration case,[193] the CJEU declared that EU law is not contrary to French rules prohibiting the return to France of third country nationals who possess a temporary stay permit, but not a re-entry visa. The Court interprets the notion of a 're-entry visa' as a national authorisation to be issued to a third country national that allows them to leave the concerned Member State and to subsequently return to the same Member State.[194]

In order to fight **irregular migration and smuggling**, a number of measures have been taken at the EU level:

1. **Facilitation Directive 2002/90**[195] defines unauthorised entry, transit and residence and allows for sanctions against those who facilitate such breaches. These sanctions established by Member States must be effective, proportionate and dissuasive (Article 3).

191. Articles 19 and 21 of the Schengen Convention provide that third country nationals possessing a Schengen visa for short-term stay (otherwise known as a Schengen uniform visa) and who have legally entered the territory of a Schengen state, or those who hold a valid residence permit issued by one of the Schengen states and a valid travel document, can move freely on the territory of all Schengen states as long as their visa remains valid (i.e. for a maximum of 90 days within 180 days after entry).
192. The Directive does not apply to Denmark, Ireland, and the United Kingdom.
193. CJEU, Association nationale d'assistance aux frontières pour les étrangers (ANAFE) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'immigration, C-606/10, Judgment of 14 June 2012.
194. Ibid., para. 48.
195. Council Directive 2002/90/EC of 28 November 2002.

2. **Council Directive 2004/82/EC** of 29 April 2004 requires air carriers to collect and transmit passenger data to the authorities of the Member State of destination and responsible for performing checks. Non-compliance may lead to fines being imposed and, in the case of serious infringement, confiscation of the means of transport or withdrawal of the operating licence.

3. The obligations provided for in the above Directive are complementary to those prescribed by Article 26 of the Convention implementing the Schengen Agreement, supplemented by **Council Directive 2001/51/EC (Carriers Sanctions Directive)** concerning the obligation of airlines to return third country nationals who are denied entry by the Member State of destination.

4. **Directive 2009/52/EC** provides for sanctions and measures to be applied against employers of illegal third country nationals, thus establishing a general prohibition on the employment of illegal third country nationals. Other measures aim at improving checks at the EU's external borders.[196]

5. **The Return Directive (Directive 2008/115/EC)** provides for the introduction of an '**entry ban**', preventing re-entry to the territory of all Member States, to accompany removal orders. This measure is mainly intended to have preventative effects. The length of the entry ban will be determined with due consideration of all relevant circumstances of the individual case. Normally, the ban should not exceed 5 years.

To fight **human trafficking**, the EU has enacted measures to punish criminals involved in human trafficking and to better assist victims.[197] In 2010, the European Commission appointed an EU coordinator for the fight against trafficking in order to improve the coordination and coherence of actions by the different actors involved (institutions, agencies, EU Member States, and third countries).

196. For example, the EU developed a strategy for integrated border management, aiming at maintaining a high level of security by using information technology and biometric features for identification. In February 2008, the European Commission presented a roadmap for establishing the European Border Surveillance System (EUROSUR) focused on 'enhancing border surveillance, with the main purpose of preventing unauthorised border crossings, to counter cross-border criminality and to support measures to be taken against persons who have crossed the border illegally'. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Examining the creation of a European border surveillance system (EUROSUR) {SEC(2008) 151} {SEC(2008) 152}; COM/2008/0068 final.

197. Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

d) Refugees and asylum seekers

Article 78 of the Treaty on the Functioning of the European Union (TFEU) provides that the EU's common policy on asylum must develop in accordance with the 1951 Refugee Convention and other relevant treaties. No-one who requests asylum can be rejected at the border, nor expelled or forced to return to the country of origin where they may be subject to persecution. Asylum seekers enjoy the same rights as any foreign person, and the receiving state shall accord asylum seekers and refugees the same treatment as its own nationals.

The EU asylum *acquis* only applies from the moment an individual has arrived at the border, including territorial waters and transit zones **(Article 3(1) of the Asylum Procedures Directive (2013/32/EU))**. For those claims, **Article 6** of the directive sets out details concerning access to the asylum procedure, stating that applications should generally be registered within three working days. Per **Article 43**, asylum applications can be processed at the border, within four weeks from the submission of the claim; otherwise the applicant must be granted access to the territory. In that context, the admissibility of the request as well as on the substance can also be considered via accelerated procedures (**Article 31**). In such circumstances, the basic principles and guarantees applicable to asylum claims submitted inside the territory continue to apply.

Article 6 of the Reception Conditions Directive 2003/9/EC affirms the right to documentation for asylum seekers, stating that, within three days of their application, asylum applicants must be given a document that entitles them to stay in the country while the asylum claim is being examined. According to **Article 24 of the Qualification Directive (2011/95/EC)**, individuals to whom international protection has been accorded are entitled to a residence permit: the permit can last up to three years for refugees and one year for subsidiary protection. **Article 25** of the Directive entitles refugees and, in certain cases, beneficiaries of subsidiary protection, to travel documents.

CHAPTER II

THE RIGHTS OF MIGRANTS AT THE BORDER

By virtue of the sovereignty with which it is imbued, a state disposes of the authority to exercise power over its citizens, as well as all other persons present on its territory and subject to its jurisdiction, *inter alia*, by adopting laws, and applying sanctions for non-observance of laws.

Border checks may be defined as controls conducted by a State **at the legal limit of its full and exclusive territorial sovereignty**, in order to facilitate the mobility of legal migrants and to hamper the further mobility of those travelling without authorisation or who are acting in a criminal manner. In the context of border checks, international standards prohibit disproportionate use of violence, abuse of any nature, and arbitrary detention of migrants, as well as discrimination during decisions for entry.

States are free to determine the particular criteria according to which non-citizens may be admitted to and may reside within their territory. At the same time, in controlling admissions to the State and the borders thereof, **states are obliged to act in accordance with their international obligations**. Therefore, in some cases, states may be obliged by international law to permit an individual to enter or stay on their territory due to the circumstances in which that individual finds himself or herself. This may be the case, for example, if the individual in question fulfils the criteria to apply for refugee status, or if a person is permitted to enter into the territory for the purposes of family reunification.

This chapter will illustrate some basic human rights principles with which states must comply in the context of border management, explaining how these rights are applicable in the Moldovan context, and how they have been incorporated into the Moldovan legal order.

The first section will focus on analysing the powers and jurisdiction of the state over its borders, how far they extend and in what circumstances they are limited by the international legal obligations of the State. A subsection will discuss border controls in particular, and will endeavor to illustrate why a thorough understanding of the human rights standards that must be respected in the exercise of such controls is indispensible for individuals who are engaged in the exercise of such controls.

The following sections will describe a series of specific rights involved in the context of borders management. Firstly, the obligations of the State connected to the **right to life** will be treated. Thereafter, the **prohibition upon torture, including the key principle of *non-refoulement*** will be discussed in some detail. The State's obligations concerning **non-discrimination and due process** (the right of an individual to a fair trial and to challenge administrative decisions take against him or her before a judicial authority will also be examined.

A) The powers and jurisdiction of the State over its borders

Sovereignty and the equality of states represent two of the fundamental axioms inherent in the life and powers of States in the international framework.[198]

As a "political entity that has legal jurisdiction and effective control over a defined territory, (…) the authority to make collective decisions for a permanent population, [and] a monopoly on the legitimate use of force,"[199] **each State has the power and possibility to exercise its sovereignty in the means of its choosing**. In exercise of its sovereignty, each State is empowered to regulate the entry of migrants to its territory. The concept of sovereignty, moreover, has as one of its principal corollaries the fact that a State may exercise its jurisdiction over a specific territory and the population living there (who may be the State's citizens or otherwise). Since sovereignty – or at least, territorial sovereignty – ends at the State's border's, individuals who have entered within the borders of the State are thus subject to its sovereignty, and ergo its jurisdiction, even if they are at the very edge of both. The freedom granted to the State by sovereignty is particularly relevant in the context of migration and border management, granting the State a good deal of flexibility in how it goes about determining the procedures that grant access to its territory.

The border delineates the legal limit of the State's full and exclusive territorial sovereignty. Taking into account that the legal order in a State starts and ends at its borders and that any person on the state territory and within its jurisdiction must be protected and their (human) rights respected – and that the State is responsible for ensuring that such are respected on its territory [200] – the State has the right to control its borders and to impose limitations on freedom of movement.

However, States may regulate the access to their territory only within the limits set by international legal standards, devising specific border management policies in order to ensure both proper governance and compliance with the former. Such policies are traditionally developed with two main aims in mind:

1. to facilitate the flow of regular migrants; and
2. to prevent the illegal entry of irregular migrants.

198. Malcom N., Shaw, International Law, Cambridge University Press, 2008.
199. IOM Glossary on Migration, available at: http://publications.iom.int/bookstore/free/IML_1_EN.pdf.
200. See Chapter 1.

The measures implemented by states may include for example the imposition of visa requirements to enter the territory of the country, the imposition of sanctions against irregular migrants who gain access to the territory, and the interdiction of irregular migration.[201]

While the connection between the concepts of territory and its sovereignty allow a State to regulate the management of its borders, the standards prescribed by international law impose a duty for States to craft sophisticated border management strategies, which should aim to facilitate the entry of legitimate travellers, to prevent the entry of irregular migrants, and to respect fundamental norms of human rights in so doing.

The exercise of jurisdiction, particularly at the border, can impact upon the human rights of individuals who may find themselves in such a location.[202] It is worth re-iterating that the power of a State to exercise its jurisdiction over those persons present in its territory not only allows the State to issue regulations with which individuals are obliged to comply, but also imposes on the State the responsibility to ensure and protect the human rights of all persons within its jurisdiction, irrespective of their nationality.[203] In this context it becomes important to establish according to which criteria a person should be considered as subject to a State's jurisdiction, and which areas must be considered as constituting the territory of the State for this purpose. (e.g. territorial waters, airport transit zones).

Specific issues related to the definition of jurisdiction and the powers of a State over its borders (and migration flows transiting through such borders) arise in relation to:

i. the concept of extra-territorial jurisdiction;

ii. refugee status; and

iii. the regulation of transit zones.

(i) With regard to the concept of **extra-territorial jurisdiction**, the European Court of Human Rights (ECtHR) has established that, although jurisdiction is primarily territorial in nature,[204] it also has an extra-territorial applicability when the State exercises its control over an area outside its borders or when the state

201. IOM, Glossary on Migration (op. cit.).
202. B. Bogusz et al. (eds.). Irregular Migration and Human Rights: Theoretical, European and International Perspectives, Martin Nijhof, 2004.
203. Article 2(1) of the ICCPR; Article 2(1) of the CRC; Article 7 of the ICRMW; Article 1of the ECHR.
204. ECtHR, Bankovic and Others v. Belgium and Others, Application No. 52207/99, Judgment of 12 December 2001.

exercises, legally or illegally, authority or control over an individual.[205] Therefore, a State also has the obligation to respect and protect the rights of persons who may not have entered its territory, but who have come within the authority and control of the State. In another judgment, the ECtHR clearly acknowledged that when State authorities intercept a boat, even when the boat is outside the state's territorial waters, the state exercises jurisdiction over all persons on the boat and must thus ensure the protection of their rights.[206] This case law demonstrates that the test as to whether a person is within the jurisdiction of a State is primarily one of **control**. As a result, the placement of border outposts slightly outside the jurisdiction of a State – for example, on the territory of a neighboring State, on the basis of an agreement with that State – may not entail that the original State is absolved from responsibility concerning the human rights of individuals who come into contact with State agents in such border outposts.

(ii) With regard to State jurisdiction and **refugee status**, the definition of jurisdiction – and therefore the responsibility of the State for refugees is relevant for the applicability of the Refugee Convention, which establishes a regime of rights and responsibilities for refugees. In most cases, only in case an individual's claim to refugee status is examined *before* he or she is affected by an exercise of state jurisdiction (for example, penalisation for 'illegal' entry), can the State be sure that its international obligations incumbent by virtue of the Refuge Convention are met. To impose penalties (for example, for illegal entry to the State's territory) without due regard to the specific situation of each applicant (for example, making an assessment as to whether they may qualify for the status of refugee) can violate the obligation of the State to ensure and to protect the human rights of every individual within its territory or subject to its jurisdiction.[207]

(iii) With regard to **transit areas**, migrants are also considered subject to the jurisdiction of the state when they are present in an 'international zone' or *'zone d'attente'* of an airport.

According to the ECtHR (Amuur v. France[208]), a State may be responsible for persons who find themselves in a transit zone.

Transit areas typically have a number of specific common features. In such areas, the apparatus available to migrants may be more limited in terms of access to migration officials, legal advice, and even accommodation.

205. Ibid., Öcalan v. Turkey (GC), Application No. 46221/99, Judgment of 12 May 2005.
206. Ibid., Medvedyev and Others v. France (GC), Application No. 3394/03, Judgment of 29 March 2010; see also Hirsi Jamaa and Others v. Italy, Application No. 27765/09, Judgment of 23 February 2012.
207. Article 2(1) of the 1966 International Covenant on Civil and Political Rights.
208. ECtHR, Amuur v. France, Case No. 17/1995/523/609, Judgment of 20 May 1996

However, it should be noted that such features – which may have the practical effect of making them difficult environments for migrants – do not diminish the responsibility of the State towards such individuals who find themselves within such areas.

Traditionally there are two main locations for transit areas:

1. international airports, if a temporary accommodation area for an immigrant is needed until a decision is made on the immigrant's access to the state's territory; and
2. remote and insular areas upon denial of entry.

However, in the Moldovan case, the latter category will not be of particular relevance, due to the fact that, without a seaward border, Moldova does not possess any insular areas, though it is clear that remote border crossings may exist.

The following categories of persons may be amongst those who tend to arrive in transit areas:

1. foreigners without documents (or those who have destroyed their documents during the course of their journey);
2. foreigners without a valid passport, without a visa, or whose names feature on lists, including lists of undesirable persons (subject to an interdiction of entry and stay);
3. applicants for international protection (including victims of trafficking, potential asylum seekers, persons in need of temporary protection or refugees);
4. irregular migrants detained by authorities in the border area; and
5. (unaccompanied) minors and women.

A state is responsible for the protection of all persons on its territory, as well as all persons under the state's effective control.

The legal regime governing the Republic of Moldova's borders was established by the Law on State Border of the Republic of Moldova, which entered into force in 2012, having repealed the previous 1994 law on the border of Moldova. It regulates:

1. the methods for mapping the state's borders;
2. the border area;
3. the state border guard;
4. the conditions for the movement of persons, commodities and other goods across the border, as well as their means of transport; and
5. fisheries and the management of fishing at the State's maritime borders.

Law No. 200 on the regime concerning foreigners in the Republic of Moldova of 16 July 2010 stipulates the general conditions for entry and exit of foreign citizens and grants the right to permanent or temporary stay. It also deals with foreigners' documentation and evidence; personal data protection and management; the legal regime of foreign minors; access to studies; repatriation to the origin country; and competent authorities in the particular area. **Compliance of this legal provision with international human rights standards is ensured by Article 4 of the Moldovan Constitution**.

With regard to refugees in particular, and the determination of refugee status at the border, the key legal provisions, in addition to the protections provided by the Moldovan Constitution, are Law No. 270 on asylum in the Republic of Moldova of 18 December 2008, Law No. 273 on identity documents of the National Passports System of 9 November 1994, and Government Decision No. 626 on Refugees' Identity Documents of 28 June 2005. Law No. 270 on asylum in the Republic of Moldova establishes the legal framework for foreigners, stateless persons, and beneficiaries of a form of protection in the Republic of Moldova, as well as the procedure for granting, rejecting or cancelling protection. Based on the law's provisions, the competent authorities shall ensure access to the territory of the Republic of Moldova for each foreigner at the border from the moment the foreigner expresses in writing or orally his or her will to enter the country to seek protection. The law also regulates the principle of *non-refoulement*, according to which no asylum seeker or beneficiary of a form of protection can be expelled or returned from the border or from the territory of the Republic of Moldova without a due examination as to whether they face a risk of persecution. The competent authorities must also respect

the principle of the family unification, the modalities of which are prescribed by the relevant legal provisions.

In order to make a determination of the status of a particular individual, and to decide whether that individual should be permitted to remain within the territory of a State, it may in some circumstances be necessary to detain the individual in question for a limited period of time. Detention – as a deprivation of the freedom of movement – is discussed in detail in Chapter 3 of this volume. However, for the moment, it suffices to offer a few observations concerning detention at the border, and more particularly in transit areas.

Detention in transit areas is allowed under strictly defined circumstances.

Deprivation of freedom of movement is limited from a legal perspective at the level of the Council of Europe, binding the Member States (including Moldova): the detention must be justified on the basis of one of the situations listed in Article 5 ECHR (see Chapter 3 for details). This category includes persons detained in order to prevent their illegal access to the territory or persons undergoing a removal or extradition procedure. Various grounds are provided in Moldovan law to justify the deprivation of liberty of irregular migrants (detention to prevent unauthorised entry; detention to implement removal; detention for irregular entry, exit or stay; detention to establish identity and nationality, et cetera). However, the mere presence of one of these circumstances does not necessarily mean that detention is justified under national law. Other conditions, such as a necessity or proportionality test, may be required by domestic legislation or jurisprudence. The ECHR stipulates in Article 5(4) that '[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

In Amuur v. France, the ECtHR decided that detention in an airport transit area must be limited in duration and cannot be excessively extended and applied to those who have not committed a crime.

The limits of sovereignty: border controls

States habitually invest in border management systems designed to achieve two important objectives: to facilitate the mobility of legal migrants and to hamper the mobility of those travelling without authorisation or in a criminal manner. In this regard, states take measures to control their borders while ensuring full respect for human rights.

International law on human rights protects migrants at the border from possible physical and psychological violence from border police or other authorities, including disproportionate violence in relation to confinement and protection against excessive and inappropriate checks on the body. In this context, **the sovereignty and jurisdiction of each State is limited, as they can be exercised only in compliance with international standards of protection of human rights**. With regard to border management, in fact, international standards are set both with respect to general conduct during border controls and with respect to specific issues such as data protection and in connection to the most relevant human rights (namely the right to life, the prohibition upon torture, non-discrimination and due process).

The prescribed standards for general conduct during border controls and the specific issue of data protection are described in the following paragraphs, while the following sections of the chapter are dedicated to the analysis of the most relevant human rights in connection with border management.

Border checks

In order to exercise control over their borders, States develop border management policies, which represent an exercise of their sovereignty. In the general performance of border checks States must respect the standards set by international law. Some of those standards are listed in the following section.

> **The duty for the national authorities to respect human rights standards also applies during border checks.**

In several reports, the Committee against Torture (CAT) condemned the disproportionate use of violence, the existence of abuses (of any kind) and the arbitrary detention of migrants, as well as discrimination during decisions concerning the

entry to State territory of migrants.

> The CAT ascertained the charges against Greece in relation to 'Continuing allegations of excessive use of force and firearms, including cases of killings and reports of sexual abuse, by the police and, in particular, border guards. Many of the victims are reportedly Albanian citizens or members of other socially disadvantaged groups (…).'[209]

The rights prescribed by the ICCPR must be respected during border checks and fall under the monitoring system of the UN Human Rights Committee, which has shown a willingness to balance legitimate State interests in national security with fundamental human rights, and to apply a proportionality test in so doing.

> In the case of Ranjit Singh v. France, the UN Human Rights Committee considered that the obligation of a Sikh man to remove his turban in order to have his official identity photo taken amounted to a violation of Article 18 ICCPR. The Committee did not accept the argument that the requirement to appear bareheaded in an identity photo was necessary to protect public safety and order.[210]

At the level of the Council of Europe, the CoE Commissioner for Human Rights issued a recommendation in 2001[211] asserting that:

1. Everyone has the right, on arrival at the border of a Member State, to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud.

2. On arrival, everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where appropriate, to lodge a request for asylum. (…). The practice of *refoulement* "at the arrival gate" thus becomes unacceptable.

3. As a rule there should be no restrictions on freedom of movement. Wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures.

209. Rapport A/60/44 (2004) CAT, Greece, para. 47.
210. CCPR/C/102/D/1876/2009, Human Rights Committee, 102nd session, 11–29 July 2011, available at http://www.ccprcentre.org/doc/OP1/Decisions/102/1876%202009%20France_en.pdf.
211. CommDH/Rec(2001)1 of 19 September 2001.

The European Court of Human Rights has also dealt with a good number of cases involving border checks, stating that **a balance must be struck between individual rights, and the right of the State to conduct the necessary procedures at its borders.**

In El Morsli v France, the requirement for a Muslim woman to remove her headscarf for an identity check at a consulate was found not to violate her right to freedom of religion per Article 9 of the ECHR.[212]

In Phull v. France,[213] the ECtHR concluded that the claim of a Sikh who was compelled to remove his turban during a security check at an airport was manifestly ill-founded, since it considered the removal of the turban without any doubt to be necessary to safeguard public safety.

The ECtHR also set out a **general duty of the individual to co-operate with the border authorities.**

In Sarigiannis v. Italy,[214] the ECtHR decided that a person is obliged to cooperate with the police during border control procedures, even if there is no reason to suspect that the person seeks to commit a crime. However, although Article 3 does not exclude the application of force by policemen during the questioning process, the application of force should be proportionate and necessary.

The ECtHR has also held that **migrants at the border are in a particularly vulnerable situation, which may render violations of their human rights more serious than would otherwise be the case.**

In the Zontul v. Greece case,[215] the ECtHR concluded that the rape of a migrant prisoner by a border guard is a very serious form of ill-treatment, given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim; and held that this behaviour generates a deep psychological trauma that is liable to cause degrading and humiliating feelings, amounting to torture.

212. ECtHR, El Morsli v France 15585/06, 4 March 2008;
213. ECtHR , Phull v. France, Decision of 11 January 2005.
214. Ibid., Sarigiannis v. Italy, Application No. 14569/05, Judgment of 5 July 2011.
215. Ibid., Zontul v. Greece, Application No. 12294/07, Judgment 17 January 2012

Moldova is subject to the standards set by the UN system, and is also subject to the jurisdiction of the ECtHR. As such, it is obliged to provide for adequate procedures, in order to ensure that the rights of migrants at the border are respected. In accordance with the provisions of Article 19 of Law No. 215/2011 on the state border of the Republic of Moldova, 'border control is carried out with full respect for human dignity without distinction of race, nationality, ethnic origin, language, sex, religion, opinion, political affiliation, wealth or social origin'. Similar provisions are included in the code of ethics for the border police, which states that 'in the enforcement of coercive actions by the border guard, human dignity will be respected'.

Both international human rights law and Moldovan domestic legislation serve to protect migrants at borders from possible physical and psychological violence from the border police or other authorities, including disproportionate violence in relation to confinement and protection against excessive and inappropriate checks on the body. Any violations of such standards may result in a legal action before the Moldovan courts, or, in case of exhaustion of domestic remedies, the ECtHR.

Provisions under European Union Law (provided for comparative purposes)

While **all members of the European Union are also Council of Europe Member States, and are thus subject to the jurisdiction of the ECtHR on the basis of the ECHR** – thus being subject to identical obligations as the Republic of Moldova, it is clear that **a deeper level of integration has been achieved within the EU with respect to border management.** The following section will provide an overview of the main provisions in this regard.

Article 77 of the Treaty on the Functioning of the European Union (TFEU) provides that the EU shall develop a policy to ensure:

1. the elimination of checks of persons, whatever their nationality, when crossing internal borders within the EU;
2. the efficient monitoring of crossing of the EU's external borders; and
3. the gradual introduction of an integrated management system for external borders.

The **Schengen Borders Code** stipulates that all non-EU nationals are subject to checks at the borders of EU Member States, and that EU citizens may undergo a minimum check (although they may also, on a non-systematic basis, be further checked against national and European databases). EU citizens and EEA nationals are not obliged to carry a passport; any valid travel document will suffice. Third country citizens who already enjoy the freedom of movement (for example, family members of EU citizens) should also only be subjected to minimal checks (Article 3 and Article 7). **These specialised procedures must nonetheless respect the fundamental principle of human dignity, and procedures must be provided by each State to ensure an effective means of redress for individuals whose rights are not respected**.

> In Mohamad Zakaria v. Latvia,[216] the CJEU reiterated that border control tasks must be carried out with full respect for human dignity. Although the Schengen Borders Code obliges Member States to establish a means of redress only against decisions on refusal of entry, the Court noted that in order to fully respect human dignity, Member States must provide appropriate legal remedies in their domestic legal systems. In the same case, the CJEU affirmed that this principle obliges Member States to establish a means for persons to seek redress only for decisions that rejected the application for entry.

In order to strengthen and coordinate the surveillance of the EU's external borders and promote integrated border management, Council Regulation (EC) 2007/2004 established the agency **Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union)** in 2005[217]. Six years later, the European Parliament and the European Council, through Regulation (EU) 1168/2011, mandated Frontex to develop and implement its Fundamental Rights Strategy and designate a Fundamental Rights Officer. Later in 2011, the Frontex Management Board endorsed its Fundamental Rights Strategy, according to which respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management. It further stated that Frontex is fully committed to developing and promoting a shared understanding of fundamental rights among the entire EU border guard community and to apply this understanding in cooperation with third countries. The EU has taken considerable steps to ensure that

216. CJEU, Case C23/12 Mohamad Zakaria, Judgment of 17 January 2013. Case C-23/12, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0023
217. European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (for more details check: http://frontex.europa.eu/)

Frontex improves its compliance with international human rights law. Following the judgment of the Court of Justice of the European Union (CJEU) annulling Council Decision 2010/252/EU,[218] the EU established new rules and guidelines for Frontex sea operations.

B) The right to privacy and data protection

In recent decades, information technology has experienced an ever-expanding sphere of influence within society and now extends into the most private realm of individuals' lives.

While **immigration authorities require a certain amount of personal information in order to make an informed decision** regarding the entry and stay of non-citizens on the territory of a State, **limits to how information may be collected and stored are imposed by international human rights norms**. There is also a significant degree of overlap between immigration and criminal procedures around the world. For example, within the European Union, the Schengen Information System II (SIS II) stores the personal biographic and biometric data of persons who have been involved in a serious crime or who may not be allowed to enter the EU. Even taking into account the need for the respective public authorities to have access to a person's data, the collection of data from natural persons could represent an infringement on their right to a private life, a right which is guaranteed by various international and regional instruments.[219]

The right to respect for privacy and family was first set out in Article 12 of the Universal Declaration of Human Rights (UDHR), which includes the right to protect a person's privacy, identity (e.g. social security number), name, gender, dignity, appearance, feelings, and sexual orientation. Similarly, **Article 17 of the International Covenant on Civil and Political Rights** (ICCPR) stipulates that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' It further states that '[e]veryone has the right to protection of the law against such interference or attacks.' The same wording is used in Article 14 of the Convention on Migrant Workers to protect migrant workers and their families from arbitrary interference with their family life and privacy. Article 16 of the Convention on the Rights of the Child and Article 22 of the Convention on the Rights of Persons with Disabilities also specifically guarantee privacy rights for children and disabled persons.

218. Ibid, Case C-355/10, 5 September 2012.
219. Inter alia, Article 12 UDHR; Article 17 ICCPR; Article 8 ECHR

The ECtHR has held that the **simple storing of data on an individual can interfere with an individual's private life** as understood by Article 8 of the ECHR. **The degree of interference depends on the nature of the data, the scale of the data collection, the further use of the data and the transfer of the data to other countries**.[220] However, there are limits on when the court will find a violation of Article 8:

> In the Dalea v. France case,[221] a Romanian citizen was prohibited from entering Germany because of his record in the SIS II database, stating that he was refused entry to the Schengen territory. The record was created on grounds of public safety. The applicant addressed an administrative court with the request that his record be deleted. The court rejected his request without providing any well-grounded reason for the creation of the record. The ECtHR considered his request as being inadmissible based on Article 8 due to the fact that he had the possibility to contest the proportionality of this measure before different national courts.
>
> The Nada v. Switzerland case[222] concerned a Swiss entry and transit ban imposed on Mr Youssef Moustafa Nada, a dual Italian and Egyptian citizen, by virtue of his inclusion in 2001 on a list of individuals and entities purportedly associated with al-Qaeda, which had been developed by a UN Security Council committee and adopted in Switzerland by the 'Taliban Ordinance'. Mr Nada lived in Campione d'Italia, an Italian enclave of about 1.6 km², which is surrounded by the Swiss canton of Ticino, and was therefore effectively prevented from leaving his community. The ECtHR found that his rights under Articles 8 and 13 of the Convention had been infringed.

The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Data Protection Convention) establishes the guiding principles on this matter and applies to all activities, including data storage at the border.[223]

220. ECtHR, Leander v. Sweden, Application No. 9248/81, Judgment of 26 March 1987.
221. Ibid., Dalea v. France, Application No. 964/07, Judgment of 2 February 2010.
222. Ibid.
223. As regards the Data Protection Convention, the provisions of Articles 2 and 3 apply to all activities, including law enforcement, dealing with personal data, ranging from collection to destruction, and including disclosing and merely holding data. In addition, these provisions apply to all information about identifiable individuals in the form of text, images or sound. In conformity to Article 8, individuals have the right to: know whether their personal data is being processed, have access to the data, have inaccurate data corrected

Moreover, CoE Recommendation No. R (87) 15 of the Committee of Ministers to Member States regulating the use of personal data in the police sector specifies that:

1. **personal data should be limited to what is needed 'for the prevention of a real danger or the suppression of a criminal offence';**
2. **sensitive data should only be collected 'if absolutely necessary for the purposes of a particular enquiry'; and**
3. **data should only be used for police purposes.**

The access of the individual concerned to his or her data may be refused only where 'indispensable' for police purposes, or to protect the individual or others.

Moldovan law also devotes considerable attention to the right to privacy. According to Article 28 of the Moldovan Constitution, '[t]he State shall respect and protect the intimate, family and private life.' **All persons within the jurisdiction of the state, without discrimination, benefit from this right and have the right to seek redress in court if their rights are violated.**

According to Law No. 982-XIV of 11 May 2000 on access to information, **the protection of the private life of an individual includes:**

1. the right of a person to give or to refuse consent for the disclosure of their personal information; the right of a person to participate in the decision-making process as an equal partner;
2. the right to privacy;
3. the right to review and amend inadequate, inaccurate, incomplete and irrelevant information;
4. the right to not be automatically identified during the decision-making procedure on the disclosure of information; and
5. the right to address the courts on matters relating to the violation of privacy.

The domestic legal framework refers not only to databases but also to their content (Law No. 17 of 15 February 2007 on personal data protection). The

and have unlawfully processed data blocked or erased. Derogations from data protection principles and the right of access are permitted in the interests of protecting state security, public safety and the monetary interests of the state; for protecting the individual concerned; or for protecting the rights and freedoms of others. These derogations must be 'provided for by law' and be 'necessary in a democratic society'. Article 9 states that there must be 'appropriate sanctions and remedies for violations' of domestic data protection.

data on a person's health condition or private life, as well as the data on criminal convictions, are special categories of personal data. The use of personal data is overseen by the National Centre on Personal Data Protection.

In relation to asylum applications in particular, Article 13 of Law No. 270 on Asylum in the Republic of Moldova refers to confidentiality. **All data and information concerning applications for asylum are confidential. The obligation to observe the principle of confidentiality applies to all authorities and organisations that carry out activities in the field of asylum**, third parties involved in the asylum procedure and those who accidentally come into possession of such data.

Even taking into account the need for the respective public authorities to have access to a person's data, the protection of the right to privacy and of data must be ensured according to international human rights standards.

Provisions under European Union Law (provided for comparative purposes)

While **all members of the European Union are also Council of Europe Member States, and are thus subject to the jurisdiction of the European Court of Human Rights on the basis of the European Convention of Human Rights** – thus being subject to identical obligations as the Republic of Moldova, it is again the case in this domain that the EU has also implemented further mechanisms in the field of data protection. The following section will provide an overview of the main provisions in this regard.

Rules on data protection and the respect of privacy are prescribed by the EU treaties.[224] Several information systems have been established for data collec-

224. The Lisbon Treaty introduced a general legal basis for 'rules on data protection' from Article 16 of the TFEU and also included the EU Charter of Fundamental Rights as a binding instrument, not only for EU institutions and bodies, but also for the Member States when acting on the basis of EU law. Article 7 of the EU Charter of Fundamental Rights contains the right to respect for an individual's private and family life, home and correspondence. Any limitation to this right must be provided for by law, must respect the essence of the rights and freedoms recognised by the Charter, and must be proportionate and necessary. Article 8 of the Charter contains the right to the protection of personal data. Specifically, it requires personal data to be processed fairly, for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. It also grants individuals the right to access their data that have been collected and the right to have them rectified, if needed. Compliance with these rules shall be ensured by an independent authority. Moreover, European legislation dealing with data protection also includes a number of targeted measures, such as directives. For example, Directive 95/46/EC (the Data Protection

tion, such as EURODAC, the Visa Information System (VIS), and the Schengen Information System (SIS):

EURODAC is a database of fingerprints of applicants for asylum and of irregular migrants within the EU. One of its main functions is to facilitate the application of the Dublin Regulation.[225] In 2009, the European Commission presented a proposal to give law enforcement agencies and/or Europol access to the EURODAC database. This proposal generated much discussion regarding concerns about the potential for increased stigmatisation and about the data protection implications of such a measure.

The Visa Information System (VIS) is a system which contains information about visa applicants, including photographs and fingerprints. It includes data on the visas of EU Member States and associated countries, applying a common policy on visas and contains only information on persons from countries that are on the 'black list' according to Regulation No. 574/1999.

The Schengen Information System (SIS) is the largest information system for public security in Europe. In 2013, **SIS II** was introduced. SIS II allows for the exchange of information between national border control, customs and police authorities, and thus helps to ensure that the crossing of borders can take place in a safe environment. The SIS II database assists in the implementation of entry bans that prevents persons from entering and staying in an EU country for a certain period of time. The duration of an entry ban is determined on a case-by-case basis. Each EU country can decide under which circumstances it will issue an entry ban, though this is subject to other provisions of EU law such as the Return Directive. Article 24 of Regulation 1987/2006 concerning the SIS II database defines two reasons for which third country nationals may be reported:

1. if the person is considered a threat to public policy, public security or national security; or

2. for the implementation of decisions related to immigration law.

Directive) harmonised national laws that require high-quality data management practices on the part of the 'data controllers'. It also guarantees a series of rights for individuals. Directive 2002/58/EC on privacy and electronic communications guarantees the processing of personal data and the protection of privacy in the electronic communications sector. Regulation 45/2001 deals with the protection of individuals with regard to the processing of personal data by the Union institutions and bodies and the free movement of such data. Lastly, Council Framework Decision 2008/977/JHA requires personal data processed in the framework of police and judicial cooperation in criminal matters to be protected.

225. EU legal provision that establishes the criteria for identifying the Member State responsible for the examination of an asylum claim within the European Union, developed mainly "to deter multiple asylum claims and to determine as quickly as possible the responsible Member State to ensure effective access to an asylum procedure" (Regulation No. 604/2013). See also http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html

A number of concerns have been expressed at the European level regarding these three EU databases. Registering information on asylum applications or recording if a person was detained for crossing the EU border risks creating specific categories of individuals based purely upon their migration status, which may potentially be susceptible to producing discriminatory effects.[226] However, the risk of such a result is mitigated by the presence of clear rules, limiting both in terms of time and in terms of substance, the information that can be stored concerning individuals based upon the systems discussed above.

The operational management of EURODAC, VIS and SIS II is overseen by the European Data Protection Supervisor (EDPS), which monitors EU institutions and bodies when they process personal data to ensure that they comply with data protection principles. The EDPS also advises the main EU institutions on new legislation that may have an impact on the protection of personal data.[227] These systems help to ensure that individual rights are not overly infringed via migration management systems. There are clear rules concerning what data can be stored and for how long. For example, for the collection, transmission and comparison of fingerprints of applicants for international protection, States may only store and use such data for a maximum of 72 hours (extendable in certain instances by a further 48 hours), with restrictions on how and when the data may be used.

Finally, it is noteworthy that on 28 February 2013, the EU Commission proposed a 'smart borders package'[228] to accelerate, facilitate and reinforce border check procedures for foreigners travelling to the EU. The package consisted of a 'Registered Traveller Programme' and an 'Entry/Exit System' that would simplify procedures for frequent third country travellers at the Schengen external borders and enhance EU border security. The Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme (RTP) would enable frequent travellers from third countries to enter the EU via simplified border checks, subject to pre-screening and vetting. The Proposal for a Regulation establishing an Entry/Exit System (EES) to register the entry and exit data of third countries nationals crossing the external borders of EU Member States would require the time and place of the entry and exit of third country nationals travelling to the EU to be recorded.

226. E. Guild, Criminalisation of Migration in Europe: Human Rights Implications, https://wcd.coe.int/ViewDoc.jsp?id=1579605.
227. See Regulation (EU) No 603/2013, Chapter 2, Article 9 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0603&from=EN
228. See ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/index_en.htm.

C) The right to life

Amongst the various human rights that assume particular relevance in the context of border management, the right to life may be mentioned.

"Every human being has the inherent right to life"[229] and "[n]o one shall be arbitrarily deprived of his life"[230]. As formulated, the right to life **represents the supreme human right, constituting the base for all the other human rights and is absolutely non-derogable in peacetime.**

The right is protected under Article 3 UDHR, Article 2 of the ECHR, Article 6 of the ICCPR, and also by proxy, via Article 4 of the Moldovan Constitution. Further, **Article 24 of the Moldovan Constitution explicitly guarantees the right to life and to physical and mental integrity and provides that the state shall guarantee these rights.**

A corollary of this right is that **arbitrary deprivation of life is prohibited**, and it is a duty of each State not only to refrain from breaching the right through its action, but also to actively protect those individuals that are subject to its jurisdiction from any threat to human life, including "malnutrition, life threatening illness, (…) or armed conflict"[231]. In this sense, States not only bear the responsibility to respect the right to life, but also have the obligation to take positive measures to ensure the right to life (and e.g. the duty to investigate suspicious deaths).[232]

The application of the right to life in the context of border management becomes relevant in the following circumstances, rendering a series of actions unlawful:

1. Any arbitrary deprivation of life in the form of killings by State agents, when they contain the elements of unlawfulness, injustice, capriciousness and unreasonableness.[233] In practical terms, an action may violate the right to life when it is disproportionate to the requirements of law enforcement and a violation of the right to life can also derive form an omission in case authorities fail to take adequate measures to protect such right.[234]

229. Article 6(1) of the 1966 International Covenant on Civil and Political Rights.
230. Ibid.
231. Manfred Nowak, UN Covenant on Civil and Political Rights. CCPR Commentary (2nd rev. ed.). Kehl am Rhein: Engel, 2005. Pp. xxxix + 1277.
232. See e.g. Article 6 ICCPR and Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. Jacobs, White and Ovey: the European convention on human rights. Oxford University Press, 2014.
233. Manfred Nowak, CCPR Commentary (op. cit.).
234. Ibid.

2. Deaths in custody[235] and enforced disappearances, i.e. "the abduction and detention of persons followed by a refusal to disclose their fate and whereabouts"[236]

3. Extradition or expulsion ordered in breach of the *non-refoulement* principle. Therefore, in a situation in which a migrant faces a real risk to be sentenced to death if extradited or expelled to another State (a sub-paragraph will deal with this specific topic later in the chapter), a violation of the right to life – in addition to the *non-refoulement* principle, typically examined in the context of the prohibition upon torture – may occur.

D) The prohibition upon torture

> **The prohibition of torture represents a fundamental human right, protected under several provisions of international law and constituting *ius cogens*** (i.e. peremptory and binding irrespective of the circumstances, without any restriction).

Specifically, torture is prohibited under Article 5 of the Universal Declaration of Human Rights, as well as under Article 7 ICCPR and Article 3 ECHR, and by proxy, via Article 4 of the Moldovan Constitution, due to the application of Monist doctrine.

> **The prohibition upon torture does not merely encompass torture, but also inhuman and degrading treatment. While degrading treatment is considered less severe than inhuman treatment, which, in turn is considered less severe than torture, all such conduct is equally prohibited.**

The notion of torture encompasses "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act s/he or a third person has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"[237].

235. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. The European convention on human rights (op. cit.).
236. Ibid.
237. IOM, Glossary on Migration (op. cit.).

In other words, the prohibition of torture concerns cases – in general involving a minimum level of severity – of aggravated and deliberate, cruel, inhuman and degrading treatment or punishment inflicted by a State agent.[238]

In the context of border management, a number of different forms of treatment may violate the prohibition of torture. For example:

1. when migrants are subjected to controls and procedures that involve suffering or humiliation (even in situation in which the intention is not to humiliate and inflict suffering) and especially in situations in which any breach of the prohibition can be considered aggravated by racial motives given that it involves foreigners;[239]
2. when migrants are subjects to acts in the course of arrest and police detention that exceed what is reasonable and necessary in specific circumstances;
3. when migrants are detained in prison conditions that diminish their dignity and amount to degrading treatment, including a disproportionate use of solitary confinement (see also Chapter 3 on Detention).[240]

Non-refoulement

In certain circumstances, the prohibition of torture can encompass an extraterritorial effect.[241] This connects the prohibition with the positive obligation of States to respect the principle of *non-refoulement*. The notion of *non-refoulement* is derived from the French term 'refouler', which means to return or reject. This notion was originally developed on the basis of refugee law: *non-refoulement* refers to the obligation of states to not return a refugee to 'the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[242] The principle is formulated differently in the various international treaties – most prominently, the Refugee Convention – but always refers to the prohibition to return a person to a country where they are subject to a real risk of persecution.

238. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. The European convention on human rights (op. cit.).
239. Ibid.
240. Ibid.
241. Ibid.
242. 1954 UN Convention relating to the Status of Refugees, Article 33(1)

This entails that the life of the individual should be at risk or that they would be exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment (including the death penalty).

This principle applies to the return of persons found within the state's territory, both those who have entered legally and those who have entered irregularly, as well as those at the border who have attempted to enter, regularly or irregularly, and have been refused entry.

A more thorough explanation of the principle of *non-refoulement* will be provided in Chapter 4, which deals with the expulsion of migrants, refugees and asylum seekers. Relevant here is the fact that this principle also applies to the arrival of migrants and asylum seekers at the border, or more generally when the individual is subject to the jurisdiction of the state, which is understood as including certain maritime zones (territorial sea and contiguous zone), when a vessel is intercepted in the high seas, and in transit areas.

The most common cases involve persons who would be in danger of being ill-treated by the authorities of their state of origin, should they be returned.

However, the principle of *non-refoulement* applies may in certain circumstances also apply to threats of human rights violations by non-state actors, such as family members or armed groups, particularly in circumstances where the authorities of the State to which the migrant is returned are unable to provide sufficient protection against such threats.

In H.L.R. v. France, the Court stated that: '[o]wing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."[243]

243. Ibid., H.L.R. v. France (GC), Application No. 24573/94, Judgment of 29 April 1997.

The risks that migrants incur if expelled need to be **personal**, which means that they must be **individually targeted** or fall within a **category of people** particularly subject to abuses (M.S.S. v. Belgium and Greece). Exceptionally, the principle can be applied if the country to which the migrant should be expelled is affected by a **general climate of violence.**

Finally, it should be noted that the principle of *non-refoulement* also applies when migrants and asylum seekers are sent back to a country that could deport them to another country where they would be in danger.

In Sharifi and Others v. Italy and Greece, the ECtHR found that returning to Greece thirty-two Afghan nationals, two Sudanese nationals and one Eritrean national, who had entered Italy illegally from Greece, violated Article 3 in combination with Article 13, as they reasonably feared subsequent deportation to their respective countries of origin, where they faced the risk of death, torture or inhuman or degrading treatment.[244]

Nobody may be returned to a country where their life would be threatened or they could be exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment (including the death penalty).[245]

244. Ibid, Sharifi and Others v. Italy and Greece, Application No. 16643/09, Judgment of 21 October 2014.
245. This follows from Moldova's accession to the ECHR.

E) Non-discrimination

The non-discrimination principle is reflected in all international human rights treaties, and it requires the equal treatment of an individual or group irrespective of their particular characteristics, securing the enjoyment of all the other human rights and freedoms protected by international standards. It is included, for example in Article 2 of the Universal Declaration of Human Rights (UDHR), in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 14 and Protocol 12 of the European Convention on Human Rights, and also indirectly via Article 4 of the Moldovan Constitution due to the application of Monist doctrine in the Moldovan legal system, while several further articles of the Constitution devote specific attention to non-discrimination.

> Traditionally, **impermissible grounds for discrimination include factors such as race and colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status**.[246] With regard to these factors, the notion of discrimination encompasses any **"failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."**[247]

In practical terms, the role of the principle of non-discrimination in the context of border management is important, albeit limited. On the one hand, the principle does not prohibit the development of policies that differentiate between the entry of citizens of a State and that of migrants onto the territory of that State. On the other hand, the principle prohibits any unequal treatment based on unreasonable, disproportionate and non-objective criteria.[248]

The following paragraphs offer a brief overview of the role of the principle of non-discrimination with regard to border management issues in the framework various legal regimes that are of relevance in the Moldovan context.

With regard to entry onto the territory of a State, the UN Human Rights Committee stated that 'the Covenant [the ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is, in principle, a matter for the State to decide whom it will admit onto its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, pro-

246. Cf. Article 2, Universal Declaration of Human Rights
247. IOM, Glossary on Migration (op. cit.).
248. Manfred Nowak, CCPR Commentary (op. cit.).

hibition of inhuman treatment and respect for family life arise.'[249] The statement reaffirms that **although a general right of entry is not recognised per se for non-nationals via the ICCPR, States must nevertheless implement border migration policies in compliance with the principle of non-discrimination.**

> The question of entry was directly at issue in the Aumeeruddy-Cziffra v. Mauritius case.[250] The CCPR examined the law on immigration in Mauritius, which automatically granted foreign women marrying men from Mauritius the right to stay, but did not do the same for foreign men marrying women from Mauritius. It was ascertained that the immigration law was discriminatory on grounds of gender, thus infringing the ICCPR.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) specifically prohibits racial discrimination.[251] As already stated, in the area of immigration controls, differentiations between citizens and non-citizens are permissible, but the application of such controls on the basis of race, colour, or ethnic or national origin must also be subject to scrutiny on the basis of the ICERD. Racial discrimination is explicitly forbidden by Article 5 in the context of the right to leave and return to one's country, as well as the freedom of movement and residence within a country. Although the right of entry for non-nationals is not explicitly mentioned in the Article, it is worth noting that the list of rights and freedoms included is not to be considered exhaustive.[252]

At European level, the ECHR mirrors the ICCPR and the ICERD with regard to non-discrimination, and it applies to all persons within a State Party's jurisdiction, regardless of nationality or legal status. The principle of non-discrimination in the ECHR is found in Article 14. **The ban on gender discrimination and racial discrimination in border matters have been specifically affirmed by the ECtHR.**[253]

> In Abdulaziz, Cabales and Balkandali v. United Kingdom,[254] the ECtHR decided that immigration rules that do not allow a woman's husband to stay with her or join her in the UK, but that allow the wife of a man in a similar situation to do so, constitute gender-based discrimination.

249. General Comment No. 15 on the position of aliens under the Covenant.
250. Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius, Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981).
251. ICERD, Article 2.
252. CERD, 48th Session, 1996, General Recommendation XX on Article 5 of the Convention.
253. ECtHR, East African Asians v. United Kingdom, Application Nos. 4715/70; 4783/71; 4827/71, Decision of 6 March 1978.
254. Ibid., Abdulaziz, Cabales and Balkandali v. United Kingdom, Plenary, Case No. 15/1983/71/107-109, Judgment of 24 April 1985.

In the 2005 case of Timishev v. Russia, the ECtHR underlined that 'in any event, (...) no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[255]

Racial or ethnic profiling, for example of the Roma community travelling in State Parties of the ECHR, can also be considered as treatment constituting discrimination. The European Commission against Racism and Intolerance (ECRI) defines racial profiling as 'the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities'[256]; and in this context the discrimination of those of Roma origin and the recognition that **"minorities need special and collective protection if their human rights are to be respected"**[257] become of particular relevance in light of the jurisprudence of the European Court of Human Rights.

Several articles of the Constitution of the Republic of Moldova refer to non-discrimination and equality. **Article 16 stipulates that all citizens of the Republic of Moldova shall be equal before the law and public authorities, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property or social origin, and Article 19(1) stipulates that foreign citizens and stateless persons shall enjoy the same rights and duties as citizens of the Republic of Moldova.** According to Article 16, Article 19(1), and Article 41(2) of the Constitution, all public authorities must observe the principle of equality when dealing with citizens of the Republic of Moldova, foreign citizens, stateless persons and legal persons. Similarly, the Constitution also prohibits according to a person a special legal treatment in order to place them in a subordinate or superordinate position compared to other citizens. Article 4 of the Constitution requires constitutional provisions on human rights and freedoms to be interpreted and applied according to the international instruments ratified by the Republic of Moldova. However, unlike the international instruments in the field of human rights to which the Republic of Moldova is party, the list of prohibited criteria for discrimination from Article 16(2) is somewhat limited. Nonetheless, given the provisions of Article

255. ECtHR, Timishev v. Russia, Applications Nos. 55762/00 and 55974/00, Judgment of 13 December 2005.
256. ECRI, General Policy Recommendation on combating racism and racial discrimination in policing.
257. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. The European convention on human rights (op. cit.).

4, **agents of the Moldovan State are expected to act in accordance with the obligations incumbent by virtue of Moldova's international (human rights) obligations.**

In relation to asylum-seekers at the border, the principle of non-discrimination is listed as a general principle in the Law on Asylum in the Republic of Moldova, which stipulates in article 10 that 'the provisions of the national legislation shall apply to asylum-seekers and beneficiaries of a form of protection without discrimination as to race, nationality, ethnic origin, language, religion, political membership, social category, beliefs, gender, sexual orientation or age.' This principle is also reiterated in Law No. 274 of 27 December 2011 on integration of foreigners in the Republic of Moldova.

The principle of non-discrimination is reflected in all international human rights treaties. The principle does not impair States from implementing border management policies that treat nationals and foreigners in a different manner, but limits the exercise of their sovereignty, imposing some characteristics to such differentiation: only differentiations that are reasonable, proportional and objective do not breach the non-discrimination principle.

Provisions under European Union Law (provided for comparative purposes)

The principle of non-discrimination and equality is featured in several articles of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).[258] This principle has also been reiterated through secondary legislation and through the case law of the Court of Justice of the European Union (CJEU).[259] Here, the principle is generally re-iterated in similar terms to the ECHR. **However, there are some areas where non-EU citizens are excluded from the application of the standards included in EU legislation.** For example, the freedom of movement of persons in the EU applies only to citizens of EU Member States (See Chapter 1 for a more detailed treatment in this regard). In addition, the non-discrimination directives contain various ex-

258. Article 2 and 3(3) of the TEU.
259. See the Gender Equality Directive (2006/54/EC); the Employment Equality Directive (2000/78/EC); and the case Seda Kücükdeveci v. Swedex GmbH & Co. KG., ECJ, Case C-555/07, Judgment of the Court (Grand Chamber) of 19 January 2010.

clusions in their application for third country nationals. For example, the Racial Equality Directive (2000/43/EC) only focuses on ensuring racial equality and does not cover differences in treatment based on nationality or the legal status of third country nationals.

F) Due process

The notion of due process requires legal proceedings to be conducted in accordance with "generally accepted rules and principles providing for the protection and enforcement of private rights, including notice and the **right to a fair hearing before the court or administrative agency with the power to decide the case**"[260].

Among the international legal instruments that guarantee the due process of law, the following provisions may be mentioned: Articles 7 and 10 of the UDHR, Article 14 of the ICCPR, and Article 6 of the ECHR. The right affirms that all individuals are entitled to legal protection by law in respect of the non-discrimination principle,[261] and that they shall be equal before courts and tribunals.[262] Its content renders it "a pithy epitome of what constitutes a fair administration of justice"[263], as a fundamental element of the notion of the rule of law.

In the context of border management the procedural standards that must be guaranteed in compliance with the due process rule ensure to migrants:

1. in case of criminal charges and disputes over rights and obligations in suits at law, the right to a fair (i.e. in respect of the principle of "equality of arms"[264]) and a public hearing by an independent, competent and impartial tribunal. This represents the so-called **right of access to court**, which must be read together with the **necessity for the effectiveness of court proceedings.** The overall requirements of a fair hearing include the necessity for a certain degree of procedural equality, the right to have an adversarial trial with disclosure of the evidence to both parties, **a general right to appear in person at the trial** (in situation in which the presence has an essential importance for the fairness of the procedure) and to effectively participate in the proceedings.[265]

260. IOM, Glossary on Migration (op. cit.).
261. See e.g. Article 7 UDHR.
262. See e.g. Article 14 ICCPR.
263. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. The European convention on human rights (op. cit.).
264. Manfred Nowak, CCPR Commentary (op. cit.).
265. Cf. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. The European convention on human rights (op. cit.).

2. **the right to a public judgment** (i.e. to the publicity of the proceeding as well as to the public pronouncement of the judgment), with the exception of situations in which the interests of a child must be protected;[266] the judgment must also derive from a proceeding of reasonable length (judgment in a reasonable time), especially in situations that regards detainees;

3. **the right to be informed of the charges she or he is facing**, and in a language she or he can understand (with the free assistance of an interpreter);[267]

4. **the right to a sufficient amount of time to prepare her or his defense and to communicate with a counsel.**[268]

These guarantees affect border management policies in several aspects. For example, to ensure protection against expulsion, no arbitrary expulsion decisions may be taken (Article 13 of the ICCPR) and all aliens who are lawfully in the territory and subjected to an expulsion order should have access to legal representation in order to potentially contest and submit the reasons against their expulsion[269], unless compelling reasons of national security exist to limit or preclude the applicability of this right[270].

266. See e.g. Article 14 ICCPR.
267. See e.g. Article 14 ICCPR.
268. See e.g. Article 14 ICCPR.
269. Concluding Observations on Denmark, CCPR/CO/70/DNK, 31 October 2001, para. 17.
270. V.R.M.B. v. Canada, CCPR/C/33/D/236/1987, 18 July 1988, para. 6.3; Karker v. France, CCPR/C/70/D/833/1998, 26 October 2000, para. 9.3.

CHAPTER III

THE RIGHTS OF MIGRANTS IN DETENTION

The reasons for which migrants may find themselves being detained (by the receiving State) are myriad. **States must, first and foremost, uphold the law,** and as such, migrants – like any other individual within the jurisdiction of a given State – may be detained on suspicion of having committed an infringement of the law of the country in question. However, beyond this, **a number of further types of detention specific to migrants are commonly practiced**. Individuals suspected of visa violations, illegal entry or unauthorised arrival, and those subject to deportation and removal are sometimes held in detention until a decision is made by immigration authorities to grant a visa and release them into the community, or to repatriate them to their country of departure/origin. Practices of compulsorily detaining or imprisoning persons seeking asylum, or who are considered to be illegal immigrants or unauthorised arrivals into a country are also not uncommon. There may also be a need to imprison individuals who are considered to be flight risks, that is, those who are deemed likely to abscond if not placed into custody.

In relation to detention of migrants, **States must respect certain human rights guarantees. These primarily relate to the treatment of the migrants while they are being detained.** In this regard, States must ensure that migrants are afforded the most fundamental of human rights, namely that their right to life is protected, and that they are not subjected to torture, inhuman or degrading treatment. Beyond this, they are further obliged to ensure certain minimum standards of treatment to detainees, notably in relation to the right to health. The right to be informed of the reasons for one's detention, *habeas corpus* and the prohibition upon arbitrary detention also constitute important guarantees that States must ensure to migrants in detention, while special provisions apply to groups that are identified as vulnerable, such as victims of torture, women and children.

These rights are protected by an overlapping and multi-layered series of legal regimes, including a variety of international treaties, *ius cogens* and customary international law, the Council of Europe legal apparatus – and particularly the European Convention on Human Rights – and of course Moldovan domestic law. The rights themselves also overlap to a significant degree. Nonetheless, an effort has been made in this chapter to discuss the relevant provisions in a systematic manner.

The chapter begins with a brief recapitulation of the right to life, which was already treated in some detail in the previous chapter, explaining precisely why respect for this right is essential in the context of detention. Thereafter, the second section presents a more detailed overview of the prohibition on torture, inhuman and degrading treatment, including the obligation of the State to maintain cer-

tain standards amounting to humane treatment during detention. A third section provides an overview of human dignity, and the right to health in the context of detention.

The chapter then moves on to the matter of procedural guarantees, presenting a synopsis of the prohibition of arbitrary detention, the right to be informed of the reasons for one's detention, *habeas corpus* and judicial review. The chapter concludes with an examination of particular guarantees that are accorded to groups identified as vulnerable.

A) The right to life

Amongst the various human rights that are of relevance in the context of detention, the right to life certainly warrants mention. This right has been discussed in detail in Chapter 2, but a brief synopsis will be provided here.

"Every human being has the inherent right to life"[271] and "[n]o one shall be arbitrarily deprived of his life"[272]. As formulated, the right to life **represents the supreme human right, constituting the base for all the other human rights and is absolutely non-derogable in peacetime**.

The right is protected under Article 3 of the Universal Declaration of Human Rights (UDHR), Article 2 of the European Convention on Human Rights (ECHR), Article 6 of the International Covenant on Civil and Political Rights (ICCPR), and also by proxy, via Article 4 of the Moldovan Constitution. Further, **Article 24 of the Constitution explicitly guarantees the right to life and to physical and mental integrity and provides that the state shall guarantee these rights**.

A corollary of this right is that **arbitrary deprivation of life is prohibited**, and it is a duty of each State not only to refrain from breaching the right through its actions, but also **to actively protect those individuals that are subject to its jurisdiction from any threat to human life, including "malnutrition, life threatening illness, (…) or armed conflict**"[273]. In this sense, States not only bear the responsibility to respect the right to life, but also have the obligation to take positive measures to ensure the right to life (and e.g. the duty to investigate suspicious deaths).[274]

The application of the right to life in the context of detention becomes relevant in the following circumstances, rendering a series of actions unlawful:

1. Any arbitrary deprivation of life in the form of killings by State agents, when they contain the elements of unlawfulness, injustice, capriciousness and unreasonableness.[275] In practical terms, an action may violate the right to life when it is disproportionate to the requirements of law enforcement and a violation of the right to life can also derive form an omission in case authorities fail to take adequate measures to protect such right.[276]

271. Art. 6(1) ICCPR.
272. Ibid.
273. M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd ed. (hereinafter Nowak), Engel 2005, p. 1277.
274. See e.g. Article 6 ICCPR and Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *Jacobs, White and Ovey: the European convention on human rights*. Oxford University Press, 2014.
275. Nowak, p. 1277.
276. Ibid.

2. Deaths in custody[277] and enforced disappearances, i.e. "the abduction and detention of persons followed by a refusal to disclose their fate and whereabouts".[278]

3. Extradition or expulsion ordered in breach of the *non-refoulement* principle. Therefore, in a situation in which a migrant who is detained by the State authorities faces a real risk to be sentenced to death if extradited or expelled to another State (a violation of the right to life – in addition to the *non-refoulement* principle, typically examined in the context of the prohibition upon torture – may occur).

In the context of detention, the active duty of the State to protect the individuals within its jurisdiction from threats to their lives is particularly acute. Through the duties owed by the State to individuals who are subject to detention, *inter alia*, to provide healthcare, humane conditions and freedom from torture, inhuman and degrading treatment (all of which are discussed in detail below), the State must see to it that, as a result of detention, no individual is arbitrarily deprived of his or her life, *inter alia*, through malnourishment, mistreatment, or abuse.

B) The prohibition upon torture and the Need To Ensure Humane Conditions

The prohibition of torture represents a fundamental human right, protected by a variety of provisions of international law and constituting *ius cogens* (i.e. a norm that is peremptory and binding irrespective of the circumstances, without any restriction).

Specifically, torture is prohibited under Article 5 UDHR, as well as under Article 7 ICCPR and Article 3 ECHR, and by proxy, via Article 4 of the Moldovan Constitution, due to the application of Monist doctrine.

The prohibition upon torture does not merely encompass torture, but also inhuman and degrading treatment. While degrading treatment is considered less severe than inhuman treatment, which, in turn is considered less severe than torture, all such conduct is equally prohibited.

The notion of torture encompasses "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such pur-

277. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *The European convention on human rights* (op. cit.).
278. Ibid.

poses as obtaining from him/her or a third person information or a confession, punishing him/her for an act s/he or a third person has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"[279].

> **In other words, the prohibition of torture concerns cases – in general involving a minimum level of severity – of aggravated and deliberate, cruel, inhuman and degrading treatment or punishment inflicted by a State agent.**[280]

In the context of detention, a number of different forms of treatment may violate the prohibition of torture. For example:

1. when migrants are subjected to controls and procedures that involve suffering or humiliation (even in situation in which the intention is not to humiliate and inflict suffering) and especially in situations in which any breach of the prohibition can be considered aggravated by racial motives given that it involves foreigners;[281]
2. when migrants are subjects to acts in the course of detention that exceed what is reasonable and necessary in specific circumstances; and
3. when migrants are detained under conditions that diminish their dignity and amount to degrading treatment, for example:
    a) Disproportionate use of solitary confinement;
    b) Failure to acknowledge and deal with repeated prisoner requests;
    c) Application and enforcement of the rules of detention in an arbitrary and unequal manner, creating a climate of suspicion and mistrust among the detainees; and
    d) Entering cells or rooms of the detainees suddenly and without reason.

In order to fulfil their obligation to prohibit torture and inhuman or degrading treatment, states must ensure adequate accommodation capacity – detained persons should not be accommodated in overcrowded conditions. Therefore, centres must not exceed their design capacity.

279. IOM, Glossary on Migration (op. cit.).
280. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *The European convention on human rights* (op. cit.).
281. Ibid.

Derogations from the **prohibition upon torture** are not allowed under any circumstances.

The principal legal framework of relevance to the prohibition upon torture is provided by the **Council of Europe system**.

> In M.S.S. v. Belgium and Greece,[282] the ECtHR considered that there was a violation by Greece of Article 3 due to the conditions of detention and living in Greece, and a violation by Greece of Article 13 (right to an effective remedy), in conjunction with Article 3, due to deficiencies in the asylum procedure used by the applicant. Considering the shortcomings of the asylum procedure and the conditions of detained persons living in Greece, which could not have been unknown to the Belgian authorities at the time of the expulsion of the applicant, the Court stated that there was also a violation by Belgium of Article 3 due to the exposure of the applicant to risks related to these deficiencies and detention and living conditions.

The above case demonstrates that detention conditions in the receiving country in cases of returns of migrants who face detention may also be relevant to the authorities of the sending State and their obligations in terms of international human rights law.

Beyond the prohibition upon torture, States are obliged to ensure **humane conditions** for all those held in detention, and to ensure the **fulfilment of certain minimum standards.**

The international standards stipulating minimum conditions for people held in detention are represented by the:

1. Universal Declaration of Human Rights;
2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
3. United Nations Resolution 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
4. United Nations Resolution 40/33 (United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')); and

282. Ibid., *M.S.S.* v. *Belgium and Greece* (GC), Application No. 30696/09, Judgment of 21 January 2011.

5. Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

This body of instruments requires that detainees **must be treated with dignity and respect. The conditions of detention must respect their human rights,** including the right to family life and privacy; the right to health care, accommodation, and adequate food; the right to cultural life; the right to leisure; the right to religion; and the right to education.

Therefore, the competent authorities should ensure decent accommodation, i.e. accommodation that meets all national and local health regulations. The **sanitary facilities** should enable every detainee to fulfil their needs in a clean and decent way. Detainees should have individual beds, **men and women should be separated, and families should be provided with special facilities.** Each detainee should receive food with a nutritional value adequate to the detainee's age and physical condition and, on request, food that adheres to their religious practices. Adequate medical care should be ensured for all detainees and, when needed, they should be transferred to appropriate medical facilities. Furthermore, **detainees should undergo a medical examination as soon as possible in order to identify survivors of torture and detainees with other special needs so that they can be given proper care.** Detainees who are children must be offered education similar to the education offered to citizens of that country – though children should, as a rule, not be detained at all, and if they are detained, this should be a measure of last resort and for as short a duration as possible[283] – and adult detainees should have the opportunity to continue their studies or have access to vocational education. Lastly, detainees should have access to recreational activities while in detention.

The Council of Europe largely replicates the above standards, with the minimum conditions for people held in detention regulated by the:

1. European Convention for the Protection of Human Rights and Fundamental Freedoms;

2. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

3. Recommendation Rec(2006)2 of the Committee of Ministers to Member

283. Committee on the Right of the Child, General Comment No. 6, http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf, para. 61.

States on the European Prison Rules; and Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse; and

4. Guidelines on human rights protection in the context of accelerated asylum procedures (Article XI), adopted by the Committee of Ministers on 1 July 2009.

These standards include, *inter alia*[284]:

1. adequate facilities, suited for the specific situation of detention in the context of immigration control, and therefore different from those of convicted prisoners or persons in pre-trial detention[285];
2. detention conditions appropriate to the detainee's situation, e.g. a hospital for a mental health patient,[286] or accommodation which allows family members to be reunited;
3. access to toilets, showers, and more generally a clean, safe and healthy environment in terms of space, light, ventilation, outdoor activities, etc.[287];
4. contact and communication with the outside, one's lawyer and one's family[288]; and
5. access to religious services, separate areas for religious worship and opportunity for the detainees to practice their religion.

At domestic level, **Article 24 of the Constitution of the Republic of Moldova** provides that no one shall be subject to torture or other cruel, inhuman or degrading punishment or treatment.

Following the ratification by Moldova on 30 March 2006 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under Law No. 52 of 3 April 2014 to protect people against torture and other cruel, inhuman or degrading punishment, **the Council for the Prevention of Torture was established within the Ombudsman's Office as a national mechanism to prevent torture.**

284. Other examples of relevant case law are: *Peers* v. *Greece*, ECtHR, Application No. 28524/95, Judgment of 19 April 2001; *Dougoz* v. *Greece*, ECtHR, Application No. 40907/98, Judgment of 6 March 2001; *Kalashnikov* v. *the Russian Federation*, ECtHR, Application No. 47095/99, Judgment of 15 July 2002; and *Van der Ven* v. *the Netherlands*, ECtHR, Application No. 50901/99, Judgment of 4 February 2003.
285. ECtHR, *Saadi* v. *United Kingdom* (GC), Application No. 13229/03, Judgment of 29 January 2008.
286. Ibid., *Aerts* v. *Belgium*, Application No. 25357/94, Judgment of 30 July 1998.
287. Ibid., *Orchowski* v. *Poland*, Application No. 17885/04, Judgment of 22 October 2009.
288. Ibid., *Ilascu and Others* v. *Moldova and Russia* (GC), Application No. 48787/99, Judgment of 8 July 2004.

Detainees must be treated with dignity and respect. Detention conditions may be considered, in certain circumstances, as torture or inhuman or degrading treatment.

Provisions under European Union Law (provided for comparative purposes)

In general, detention must comply with all fundamental rights norms. The detention conditions of **asylum seekers** are regulated in Article 10 of the revised Reception Conditions Directive (2013/33/EU).

The **Return Directive**[289] states that detention shall, as a rule, take place in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and must resort to accommodation in a prison, the third country nationals in detention shall be kept separated from ordinary prisoners. Third country nationals in detention shall be allowed, on request, and in due time, to contact legal representatives, family members and competent consular authorities. Emergency health care and essential treatment of illness shall also be provided.

C) Dignity, physical integrity and the right to health and medical assistance

The concept of **human dignity** is contained, in some form, in almost all major international human rights instruments. However, a specific determination of its substantive content is difficult. In the broadest sense, it refers to the **right of every individual not to be subjected to humiliation or degradation**. Closely connected is the right to **physical integrity**. Particularly in the context of migration, it prohibits the use of excessive force during detention, or of especially degrading methods to overcome an individual's resistance. As a result, it is closely linked to the prohibition upon torture and the right to humane treatment in detention, discussed above.

The **right to health** includes both migrants' freedom to control their own health and their right to access a system of health protection which produces equality of opportunity for people to enjoy the highest attainable level of health.[290] The obligations of states regarding the right to health include:

289. Directive 2008/115/EC.
290. CESCR General Comment No. 14, contained in document E/C.12/2000/4, para. 8.

1. The prevention, treatment and control of epidemic, endemic, occupational and other diseases; and
2. The creation of conditions that would assure to all medical service and medical attention in the event of sickness.

Also part of the right to health is the right to find within state underlying preconditions for living a healthy life, such as:

1. Access to safe and potable **water**;
2. Adequate **sanitary facilities**;
3. An adequate supply of safe and nutritious **food**; and
4. Safe and reliable **accommodation.**

The right to health should be understood as a dynamic concept in the sense that it is receptive to new medical discoveries, scientific progress, and changing environmental conditions.[291] In the context of detention, these principles create duties for States to provide detention facilities that ensure that an adequate level of health will be assured to – and can be maintained by – all detainees.

The right to dignity and physical integrity is not subject to any exceptions. The right to health is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society**. Therefore, in the context of detention, the right to health is extremely unlikely to be subject to any derogations.

Articles 2 and 3 ECHR are again relevant in this context. In particular, an assessment must be made as to whether the injury or harm that public officials may have caused to individuals within their custody and control is of sufficient gravity to invoke Article 3 ECHR. Moreover, an individual's particular vulnerabilities, such as those deriving from **age** or from **mental health**, must be taken into account.[292]

291. E. Riedel, *Health, Right to, International Protection*, Max Planck Encyclopedia of International Law, para. 31.
292. ECtHR, *M.S.S.* v. *Belgium and Greece* (GC), Application No. 30696/09, Judgment of 21 January 2011; ECtHR, *Darraj* v. *France*, Application No. 34588/07, Judgment of 4 November 2010.

In Popov v. France, concerning the administrative detention of a family for two weeks at the Rouen-Oissel Centre in France pending their removal to Kazakhstan, the Court found that the authorities had not considered the inevitably harmful effects on the children (aged five months and three years) of being held in a detention centre in conditions that exceeded the minimum level of severity required to fall within the scope of Article 3.

The ECtHR has held that Member States not only have 'negative' obligations not to harm individuals, but also 'positive' **obligations to protect** individuals against loss of life or serious injury, including from third parties or from themselves, as well as to provide access to medical services.

In Kaya v. Turkey,[293] the ECtHR reiterated that the Member State must consider the force employed and the degree of risk that may result in the loss of life.

In Ilhan v. Turkey,[294] the Court found that Article 3 of the ECHR rather than Article 2 was breached when the individual suffered brain damage as a result of the use of excessive force upon arrest.

D) The prohibition of arbitrary detention

Detention is arbitrary if it does not comply with the requirements that are prescribed by law, or if no such requirements exist at all, thus leaving it to the authorities to detain persons at their own discretion. The human right to liberty does not, strictly speaking, grant freedom from detention, but obliges States to set up **substantive preconditions and procedural requirements for detention** in legal terms and to comply with them in practice. The notion of arbitrariness is interpreted more broadly than just meaning 'against the law', and includes elements of unreasonableness and proportionality.[295] The internationally accepted standard for deprivations of liberty includes, in addition to those guarantees discussed earlier in this chapter, that the detention must be legal.

Legality of detention: The grounds of detention and its procedure must be **prescribed by law** before the detention occurs. Thus, every deprivation of liberty must be authorised by a **general norm of law**, either an act of parliament, or a

293. ECtHR, *Kaya* v. *Turkey*, Application No. 22729/93, Judgment of 19 February 1998.
294. Ibid., *Ilhan* v. *Turkey* (GC), Application No. 22277/93, Judgment of 27 June 2000, paras. 77 and 87.
295. O. Dörr, *Detention, Arbitrary*, Max Planck Encyclopedia of International Law, para. 3.

long-lasting, transparent custom.[296] The norm on which the detention is based must be legally binding, of a general character and accessible to the public. In substance it must be sufficiently specific and precise to allow the persons concerned to foresee the consequences of their actions.[297]

Secondly, **every act of deprivation of liberty itself must conform with that law.**

Thirdly, every detention must have a **substantive reason recognised by the applicable international human rights norm**. Art. 5 (1) ECHR contains an exhaustive list of grounds of detention that are considered legitimate under the ECHR. Among them are, for example, criminal justice, immigration, infectious disease control, and enforced psychiatric treatment.

Finally, every deprivation of liberty must in any other respect be **free of arbitrariness**. This general requirement includes elements of justice and reasonableness. The ECtHR, for example, considers the **proportionality** of every measure of detention to be an essential element. It repeatedly held that 'the detention of an individual is such a serious measure that it is only justified where **other, less severe measures,** have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.'[298]

The prohibition of arbitrary detention is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society.**

The ICCPR does not include specific provisions for situations where deprivation of liberty is permissible, although it accepts in principle that detention as a response to illegal entry may be admitted, and is not necessarily arbitrary. The state must show that detention is **reasonable, necessary and proportionate** in each individual case and must establish that detention is not arbitrary[299] (Article 9 of the ICCPR). Deprivation of liberty may be 'arbitrary' if it is not **legally based** or if it does not **follow procedural requirements.** In order to determine the necessity and proportionality of the detention, it must be shown that other less restrictive measures have been considered and have proven to be insufficient.

296. ECtHR, *Drozd and Janousek v. France and Spain*, Application no. 12747/87, paras. 105-7.
297. O. Dörr, *Detention, Arbitrary*, Max Planck Encyclopedia of International Law, para. 12.
298. ECtHR, *Witold Litwa v. Poland*, Application no. 26629/95, para. 78.
299. *ICCPR available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx*.

In the case A. v Australia,[300] the UN Human Rights Committee stressed that there must be a reasonable justification for detention and that detention should not last longer than the period for which this justification is applied. The Committee also stated that detention can be justified upon entry in order to verify the person's identity, although the detention may become arbitrary if it is unduly prolonged. Moreover, the Committee decided that: 'the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all circumstances of the case, for example, to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.' The CCPR observed, however, that every decision to keep a person in detention should be **periodically open to review** in order for the grounds justifying the detention to be assessed.

The Committee for Civil and Political Rights (CCPR) also applies this reasoning to asylum cases.[301] In accordance with international refugee law, **the detention of asylum seekers is permitted, but only under the specific conditions provided for in Article 31 of the 1951 Refugee Convention**. The UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention[302] state that detention may be permitted:

1. in order to verify a person's identity;
2. to determine the basis on which a request for protection has been made;
3. to protect national security and public order; and
4. if the persons have used false documents.

300. *A* v. *Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997).
301. *C. v. Australia*, 13/11/2002, CCPR/C/76/D/900/1999. 'C.', an Iranian asylum seeker, was detained after his arrival in Australia and subsequent asylum claim (the decision of which was still pending) under Australian law. C. claimed that his detention breached Article 9(1) of the ICCPR. 'The Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of Article 9, paragraph 1.' (paragraph 8.2)
302. http://www.unhcr.org/505b10ee9.html.

However, the detention of refugees for other purposes, such as to discourage other potential asylum seekers, to discourage asylum seekers during their attempt to apply for asylum, or for punitive reasons, contravenes refugee law, including the Refugee Convention, customary international law, and the ECHR. [303]

Although UNHCR opposes the detention of refugees and asylum seekers, and the 1951 Refugee Convention expressly forbids governments from penalising refugees for illegal entry, certain States detain refugees who have not yet officially requested asylum, asylum seekers awaiting a decision on their status, rejected asylum seekers, irregular migrants, and migrants waiting to be deported. They may be held in various stages of the process of migration or of becoming a refugee:

1. before being officially admitted to the border;
2. during the processing of applications requesting permission to remain in the country (including the application for refugee status); or
3. before deportation.

The duration of this administrative detention varies from one state to another.[304]

Within the Council of Europe, the case law of the ECtHR makes it clear that a restriction to the freedom of movement will amount to a deprivation of liberty, depending on a series of 'factors such as the **nature, duration, effects and manner of execution** of the penalty or measure in question'[305].

The decision to detain a person must have a legal basis, which thus ensures that persons are protected against arbitrary decisions (ECHR Article 5(1) lit. f)). Specifically, this means that the detention must be in accordance with national laws and procedures, and that these laws and procedures must allow the individual to foresee to a large extent the consequences that enforcement of the law might have on them. However, the ECtHR found that if detention was applied as a **measure to prevent unauthorised entry or ensure deportation**, it is not necessary to prove that the detention of the person is reasonable, necessary or

303. See also UNHCR, *Detention Guidelines*, http://www.unhcr.org/505b10ee9.html, para. 21.
304. For example, the United Kingdom (Terrorism Act 2000, http://www.legislation.gov.uk/ukpga/2000/11, Section 41) allows detention for an indefinite amount of time in certain cases, while in Germany, administrative detention may only be ordered for a period of up to 12 months (Residence Act, http://www.gesetze-im-internet.de/englisch_aufenthg/index.html, Section 62(4)).
305. ECtHR, *Engel and others* v. *the Netherlands*, Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 2 June 1976.

proportionate.[306]

> In the Rahimi v. Greece case,[307] the ECtHR held that '[i]n principle, the length of […] detention – two days – could not be said to have been unreasonable with a view to achieving that aim [deportation]. Nevertheless, the detention order in the present case appeared to have resulted from automatic application of the legislation in question. The national authorities had given no consideration to the best interests of the applicant as a minor or his individual situation as an unaccompanied minor.'

The requirement that legislation on detention should be **accessible and precise, and that the detention being used as punishment (for example for non-compliance with domestic laws) should be foreseeable**, has special implications for migrants. The law should provide deadlines that apply to detention, and **clear procedures** for the revision or extension of detention. In addition, there must be **clear evidence** for the arrest of the individual or bringing the individual into custody.

> In the case Abdolkhani and Karimnia v. Turkey,[308] the ECtHR ruled that a law requiring non-citizens without valid travel documents to live in certain designated places does not provide a sufficient legal basis for their detention during the deportation process. In this case, the Court stated that in view of the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness.

The same reasoning applies also to cases involving **asylum seekers**:

Detention is permitted in the following specific situations connected to the migration process (ECHR, Article 5(1) lit. f):

1. to prevent unauthorised entry into the country; or
2. if a person is being deported or extradited.

306. ECtHR., *Chahal* v. *United Kingdom* (GC), Application No. 22414/93, Judgment of 15 November 1996.
307. Ibid., *Rahimi* v. *Greece*, Application No. 8687/08, Judgment of 4 April 2011.
308. Ibid., *Abdolkhani and Karimnia* v. *Turkey*, Application No. 30471/08, Judgment of 22 September 2009.

However, the laws and procedures must ensure that detention upon entry does not adversely affect the right of persons to apply for refugee status under international law.

Moreover, if there is a delay in carrying out a national court's release order, or if the proceedings are suspended for a significant period of time, arbitrary detention may result.

> The ECtHR ruled in Amuur v. France[309] that the 'retention' of asylum seekers in the international area of the airport, involving the restriction of movement and police surveillance for 20 days, amounts to a deprivation of liberty.
>
> In the Eminbeyli v. Russia case,[310] a period of three days to communicate the decision and to release the person was found to constitute a violation of Article 5(1)(f). The ECtHR held that although 'some delay in implementing a decision to release a detainee is understandable and often inevitable in view of practical considerations relating to the running of the courts and the observance of particular formalities (…) the national authorities must attempt to keep it to a minimum (…) [and] formalities connected with release cannot justify a delay of more than a few hours.'
>
> In the Saadi v. United Kingdom case,[311] the ECtHR noted that the applicant's detention for seven days in the centre of Oakington did not constitute a breach of Article 5(1) of the Convention given the serious administrative problems that the United Kingdom was facing with regard to the number of applications for asylum.

Similarly, if the authorities are not able to deport the person to the country of origin, because it would be a violation of the principle of *non-refoulement*, detention for the purpose of deportation can no longer be justified. The same principle applies when other legal or practical obstacles prevent deportation, such as the person being stateless with no other country willing to accept them. The ECtHR stressed that when the real purpose of detention is the transfer of the person for prosecution and trial in another state, then the detention is a 'disguise' for extradition and is thus arbitrary and contrary to Article 5(1)(f).[312]

309. ECtHR, *Amuur* v. *France*, Case No. 17/1995/523/609, Judgment of 20 May 1996
310. Ibid., *Eminbeyli* v. *Russia*, Application No. 42443/02, Judgment of 26 February 2009.
311. Ibid., *Saadi v. United Kingdom, No.13229/03, Judgement 29 January 2008,.*
312. Ibid., *Bozano* v. *France*, Application No. 9990/82, Judgment of 18 December 1986.

Under Moldovan domestic law, the restriction of a person's liberty shall be carried out according to Article 25 of the Constitution of the Republic of Moldova, which stipulates that **detainment or arrest of a person shall be allowed only by law and based on a warrant issued by a judge.** It covers all persons within the jurisdiction of the Republic of Moldova. According to the Constitution, the individual freedom and security of a person are inviolable. The search, detainment, or arrest of a person shall only be allowed pursuant to the procedures established by the law. The period of detention in custody may not exceed 72 hours. The arrest of a person shall be made on the basis of a warrant issued by a judge for a period of 30 days at most. The length of detention may be extended for up to 12 months, but only by a judicial authority. If reasons for detention or arrest no longer exist, the person concerned must be released without delay.

Law No. 200 of 16 July 2010 on the Regime for Foreigners in the Republic of Moldova provides in article 8(5) that *'if a foreigner who is not allowed entry to Moldova cannot leave immediately the state border crossing point, the authorised body shall order his/her accommodation in a place arranged for this purpose, until the reasons that make impossible his/her departure have ceased, but no later than 24 hours from the start of accommodation. If the reasons that make impossible such departure do not cease within 24 hours after the start of accommodation, the foreigner shall be handed over to the competent authority for foreigners under the law in order to leave the Republic of Moldova.'* **Article 64(1)** of the law defines taking a foreigner into public custody as *'a measure to restrict freedom of movement, ordered by the court against a foreigner who fails to carry out the return decision, or who could not be returned within the period prescribed by law, who illegally crossed or attempted to cross the border, who entered the country in the period of prohibition previously ordered, whose identity could not be established, who was declared undesirable or against whom expulsion has been ordered'*.

Any restriction to liberty must be reasonable, necessary, and proportionate. Detention is arbitrary if it is not provided for in law in a clear and exhaustive manner and if it does not follow specific procedural requirements. In the migration process, detention can be foreseen in three cases:

i. **in case of unauthorised entry to the country or overstaying one's visa or permit of stay;**

ii. **while awaiting a pending decision on asylum status (in limited circumstances); and**

iii. **pending deportation or extradition.**

Provisions under European Union Law (provided for comparative purposes)

The EU Charter of Fundamental Rights (CFR) affirms that everyone has a right to liberty and security.[313] Restrictions to this right during the migration process are allowed in two specific situations:

1. detention as a result of unauthorised entry (irregular migrants or asylum seekers under specific circumstances), including those who overstay the terms of their permit of stay; or

2. detention pending deportation or extradition.

1. **Migrants** trying to enter the territory of an EU country without fulfilling the requirements foreseen by the **Schengen Border Code**[314] are sometimes detained. EU Member States should ensure that the grounds for detention established at national level do not extend beyond the list of legitimate grounds delineated in Article 5(1) ECHR.[315] Regarding **asylum seekers**, the **Dublin Regulation**[316]

313. Article 6, EU Charter of Fundamental Rights.
314. Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).
315. Deprivation of liberty falling under the scope of Article 5(1)(f) of the ECHR is covered in Council Directive 2005/85/EC in Article 18, in Council Directive 2003/9/EC in Recital 10 and Articles 6(2), 13(2), and 14(8), and in Directive 2008/115/EC (Return Directive).
316. Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a

forbids detaining a person solely because they seek international protection. According to it, there is only one reason permitting Member States to lawfully detain a person: when there is a significant risk of absconding. Detention should be as brief as possible and subject to the principles of necessity and proportionality.

Other provisions addressing the detention of **asylum seekers** are included in the **Asylum Procedures Directive**,[317] which also prohibits Member States from detaining persons for the sole reason that they are asylum seekers, and in the **Reception Conditions Directive**,[318] which contains guarantees for detained asylum seekers and rules on the conditions of detention, as well as in the **Regulation (EU) No. 604/2013**, which provides six legal justifications (Article 8) for allowing EU Member States to detain migrants:

1. to determine or verify the applicant's identity or nationality;
2. to determine elements of the asylum application, which could not be obtained in the absence of detention, in particular where there is a risk of absconding;
3. to decide on the applicant's right to enter the territory;
4. if they are detained under the Return Directive and submit an asylum application to delay or frustrate the removal;
5. when the protection of national security or public order so requires; and
6. in accordance with Article 28 of the Dublin Regulation, which under certain conditions allows detention to secure transfer procedures under the Regulation.

2. Article 15 of the **Return Directive**[319] allows Member States to detain migrants only when they are 'subject to return procedures in order to prepare the return and/or carry out the removal process', and in particular when:

1. there is a risk of absconding; or
2. the third country national concerned avoids or hampers the preparation of the return or removal process.

stateless person (recast).

317. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

318. Directive 2013/33/EU of the European Parliament and of the Council, of 26 June 2013, laying down standards for the reception of applicants for international protection (recast).

319. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals.

Although Article 15 dictates that 'detention shall be for as short a period as possible', it does allow for the detention of a migrant for up to 6 months, with the possibility of extension for two further periods of 6 months if certain requirements are fulfilled. Detention shall be ordered by administrative or judicial authorities, in writing, and with reasons being given in fact and in law.

E) The right to be informed of the reasons for one's detention

> **All persons detained have the right to be promptly informed of the reasons for their detention and of any charge against them. This guarantee applies not only to persons who are arrested in respect of criminal proceedings, but to all forms of detention.**

That all persons detained should know why they are being deprived of their liberty, is intended to put them in a **position to challenge the lawfulness of their detention**. Therefore, detainees must be told, in **simple, non-technical language that they can understand**, the essential legal and factual grounds for their arrest.[320]

If the person detained is not a national of the detaining State, the detaining State must, at the request of the detained person, inform the consular post of the sending State, of which the detainee is a national, of the latter's detention.[321]

The right to be informed of the reasons for one's detention is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society**.

Article 9(2) ICCPR states that 'Anyone who is arrested shall be informed, at the time of arrest, of the **reasons for his arrest** and shall be promptly informed of any charges against him.' **These shall be presented in a language which the person understands.** Upon arrival, refugees, asylum seekers and migrants are particularly vulnerable. It is therefore essential to ensure their understanding of what is happening and their rights. In addition, lawyers must be present in order to speak directly with those who are newly arrived.

Article 5(2) ECHR established the right of a person to be informed of the reasons for the deprivation of liberty, and if the person is accused of a crime, the nature of the accusation. According to the case law, this information must be provided in principle at the time the action is carried out, or as soon as possible. The com-

320. O. Dörr, *Detention, Arbitrary*, Max Planck Encyclopedia of International Law, para. 22.
321. Art. 36(1)(b) Vienna Convention on Consular Relations, 596 UNTS 261.

petent authorities must immediately provide the detained person with information on their **rights**, including the **process of review or appeal** of the decision on detention. The ECHR echoes the requirement that information shall be presented in a language which the person understands.

In the Shamayev and Others v. Georgia and Russia case,[322] the ECtHR reiterated that Article 5, paragraph 2 requires that any person who is arrested must know why they are deprived of their liberty. This provision constitutes an integral part of the protection afforded by Article 5. Under paragraph 2, any person arrested shall be informed, in the shortest time possible and in a language which they understand, of the reasons for their arrest and of any charge against them, so as to be able to challenge the legality of the detention, in accordance with paragraph 4. Moreover, the content of the information submitted shall be evaluated individually. The Court also found that those provisions make no distinction between persons deprived of their liberty by arrest and those deprived of it in custody

In the Saadi v. United Kingdom case,[323] regarding the violation of Article 5(2), the Court held that the petitioner was informed for the first time through his representative about the real reason for his detention on 5 January 2001, after 76 hours of detention. The Grand Chamber found that Article 5(2) had been violated, as the 76-hours period was inconsistent with the obligation to inform the detainee 'in the shortest time possible'.

Moldovan domestic law provides that the detained or arrested person shall be informed without delay of the reasons for their detention or arrest, and notified of the charges against them. The notification of the charges shall be made only in the presence of a lawyer, either chosen by the defendant or appointed *ex officio* (Constitution of the Republic of Moldova, Article 26).

The detained person must be immediately informed, in a language they understand, of the reasons for their arrest and detention, and of their rights, including the process of review or appeal of the decision on detention.

322. ECtHR, *Shamayev and Others* v. *Georgia and Russia*, Application No. 36378/02, Judgment of 12 April 2005.
323. Ibid., *Saadi v. United Kingdom, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008.*

Provisions under European Union Law (provided for comparative purposes)

In addition to all of the guarantees provided by the international legal apparatus – since all EU Member States are also Council of Europe Member States – Article 8 of the recast Asylum Procedure Directive requires that Member States provide third country nationals or stateless persons with information on **how to apply for international protection,** as well as the necessary interpretation services to facilitate their application. They shall also ensure that organisations and persons **providing counsel** to applicants have access to the applicants present at external border crossing points, including transit zones.

According to the Return Directive, detention shall be ordered by administrative or judicial authorities, in writing, and with reasons given in fact and in law.

F) Due process, habeas corpus and judicial review

The notion of **due process** requires legal proceedings to be conducted in accordance with "generally accepted rules and principles providing for the protection and enforcement of private rights, including notice and the **right to a fair hearing before the court or administrative agency with the power to decide the case**"[324]. In the context of detention of migrants, this is ensured by a bundle of several rights:

1. The right to be allowed to submit the **reasons against the detention** to the competent authority (also called *habeas corpus* - "An action before a court to test the legality of detention or imprisonment");[325].
2. The right to have the **case reviewed** by an independent and impartial court or administrative authority in a procedure where the migrant can be represented; and
3. The right to **equality** before courts and tribunals.

With the exception of migrant workers, there are certain limited restrictions upon the circumstances in which foreigners not lawfully in the territory of the State cannot invoke these procedural safeguards. However, generally speaking, the right to due process can be suspended in case of a **public emergency** which **threat-**

324. IOM, Glossary on Migration (op. cit.).
325. This idea is based upon the *Magna Carta*, the Great Charter of 1215 in England, which restrained the King's power, and is seen as being one of the first ever protections of individual rights in law. IOM, Glossary on Migration (op. cit.)

ens the life of the nation and the existence of which is **officially proclaimed**, provided that such measures are **not inconsistent with their other obligations under international law** and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The ICCPR prescribes in Article 14 that '[e]veryone charged with a criminal offence has the right, in terms of full equality, (...) to **be judged without undue delay**'. Moreover, according to the ICCPR, authorities must **ensure the initial and periodic review** of the legal status of detained persons. In this respect, anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court to decide without delay on the lawfulness of their detention and their release if the detention is unlawful (Article 9, para. 4). However, the 'reasonable time' for judicial review of detention depends on the circumstances.

> In the Torres v. Finland case,[326] the UN Human Rights Committee established that 'Article 9, paragraph 4 (...) envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control. The Committee further notes that while Torres was detained under orders of the police, he could not have the lawfulness of his detention reviewed by a court. Review before a court of law was possible only when, after seven days, the detention was confirmed by order of the Minister. As no challenge could have been made until the second week of detention, the author's detention (…) violated the requirement of Article 9, paragraph 4 of the Covenant'.
>
> The Committee later stated in the case Mansour Ahani v. Canada[327] that a delay of nine and a half months to determine the lawfulness of detention was a violation of Article 9(4) of the ICCPR.

The UN Human Rights Committee has repeatedly emphasised that judicial review requires a genuine and not merely a formal examination of the reasons and circumstances of detention. The review process must meet the **standards of a trial**. Although it is not always necessary for the review to include the same procedural safeguards as those required for criminal or civil litigation, it must have a judicial character and provide a legal basis for the type of deprivation of liberty in question. In this respect, the procedure should be adversarial and must always ensure 'equality' between the parties.

326. Torres v. Finland, CCPR/C/38/D/291/1988, UN Human Rights Committee (HRC), 5 April 1990
327. *Mansour Ahani* v. *Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004).

With regard to **refugees and asylum seekers**, authorities also need to ensure their contact with **lawyers or representatives** from the local UNHCR office, national refugee bodies or other agencies and to allow these representatives access to detention centres (UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers[328]).

The Council of Europe System ensures a sophisticated system of protection of due process for those who are detained. The ECHR in Article 5(4) stipulates that any person deprived of their liberty by arrest or detention shall be entitled to **appeal** before a court to decide in the **short term** on the lawfulness of their detention and to order their release if the detention is not lawful. This aims to prevent arbitrary imprisonment and abuse. However, according to the case law of the ECtHR, if the custody decision itself was made by a judge, the individual in custody does not have a right to appeal, since the guarantee provided by Article 5(4) is observed from the beginning.

> In the M. and Others v. Bulgaria case, 'the Court reiterates that the Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness'. (para. 83)
>
> In Embenyeli v. Russia,[329] the ECtHR determined that a period of five months to process a review of detention was a violation of Article 5(4) of the ECHR.

The ECtHR determined that the judicial review should be wide enough to consider the essential conditions for lawful detention.[330] The review should be undertaken by a body which has the power to issue binding decisions that can lead, if applicable, to the person's release.[331]

Special procedures for judicial review of detention in cases involving national security or counter-terrorism can violate ECHR provisions.

328. See http://www.unhcr.org.au/pdfs/detentionguidelines.pdf.
329. ECtHR, *Eminbeyli* v. *Russia*, Application No. 42443/02, Judgment of 26 February 2009.
330. ECHR, Suso Musa v. Malta, App. No. 42337/12, para. 50.
331. Ibid., para. 51.

In the case of A. and Others v. United Kingdom,[332] the ECtHR found that the system of administrative detention review of individuals subject to immigration control or terrorism suspects, using special advocates who have access to the evidence in the file, without the prisoner being aware of the advocates, did not meet the requirements of Article 5(4) ECHR. The Court held that the prisoner should have access to sufficient information to be able to give adequate instructions to the lawyer. It is a violation of Article 5(4) to base the detention decision mainly on insubstantial evidence that is in the open, and material evidence that was largely inaccessible to the prisoner.

Basic principles of international law on human rights and international humanitarian law require that states **provide appropriate, effective and prompt remedies, including compensation, for wrongful detention**, if applicable.[333] Accordingly, people who have been wrongly detained are entitled to compensatory damages for unlawful detention (Article 9(5) of the ICCPR). Under the ICCPR, this means that whenever detention is considered 'illegal', it amounts to a violation of a law or is a violation of the ICCPR. Similar guarantees may be obtained via the ECHR.

Moldovan domestic law provides that the arrested person may lodge a complaint with a hierarchically superior court of law on the legality of the warrant, under the terms of the relevant law (Constitution of Republic of Moldova, Article 25). According to the Criminal Procedure Code of the Republic of Moldova, the term of a person's detention during a criminal investigation prior to the case going to court shall not exceed 30 days except in cases allowed by the Code. In exceptional cases, depending on the complexity of the criminal case, the seriousness of the crime, and the risk that the accused will flee or exert pressure on witnesses or destroy or damage sources of evidence, the duration of preventive detention during the criminal investigation may be extended up to 6 months if the person is charged with committing a crime for which the law sets a maximum punishment of 15 years of imprisonment. The detention may be extended up to 12 months if the person is charged with committing a crime for which the law sets a maximum punishment of 25 years of imprisonment or life imprisonment.

332. ECHR, *A. and Others* v. *United Kingdom* (GC), Application No. 3455/05, Judgment of 19 February 2009.
333. Cf. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/11/13/Add.1, p. 3.

Detained migrants and asylum seekers must be promptly enabled to initiate a legal process, undertaken by an independent and impartial judiciary body, to review the lawfulness of detention. Compensation for arbitrary detention must be ensured.

Provisions under European Union Law (provided for comparative purposes)

Article 47 CFR provides that any individual in a situation governed by EU law has the right to an effective remedy and to a fair and public hearing within a reasonable time.

The **Dublin Regulation** stipulates that the procedures provided under the regulation regarding a detained person should be applied as a matter of priority, within the shortest possible time period.

According to the **Reception Conditions Directive**[334], the detention of applicants shall be ordered in writing by judicial or administrative authorities. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of the detention, to be conducted *ex officio* at the request of the applicant.

Similarly, the **Return Directive**[335] requires that the detention shall be reviewed at reasonable time intervals either upon request by the third country national concerned or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

In the EU system, following the CJEU ruling in the Francovich case[336], EU Member States are required, under certain conditions, to provide compensation in appropriate cases for damages arising from a Member State's failure to comply with EU law.

334. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection
335. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
336. ECJ, Joined Cases C-6/90 and C-9/90 [1991] ECR I-05357, *Francovich and Bonifaci and Others* v. *Italian Republic*, 19 November 1991; ECJ, Case C-479/93 [1995] ECR I-03843, *Francovich* v. *Italian Republic*, 9 November 1995.

G) Special protection for vulnerable groups

The UNHCR guidelines on the detention of asylum seekers[337] recommend that alternatives to detention shall be considered for persons who would likely be seriously affected by detention. This category of persons includes **women, children, unaccompanied elderly persons, survivors of torture or other trauma, and people with physical or mental disabilities**. If these people are detained, special attention should be paid to the conditions of detention, provision of medical assistance, et cetera. **This principle is particularly important when detaining asylum seekers who have suffered torture, ill-treatment or other traumatic experiences**, sometimes with significant impact on their physical or mental health. Unique problems can sometimes occur when survivors of torture and trafficking, children, elderly persons or people suffering from a serious illness or disability are detained.

> In the case C. v. Australia,[338] the UN Human Rights Committee found that a violation of Article 9(1) of the ICCPR occurred on the basis that the state party had not demonstrated that, in the light of the applicant's particular circumstances, less invasive means of achieving the same ends were not available, i.e. the imposition of reporting obligations, sureties or other conditions which would take account of the applicant's deteriorating condition.

Under the CoE system, the need to ensure appropriate facilities for the categories mentioned above is stated in the Committee of ministers Recommendation N. R (1998) 7 on ethical and organisational aspects of health care in prison.

> **Failing to comply with adequate conditions would amount to inhuman or degrading treatment and would constitute a violation of Article 3 ECHR.**

337. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR, 2012, available at http://www.unhcr.org/505b10ee9.html
338. *C.* v. *Australia*, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002).

> In Musial v. Poland, the ECtHR stated that '[u]ndeniably, detained persons who suffer from a mental disorder are more susceptible to the feeling of inferiority and powerlessness. Because of this, an increased vigilance is called for in reviewing whether the Convention has been complied with. While it is for the authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used to preserve the physical and mental health of patients who are incapable of deciding for themselves, and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3 (...) the Court considers that the failure of the authorities to hold the applicant during most of his detention in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward has unnecessarily exposed him to a risk to his health and must have resulted in stress and anxiety'.[339]

A number of issues also arise regarding the detention of **stateless persons**, as it is difficult to ensure their return to their country of origin or to identify alternative places to which to transfer them. This may result in the detention of stateless persons for long periods of time as they await deportation, or as efforts are made to determine or resolve their legal status or right to remain in the country in which they find themselves. The principle that requires authorities to establish that the detention is justified while deportation is actively pursued is therefore particularly important for stateless persons. It will be more difficult for authorities to justify detention of stateless persons, because there is often no identifiable country to which they may be sent, thus rendering dubious any providing for the return or expulsion of such persons. Detention cannot be justified if there is no active or realistic progress on their transfer to another state.

Women are usually considered as a vulnerable group for being particularly exposed to certain kinds of threats. Various provisions are included in the ECHR, the Convention on the Elimination of All Forms of Discrimination against Women, and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

339. ECtHR, *Musial* v. *Poland*, Application No. 28300/06, Judgment of 20 January 2009.

In the Filiz Uyan v. Turkey case[340], the ECtHR considered that 'the insistence on the use of handcuffs during an examination by a gynaecologist, and the presence of three male security officers in the examination room during consultation, even behind a folding screen, were disproportionate security measures, when there were other practical alternatives'.

Children are also considered a vulnerable group due to their physical and mental immaturity.[341] Children should, as a rule, not be detained at all, and if they are detained, this should be a measure of last resort and for as short a duration as possible.[342] Furthermore, a distinct system of juvenile justice should be established.[343]

The UN Convention on the Rights of the Child provides at Article 37(b) that the arrest, detention or imprisonment of a child shall be in conformity with the law and will only be a measure of **last resort** and imposed for **as short a duration as possible**. Also, the UN Rules for the Protection of Juveniles Deprived of their Liberty states that: 'Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances' (Article 17). In addition, Article 40 of the Convention requires states to promote a **distinct system of juvenile justice for children** (i.e. persons up to 18 years old or the age of majority), with specific positive rather than punitive aims being set out in paragraph 1.

The Committee on the Rights of the Child in General Comment No. 6 provided guidance on the application of Article 37(b) of the CRC to migrant children. In this regard, the Committee said 'unaccompanied or separated children **should not, as a rule, be detained**. Detention cannot be justified solely on the basis that a child is unaccompanied or separated, or based on migrant status. If that detention is exceptionally justified for other reasons, it will be (...) used only as an extreme measure and will be as short as possible. Consequently, all efforts should be made, including acceleration of the relevant processes to enable the immediate release of the unaccompanied and separated children from detention and placing them in appropriate places for accommodation.'[344]

In addition, for the detention of a migrant child, it is important to apply the provision of Article 3(1) of the CRC, which states that in all actions concerning chil-

340. ECtHR, *Filiz Uyan v. Turkey*, Application No. 7496/03, judgment of 8 January 2009, paragraph 32
341. Preamble of the Convention on the Rights of the Child.
342. Committee on the Right of the Child, General Comment No. 6, http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf, para. 61.
343. Art. 40(3) CRC.
344. General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005.

dren, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the **child's interests** must prevail.

Where children are detained against their interests, the UN Human Rights Committee held that the detention may be arbitrary and violate the provisions of Article 9(1) of the ICCPR. It may also amount to a violation of Article 24 of the ICCPR, which guarantees that **every child, without discrimination** based on race, colour, sex, language, religion, national or social origin, property or birth, has the right to measures of care due to their status as a minor in the society and the state.

> In Bakhtiyari v. Australia,[345] the UN Human Rights Committee concluded that the mandatory detention of an Afghan refugee with five children for a term of two years and eight months constituted an arbitrary detention and a violation of Article 24(1) of the ICCPR, as the measures taken did not consider the interests of the children. However, the detention of a minor does not necessarily amount to a violation of Article 24 of the ICCPR, but can be justified only in exceptional circumstances.

In accordance with Article 22(1) CRC, states shall ensure that a child who is seeking **refugee status** or who is considered a refugee in accordance with the applicable international and national regulations and procedures, whether unaccompanied or accompanied by their father or mother or any other person, shall receive appropriate protection and humanitarian assistance to enjoy the rights recognised by international human rights or humanitarian instruments to which the concerned states are parties. The provisions of Article 39 of the CRC are also relevant in this situation. They require states to take all appropriate measures to **facilitate the physical and psychological recovery and social reintegration** of a child who is a victim of any form of neglect, exploitation, abuse, torture, punishment, or cruel, inhuman or degrading treatment or who is a victim of armed conflict.

Similar principles are reiterated in the following Council of Europe instruments:

1. The Committee of Ministers Guidelines on human rights protection in the context of accelerated asylum procedures, which state that '[c]hildren, in-

345. *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari* v. *Australia*, Communication No. 1069/2002, U.N. Doc. CPR/C/79/D/1069/2002 (2003).

cluding unaccompanied minors, should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance.' (Article XI, 2);

2. PACE Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return; and

3. PACE Recommendation 1985 (2011) on undocumented migrant children in an irregular situation: a real cause for concern. The latter specifies that children should **not be separated from a parent** and should be detained in **separate facilities from those for adults**. Moreover, where a doubt exists as to the **age** of the child, the **benefit of the doubt** should be given to that child.

The ECtHR incorporated these principles in its case law, declaring that a violation of article 3 or 8 (right to family life) occurs where these standards are not met.

> In the Mubilanzila Mayeka and Kaniki Mitunga v. Belgium case,[346] the ECtHR found a violation of Article 3, as the detention conditions were inappropriate for a minor. The ECtHR noted that the measures taken were far from adequate, as the child was separated from her parents and detained for two months in a centre for adults, without the authorities having taken any measures to ensure that she receive appropriate accommodation in the centre or educational and psychological care. Her very young age and the fact that she was an foreigner in an irregular situation in a foreign country, far from her family, placed her in an extremely vulnerable situation. For these reasons, the Court found that her detention demonstrated a lack of humanity to a degree that amounted to inhuman treatment.

In the Republic of Moldova, both the Criminal Code of the Republic of Moldova (Code No. 985/2002 with subsequent amendments) and the Enforcement Code (Code No. 443/2004 with subsequent amendments) contain provisions concerning specific measures in the case of minors.

Law No. 200 of 16 July 2010 on the Regime for Foreigners in the Republic of Moldova, Article 64[1] provides that 'unaccompanied minors and families with minors are taken into public custody only as a last resort and for the short-

346. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium*, Application No. 13178/03, Judgment of 12 October 2006.

est possible period (paragraph 1). The best interests of the child shall be a primary consideration when taking minors into public custody (paragraph 2). Minors taken into public custody have the right to education and educational programmes, taking into account their ethnic, cultural and religious needs, as well as their age and health status (paragraph 3).

The detention of persons considered vulnerable, taking into account their age, sex, state of health, previous traumatising experience, or individual circumstances, may constitute cruel, inhuman or degrading treatment.

Special attention and adequate facilities must be ensured to children, women, elderly people, asylum seekers, and mentally or physically disabled persons.

Provisions under European Union Law (provided for comparative purposes)

According to the EU's Reception Directive[347] and the Return Directive[348], **minors shall be detained only as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively.** Such detention shall be for the shortest period of time possible, and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age. Unaccompanied minors shall be detained only in exceptional circumstances. They shall never be detained in prison accommodation. When unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

347. Directive 2013/33/EU.
348. Directive 2008/115/EC.

CHAPTER IV

THE RIGHTS OF MIGRANTS DURING EXPULSION OR WHEN BEING RETURNED TO THEIR COUNTRY OF ORIGIN OR TO A TRANSIT COUNTRY

In certain situations, a state in which an individual is resident may decide to suspend the stay of an individual who is present on its territory **by means of expulsion or extradition.**

> **Extradition and expulsion affect the liberty and the right to free movement of the person, and are regulated by a variety of different international legal provisions, some of which relate to international human rights law *simpliciter,* some to migration in particular, and some to the question of extradition, expulsion and/or returns specifically.**

This picture is further complicated by the fact that the mentioned regimes are protected at a number of overlapping, multifaceted, levels.

Neither extradition nor expulsion is permitted if the foreign or stateless person risks being subjected to torture, inhuman or degrading treatment, or the death penalty. For a person to be extradited, he or she must have committed the offence on the territory of the state requesting the extradition. In order for expulsion to occur, the offence must have been committed on the territory of the state carrying out the expulsion. The two measures are also different in terms of procedures: Expulsion – also referred to as 'return' in some legal systems (notably that of the European Union – is carried out *ex officio* by judicial authorities, while extradition is ordered by a state based on mutual international conventions or on extradition legislation.

> **International human rights law permits states to expel migrants, while providing restrictions upon the exercise of this power.**

With regard to expulsion, three types of protection are available to persons:

1. protection from being returned to a country where they would be at risk of persecution (*non-refoulement* principle);
2. protection during expulsion procedures; and
3. protection with regard to the methods and consequences of expulsion.

These types of protection are analysed in detail in the next sections, in relation to specific human rights norms, which help to inform the reader as to the obligations governing the State authorities during the exercise of their duties in this area.

In addition to the above, this chapter includes an overview of the principles developed with regards to collective expulsions (which are generally prohibited)

and voluntary returns, with a particular focus on the legal provisions defining re-admission agreements. The legal provisions concerning forced returns are also examined in detail. The instruments relevant to the protection of migrants' rights in this area are discussed, distinguishing their institutional source, following the general taxonomy utilised in the handbook (United Nations System, Council of Europe System, Moldovan law, and provisions under European Union Law).

This chapter begins with an overview of the provisions concerning the right to judicial review and due process in the context of expulsions, charting the key procedural guarantees that are necessary in such instances. There then follows a brief examination of the main provisions relating to the right to life, largely for the purposes of informing the reader and to provide context later in the chapter. Thereafter, the prohibition upon torture, and the key principle of *non-refoulement* are discussed, providing important limits upon how and when States may return individuals to their State of origin (or a third State) in cases where such individuals may fear persecution.

The discussion then turns to the question of the dignity and physical integrity of migrants being expelled or extradited, charting the various human rights norms that provide key constraints upon the manner in which States may resort to such measures. Thereafter, the rights to privacy and family life and how they impact upon migrants who may be the subject of a decision to return them to their State of origin are discussed in detail. The chapter concludes with an overview of the prohibition of collective expulsions and the circumstances in which this prohibition may be the subject of a derogation, and the question of voluntary returns of migrants to their States of origin.

A) Due process and judicial review

The notion of **due process** requires legal proceedings to be conducted in accordance with "generally accepted rules and principles providing for the protection and enforcement of private rights, including notice and the **right to a fair hearing before the court or administrative agency with the power to decide the case**"[349]. In the context of expulsion of migrants, this is ensured by a bundle of several rights:

1. The right to be allowed to submit the **reasons against the expulsion** to the competent authority;
2. The right to have the **case reviewed** by a court or administrative authority in a procedure where the migrant can be represented; and
3. The right to **equality** before courts and tribunals.

With the exception of migrant workers, aliens not lawfully in the territory of the expelling State cannot invoke these procedural safeguards, unless deportation would amount to a violation of substantive human rights.

The right to due process can be suspended in case of a **public emergency** which **threatens the life of the nation** and the existence of which is **officially proclaimed**, provided that such measures are **not inconsistent with their other obligations under international law** and do not involve discrimination **solely** on the ground of race, colour, sex, language, religion or social origin.

Procedural guarantees help to ensure protection against expulsion and that no arbitrary expulsion decisions are taken. **Article 13 of the International Covenant on Civil and Political Rights (ICCPR)** provides that '[a]n alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in **accordance with law** and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against this expulsion and to have his **case reviewed** by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'[350]

The UN Human Rights Committee in one of its general comments reiterated that 'Article 13 directly regulates only the procedure and not the substantive grounds

349. IOM, Glossary on Migration (op. cit.).
350. The General Assembly has adopted a declaration on the human rights of individuals who are not nationals of the country in which they live. This declaration contains a provision which is very similar to Article 13 of the Covenant.

for expulsion'[351]. The Committee also recalls that the person subjected to an expulsion order should have access to **legal representation** in order to submit the reasons against their expulsion.[352] Since it applies only to aliens who are **lawfully in the territory**, the Committee underlined in a number of cases that 'illegal entrants and aliens who have stayed longer than the law or their permits allow'[353] cannot invoke the protection granted by Article 13. The provision contains an exception: the protection is not available where there are **'compelling reasons of national security'**[354].

Whereas Article 13 ICCPR applies to aliens who are lawfully in the territory of a state party to the Covenant, **Article 22 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families applies to all migrant workers and members of their families,** regardless of their immigration status. **Article 23 deals with consular or diplomatic protection.** It provides that, in the case of expulsion, the person concerned shall be informed without delay of their right to have recourse to the protection and assistance of the consular or diplomatic authorities of the state of origin, and that the authorities of the expelling state shall facilitate the exercise of this right.

Within the Council of Europe, Article 1 of Protocol No. 7 to the ECHR includes procedural safety measures in part similar to Article 13 of the ICCPR. In this case, **lawful residence** is to be understood as 'the existence of sufficient and continuous links with a specific place'. In addition, the ECtHR has held that the measure should be implemented in compliance with **both the substantive and procedural aspects** of the law, and that it should be applied in good faith.

Moreover, the **right to challenge the decision** of expulsion is considered by the Committee of Ministers as equivalent to the right to an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence **(Article 13)**. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution. The remedy must be accessible and the time limits to exercise it should not be unreasonably short.[355]

351. General Comment 15/27 of 22 July 1986, para. 10.
352. Concluding Observations on Denmark, CCPR/CO/70/DNK, 31 October 2001, para. 17.
353. UN Human Rights Committee, General Comment No. 15, Twenty-seventh session (1986), The Rights of Aliens under the International Covenant on Civil and Political Rights.
354. *V.R.M.B.* v. *Canada*, CCPR/C/33/D/236/1987, 18 July 1988, para. 6.3; *Karker* v. *France*, CCPR/C/70/D/833/1998, 26 October 2000, para. 9.3.
355. Committee of Ministers 2005, Guideline 5.1.

> In Al-Nashif v. Bulgaria, the ECtHR held that 'where there is an arguable claim that such an expulsion may infringe the foreigner's right to respect for family life, Article 13 in conjunction with Article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality'[356].

Irregular migrants or asylum seekers who do not fall under Article 1 of Protocol No. 7 also have the **right to an effective remedy** (Article 13).

Regarding this last category, **Rule 39 of the Rules of the Court** enables the Court to indicate **interim measures** to any state party to the Convention. In the majority of cases, the applicant requests the **suspension of an expulsion or an extradition.** The Court grants such requests for an interim measure only on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm, such as risk of being sentenced to death or to a life term of imprisonment, of being subjected to ill-treatment or torture, of genital mutilation, of sexual exploitation, et cetera. In general, this clause applies to the cases that would entail the application of the principle of *non-refoulement*. If the state party does not abide by the interim measures required by the Court, it may violate **Article 34 of the Convention** (right to individual application).[357]

> In Abdollahi v. Turkey, the applicant alleged that he was a member of the People's Mujahedin of Iran and that he would therefore face death or be subjected to ill-treatment if deported back to Iran (relying on Articles 2 and 3). The Court granted an interim measure to prevent his deportation pending further information. The application of Rule 39 was lifted after the Registry lost contact with the applicant.[358]

356. ECtHR, *Al-Nashif* v. *Bulgaria*, Application No. 50963/99, Judgment of 20 June 1992, para. 133.
357. Ibid., *Mannai* v. *Italy*, Application No. 9961/10, Judgment of 27 March 2012.
358. Ibid., *Abdollahi* v. *Turkey*, Application No. 23980/08, Judgment of 3 November 2009.

In Mamatkulov and Askarov v. Turkey, the Court found a violation for the first time because of a state's failure to comply with an interim measure. The Court was prevented from examining the applicants' complaints appropriately because of their extradition to Uzbekistan, despite the fact that an interim measure had been indicated to Turkey to suspend the extradition.[359]

Article 5(f) ECHR permits detaining a person 'against whom action is being taken with a view to deportation or extradition', but this must be done 'in accordance with a procedure prescribed by law'. All guarantees described in Chapter III (Detention) apply in this case.

In Samba Jalloh v. the Netherlands,[360] the Committee considered that the detention of a minor was justified if there were doubts about his or her identity, if the minor previously tried to escape, if there were reasonable grounds for his or her expulsion and if an investigation to establish his or her identity was ongoing.

Per Article 19(8) ESC, states are prohibited from expelling migrant workers lawfully residing within their territories unless they endanger national security, the public interest or morality. Migrants have the right to appeal to a court or other independent body against the expulsion decision.

The decision to expel or deport a migrant must be taken in accordance with the law. As a result, in this area, domestic procedures are of particular importance.

The specific regulatory framework covering the protection of the rights of foreigners who are in an irregular situation on the territory of the Republic of Moldova and who are to be removed from the territory include Law No. 200 on the regime concerning foreigners in the Republic of Moldova, the Contravention Code, and Government Decision No. 71 on the Establishment of the Centre for Temporary Placement of Foreigners of 30 January 2004. **Expulsion, according to Article 40 of the Contravention Code, consists of removal from the territory of the Republic of Moldova of the foreign or stateless citizen who violated the rules of residence.** According to Article 51 of Law No. 200 on the regime concerning foreigners in the Republic of Moldova, if a

359. ECtHR., *Mamatkulov and Askarov* v. *Turkey* (GC), Application Nos. 46827/99 and 46951/99, Judgment of 4 February 2005.
360. *Samba Jalloh* v. *the Netherlands*, Communication No. 794/1998, U.N. Doc. CCPR/C/74/D/794/1998 (2002).

foreigner illegally enters Moldovan territory, if his or her status on this territory has become illegal, if his or her visa or right to stay has been revoked, if his or her request for prolongation of the right for temporary stay was refused, or if his or her right to permanent stay has expired, the competent authority may decide to remove the person from the territory and prohibit this person from entering the Republic of Moldova for a defined period of time. This same applies for ex-asylum seekers.

In Moldova, a court could decide that the foreigner should be taken into public custody until the expulsion is carried out, by placing this person, for a period of no more than six months, in the **Centre for Temporary Placement of Foreigners**, a specialised facility for foreigners taken into custody and managed by the competent authority. Taking a foreigner into public custody is a measure that limits their freedom of movement. This measure is taken by a court against a foreigner whom it adjudged should be expelled, as well as against a foreigner who could not be returned according to the terms provided for by law, or a foreigner who has been declared *persona non grata* (see also Chapter 3 on Detention)

The foreigner's removal or expulsion is prohibited when the person: is a minor and his or her parents have a right to stay in the Republic of Moldova; when he or she is married to a citizen of the Republic of Moldova, and the period for illegal stay is no longer than a year and the marriage is not annulled; or in cases where he or she could be endangered, tortured, or be subjected to inhuman or degrading treatment in the home state if returned.

The decision to expel or deport a migrant must be taken in accordance with the law.

Regular migrants have the right to:

- **be informed of the decision providing for their expulsion and the reasons for it;**
- **appeal against the decision or have it reviewed by an impartial and independent authority; and**
- **be represented by a lawyer.**

The expulsion order may be temporarily suspended pending the review process.

Provisions under European Union Law (provided for comparative purposes)

The **Return Directive** is the key legal instrument for returning third country nationals. The common standards and procedures cover areas such as the use of coercive measures, force, return, removal, detention and re-entry. The Directive also contains provisions on postponement of removal (Article 9), and on safeguards pending return (concerning rights to family unity, health care, and access to education for minors, as well as the specific needs of vulnerable persons). The Return Directive provides that the return decision itself should be issued **in writing**. Moreover, upon request of the third country national, the main elements of the decision should also be orally **translated** to a language that the third country national understands (Article 12). The third country national should also be able to appeal against or **request a review** of the decision. To this end, he or she is provided with the means to appeal against decisions on return before a judicial or administrative competent authority or before an independent competent body composed of impartial members. This body may **temporarily suspend** the enforcement of these decisions (Article 13). Third country nationals should be kept in **detention** for the shortest period possible, and for the most part, only when there is a risk of absconding or if the third country national avoids or hampers the preparation of the return (Article 15). If the use of coercive measures is required, as a last resort, then they should not exceed reasonable force.

B) The right to life

Amongst the various human rights may be of relevance in the context of expulsion and return, the right to life should be mentioned.

> "Every human being has the inherent right to life"[361] and "[n]o one shall be arbitrarily deprived of his life"[362]. As formulated, the right to life **represents the supreme human right, constituting the base for all the other human rights and is absolutely non-derogable in peacetime.**

The right is protected under Article 3 of the Universal Declaration of Human Rights (UDHR), Article 2 of the European Convention of Human Rights (ECHR), Article 6 of the International Covenant for Civil and Political Rights (ICCPR), and also indirectly, via Article 4 of the Moldovan Constitution, due to the applicability of Monist doctrine and the enforceability of international human rights norms in the domestic legal order. Further, **Article 24 of the Constitution explicitly guarantees the right to life and to physical and mental integrity and provides that the state shall guarantee these rights.**

A corollary of this right is that **arbitrary deprivation of life is prohibited**, and it is a duty of each State not only to refrain from breaching the right through its actions, but also to actively protect those individuals that are subject to its jurisdiction from any threat to human life, including "malnutrition, life threatening illness, (…) or armed conflict"[363]. In this sense, States not only bear the responsibility to respect the right to life, but also have the obligation to take positive measures to ensure the right to life (and e.g. the duty to investigate suspicious deaths).[364]

The application of the right to life in the context of expulsion and return becomes relevant in the following circumstances, rendering a series of actions unlawful:

1. Any arbitrary deprivation of life in the form of killings by State agents, when they contain the elements of unlawfulness, injustice, capriciousness and unreasonableness.[365] In practical terms, an action may violate the right to life when it is disproportionate to the requirements of law enforcement and a violation of the right to life can also derive form an omission in case

361. Art. 6(1) ICCPR.
362. Ibid.
363. M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd ed. (hereinafter Nowak), Engel 2005, p. 1277.
364. See e.g. Article 6 ICCPR and Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *Jacobs, White and Ovey: the European convention on human rights*. Oxford University Press, 2014.
365. Nowak, p. 1277.

authorities fail to take adequate measures to protect such right.[366]

2. Deaths in custody[367] and enforced disappearances, i.e. "the abduction and detention of persons followed by a refusal to disclose their fate and whereabouts"[368]

3. Extradition or expulsion ordered in breach of the *non-refoulement* principle. Therefore, in a situation in which a migrant faces a real risk to be sentenced to death if extradited or expelled to another State (a sub-paragraph will deal with this specific topic later in the chapter), a violation of the right to life – in addition to the *non-refoulement* principle, typically examined in the context of the prohibition upon torture – may occur.

C) The prohibition upon torture

The prohibition of torture represents a fundamental human right, protected under several provisions of international law and constituting *ius cogens* (i.e. peremptory and binding irrespective of the circumstances, without any restriction).

Specifically, torture is prohibited under Article 5 UDHR, as well as under Article 7 ICCPR and Article 3 ECHR, and by proxy, via Article 4 of the Moldovan Constitution, due to the application of Monist doctrine.

The prohibition upon torture does not merely encompass torture, but also inhuman and degrading treatment. While degrading treatment is considered less severe than inhuman treatment, which, in turn is considered less severe than torture, all such conduct is equally prohibited.

The notion of torture encompasses "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act s/he or a third person has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public

366. Ibid.
367. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *The European convention on human rights* (op. cit.).
368. Ibid.

official or other person acting in an official capacity"[369].

> **In other words, the prohibition of torture concerns cases – in general involving a minimum level of severity – of aggravated and deliberate, cruel, inhuman and degrading treatment or punishment inflicted by a State agent.**[370]

In the context expulsion and return, a number of different forms of treatment may violate the prohibition of torture. For example:

1. when migrants are subjected to controls and procedures that involve suffering or humiliation (even in situation in which the intention is not to humiliate and inflict suffering) and especially in situations in which any breach of the prohibition can be considered aggravated by racial motives given that it involves foreigners;[371]
2. when migrants are subjects to acts in the course of expulsion or return that exceed what is reasonable and necessary in specific circumstances;
3. when migrants are detained under conditions that diminish their dignity and amount to degrading treatment, including a disproportionate use of solitary confinement (see also Chapter 3 on Detention).[372]

Derogations from the **prohibition upon torture** are not allowed under any circumstances.

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT)[373] defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." It also states that torture **cannot be justified under any circumstances.**

369. IOM, Glossary on Migration (op. cit.).
370. Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *The European convention on human rights* (op. cit.).
371. Ibid.
372. Ibid.
373. United Nations Convention Against Torture 1465 UNTS 85.

The International Criminal Tribunal for the former Yugoslavia has recognised the prohibition of torture as an obligation *erga omnes*, i.e. an obligation that a state owes towards the international community as a whole.[374]

Article 3 ECHR prohibits torture under any circumstances. Individuals who are subjected to torture, inhuman or degrading treatment in Moldova may petition the ECtHR in the event that they have exhausted all domestic remedies.

The Council of Europe has established the **Committee for the Prevention of Torture.**[375] The CPT organises visits to places of detention, in order to assess how persons deprived of their liberty are treated.

Non-refoulement

The prohibition of *refoulement* is derived from the French term 'refouler', which means to return or reject. This notion was originally developed on the basis of refugee law, and refers to the obligation of states to **not return a refugee to 'the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'**.[376] This principle applies to the return of persons found within the state's territory, both those who have entered legally and those who have entered irregularly, as well as those at the border who have attempted to enter, regularly or irregularly, and have been refused entry. In the context of torture, the principle of *non-refoulement* means that no state shall **expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture**.

Derogations from the principle of *non-refoulement* are not allowed under any circumstances.

Non-refoulement is related to the non-derogable obligation of states to prohibit the torture, inhuman and degrading treatment of all persons within their jurisdiction. It is part of human rights treaties such as **CAT (Article 3) and the 1951 Refugee Convention (Article 33)**. The latter prohibits states from expelling or returning a refugee to a territory where they fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. This protection applies to both refugees and asylum seekers on the territory or

374. ICTY, *Prosecutor v. Anto Furundzija*, Case no. IT-95-17/1-T, Judgement of 10 December 1998, para. 151.
375. http://www.cpt.coe.int/.
376. 1954 UN Convention relating to the Status of Refugees, Article 33(1)

at the border, and should be understood in terms of the risks that could arise in any country to which the person might be sent, not only their country of origin. Article 3 CAT has a wider scope since it explicitly prohibits states parties from expelling, returning or extraditing a person, not only refugees, to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture.

The Human Rights Committee interpreted Article 7 of the ICCPR as follows 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.'[377] It also established that a person should not be returned to a country where an illness which was in whole or in part caused by the State party's violation of his rights cannot be treated.[378]

At the level of the **Council of Europe**, Article 3 of the ECHR (prohibition of **torture and other ill-treatment)** has been interpreted to prohibit *refoulement*.

In its case law, the ECtHR has expanded the protection provided by Article 3 so as to cover the risk of death penalty. This principle has been subsequently reaffirmed by Protocol No. 13 to the Convention.

In Soering v. United Kingdom,[379] in a case where the person involved was facing time on death row in the United States, the Court considered that taking into account 'the period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and [to] the personal circumstances of the applicant, especially his age and mental state at the time of offence, the applicant's extradition to the U.S. would expose him to a real risk of treatment going beyond the threshold set by Article 3'.

The most common cases involve persons who would be in danger of being ill-treated by the authorities of their state of origin, should they be returned. However, the principle of *non-refoulement* applies also to threats of human rights violations by **non-state actors**, such as family members or armed groups.

377. General Comment No. 20/44 of 3 April 1992, para. 9.
378. *C.* v. *Australia*, CCPR/C/76/D/990/1999, 28 October 2002.
379. ECtHR, *Soering* v. *United Kingdom*, Plenary, Application No. 14038/88, Judgment of 7 July 1989.

> In H.L.R. v. France, the Court stated that: '[o]wing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."[380]

Moreover, for the violation to be acknowledged, it is essential that the **risk is foreseeable by the authorities** of the country returning the migrant. In this context, diplomatic assurances are usually unlikely to be sufficient to allow a transfer to countries where there are reliable reports that the national authorities tolerate torture.[381]

> In the Vilvarajah and Others v. United Kingdom case,[382] the ECtHR exonerated the UK from its liability for the return of the applicants and the resulting ill-treatment they suffered, considering that, despite all the evidence submitted by the applicants, the ill-treatment could not have been foreseen by the state: 'there existed no distinguishing features in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way'.
>
> In M.S.S. v. Belgium and Greece, the Court expressed its 'opinion that the diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms (…) and contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice."[383]

380. ECtHR, *H.L.R.* v. *France* (GC), Application No. 24573/94, Judgment of 29 April 1997.
381. Ibid., Saadi v. Italy, App. No. 37201/06, para. 147; ECtHR, Klein v. Russia, App. No. 24268/08, para. 55.
382. Ibid., *Vilvarajah and Others* v. *United Kingdom*, Applications Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87; Judgment of 30 October 1991.
383. Ibid., *M.S.S.* v. *Belgium and Greece* (GC), Application No. 30696/09, Judgment of 21 January 2011.

The risks that migrants incur if expelled need to be **personal**, which means that they must be **individually targeted** or fall within a **category of people** particularly subject to abuses (M.S.S. v. Belgium and Greece). Exceptionally, the principle can be applied if the country to which the migrant should be expelled is affected by a **general climate of violence.**

The ECtHR has also recognised that **gender and sexual orientation** may be, in certain states, a sufficient reason to require protection of *non-refoulement*. The Council of Europe's Committee of Ministers reiterated this principle, declaring that states 'should recognise that a well-founded fear of being persecuted for reasons of sexual orientation or gender identity may constitute valid grounds for granting refugee status and asylum under national law'.[384]

> In the N. v. Sweden case,[385] the Court noted that, according to reports, approximately 80% of Afghan women are victims of domestic violence that authorities considered legitimate, the result of which is that the perpetrators of these acts are not prosecuted. Therefore, the expulsion of Afghan women to the country of origin would violate the principle of *non-refoulement*.

A **lack of adequate medical treatment** also falls within the scope of Article 3. According to this Article, it is necessary to provide an opportunity for treatment in the host country for a disease that is untreatable in the country of origin. According to the Court, protection under Article 3 is absolute: it must be applied regardless of individual circumstances, such as an applicant's very short stay.

> In the D. v. United Kingdom (1997) case,[386] the ECtHR held that the threshold of ill-treatment under Article 3 could be reached even in cases where the source of the risk in the receiving country stems from factors which cannot invoke the responsibility of the public authorities of that country. However, protection under Article 3 in this context only applies in exceptional circumstances.

Article 6, which protects the right to a fair **trial in criminal and civil proceedings,** may provide a basis for not sending a person to a country where they would be subject to a process in which evidence obtained through torture is admitted in court.

---

384. Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity, CM/Rec(2010)5, adopted by the Committee of Ministers on 31 March 2010.
385. ECtHR, *N.* v. *Sweden,* Application No. 23505/09, Judgment of 20 July 2010.
386. Ibid., *D.* v. *United Kingdom*, Application No. 30240/96, Judgment of 2 May 1997.
387. Ibid., *Othman (Abu Qatada)* v. *United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012.

In the Omar Othman v. United Kingdom case,[387] the Court held that in the event of expulsion, there was no violation of Article 3, as the applicant did not risk being ill-treated and the diplomatic assurances provided by the Jordanian government to the British authorities were sufficient to protect the applicant. However, the Court held that expulsion would be contrary to Article 6 (right to a fair trial) given the real risk that in the applicant's trial in Jordan some evidence obtained through torture would be admitted. It was the first time that the Court considered that expulsion would breach Article 6. This conclusion reflects the international consensus that the use of evidence obtained by torture prevents the conducting of fair trial.

Article 9 comes into discussion where there is a flagrant violation of **freedom of religion** in the destination country or the person is deported to restrict their **freedom of thought**, religion or belief.

In Nolan and K. v. Russia, the Court emphasised that 'deportation does not ... as such constitute an interference with the rights guaranteed by Article 9, unless it can be established that the measure was designed to repress the exercise of such rights [enter or remain in a country] and stifle the spreading of the religion or philosophy of the followers'.[388]

In the T.I. v. United Kingdom case,[389] the Court found that indirect removal to an intermediary country did not affect the responsibility of the state to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.

The ECtHR pointed out that when the human right in question is an **absolute** right (such as the prohibition of torture, or the right to life as protected by article 2), *non-refoulement* becomes absolute and is not subject to any exceptions, either in law or in practice. This rule applies **regardless of considerations of national security, other public interests, economic pressures or large influxes** of migrants. The ECHR protection is therefore broader than that provided by the Refugee Convention.

388. ECtHR, *Nolan and K.* v. *Russia*, Application No. 2512/04, Judgment of 12 February 2009.
389. Ibid., *T.I.* v. *United Kingdom*, Application No. 43844/98, Judgment of 7 March 2000.

In case of Saadi v. Italy, the Court stated '[a]ccordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole. Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule"[390]

Article 4 of the Constitution of the Republic of Moldova effectively incorporates the guarantees provided by UN CAT and the ECHR concerning the *non-refoulement* principle.

In addition, Article 11 of Law No. 270-XVI of 2008 on asylum in the Republic of Moldova provides that no asylum seeker shall be expelled or returned from the border or from the territory of the Republic of Moldova. Moreover, no beneficiary of a form of protection shall be returned or expelled to a country or territory where their life or freedom might be threatened or where they may be subjected to torture or inhuman or degrading treatment. A person who has been recognised as a refugee or who has been granted humanitarian protection may be expelled or returned from the territory of the Republic of Moldova if:

a) there are well-founded reasons to consider that the person poses a threat to the state security of the Republic of Moldova or

b) having been convicted by a final court judgment of a grave criminal offence, pursuant to the provisions of the Criminal Code of the Republic of Moldova, the person poses a threat to public order in the Republic of Moldova.

Article 63 of Law 200/2010 stipulates that a foreigner may not be expelled to another state if there is justified concern that their life may be put at risk or they will be subject to torture or inhuman or degrading treatment there.

390. ECtHR, *Saadi* v. *Italy* (GC), Application No. 37201/06, Judgment of 28 February 2008.

Provisions under European Union Law (provided for comparative purposes)

While **all members of the European Union are also Council of Europe Member States, and are thus subject to the provisions of the ECHR, as well as the obligations under public international law mentioned above** – thus being subject to identical obligations as the Republic of Moldova, additional provisions relating to the prohibition upon torture and the principle of *non-refoulement* also apply. However, it should be noted that these obligations substantially replicate those under the ECHR and public international law.

The **EU's Charter of Fundamental Rights** contains two provisions that offer protection to people who fear being expelled by an EU Member State. Article 18 recognises the right to receive asylum in compliance with the 1951 Convention on Refugees, and Article 19 prohibits collective expulsions as well as the removal, expulsion or extradition of a person to any country where there is a serious risk of that person being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Several EU instruments[391] deal specifically with the issues of removal and expulsion:

1. **Directive 2011/95/EU** requires that Member States respect the principle of *non-refoulement* in accordance with their international obligations (Article 21 (1)).
2. **Directive 2011/51/EU** explains that '[i]n view of the right of beneficiaries of international protection to reside in Member States other than the one which granted them international protection, it is necessary to ensure that those other Member States are informed of the protection background of the persons concerned to enable them to comply with their obligations regarding the principle of *non-refoulement*' (recital 5).
3. **Article 9(1)(a) Directive 2008/115/EEC** (Return Directive) provides that Member States shall postpone removal "when it would violate the principle of *non-refoulement*."

391. Directive 2001/40/EC Council on the mutual recognition of decisions on the expulsion of third country nationals; 2002/90/EC Council Directive defining the facilitation of unauthorised entry, transit and residence; 2003/110/EC Council Directive on assistance in cases of transit for the purposes of removal by air; 2005/85/EC Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status; Dublin II Regulation (EC) No. 343/2003; the Council of Europe's Resolution on Minimum Guarantees for Asylum Procedures; Asylum Procedures Directive and Directive 2005/85/EC of 1 December 2005.

4. **Qualification Directive 2004/83/EC** recognises some of the EU Member States' *non-refoulement* obligations that already existed on the basis of international and regional law.
5. **Article 19(2) of the EU Charter of Fundamental Rights** provides that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

> In Joined Cases N.S. (C-411/10) v. Secretary of State for the Home Department and M.E. (C-493/10) and Others v. Refugee Applications Commissioner, the CJEU echoed ECtHR case law by stating that an asylum seeker cannot be transferred to a Member State of the EU where there is a risk of being subjected to inhuman treatment.[392]

Despite the legislation, **there are situations when the EU's international duties are not carried out.** The **UN Special Rapporteur** on the rights of migrants stated in its report on EU border controls: 'In relation to the Greek border, Italian authorities confirmed that they are preventing irregular migrants from disembarking from vessels arriving from Greece, thus forcing them to return to Greece. (…) Furthermore, it appears that no formal screening procedure is conducted, during which time migrants could have the opportunity to raise protection issues including claims for asylum.'[393]

It is relevant to note, that the measures adopted by states in implementing EU legislation cannot absolve them from their responsibilities under the ECHR. This is also the case for the **obligations assumed by EU Member States** under the Dublin Regulation, when the migrant is to be sent to a state susceptible of transferring the person to a third country where they are at risk (MSS v. Belgium and Greece).[394]

392. ECJ (GC), Joined Cases *N.S.* (C-411/10) v. *Secretary of State for the Home Department* and *M.E.* (C-493/10) *and Others* v. *Refugee Applications Commissioner*, Minister for Justice, Equality and Law Reform, 21 December 2011.
393. UN Special Rapporteur on the human rights of migrants, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12640&LangID=E and www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12858&LangID=E.
394. Ibid., *M.S.S.* v. *Belgium and Greece* (GC), Application No. 30696/09, Judgment of 21 January 2011.

D) Dignity and physical integrity

The concept of **human dignity** is contained, in some form, in almost all major international human rights instruments. However, a specific determination of its substantive content is difficult. In the broadest sense, it refers to the **right of every individual not to be subjected to humiliation or degradation.** Closely connected is the right to **physical integrity.** Particularly in the context of migration, it prohibits the use of excessive force when migrants are expelled, or of especially degrading methods to overcome an individual's resistance.

The right to dignity and physical integrity is not subject to exceptions.

International law provides rules on the rights of expelled persons, although methods of expulsion are not specifically mentioned in any international instrument. However, a legal framework regulating states' powers to expel foreigners from their territories has gradually emerged. For instance, when executing an expulsion order, states are bound by their obligation to respect the **right to life and physical integrity.** 'Procedures used in the repatriation of some asylum seekers, in particular the placing of a cushion on the face of an individual in order to overcome resistance, entails a risk to life. The Committee [CCPR] would like to receive written information on the results of the investigations, as well as of any criminal or disciplinary proceedings. It recommends that all security forces concerned in effecting deportations should receive special training.'[395]

With references to Articles 6 and 7, the UN Human Rights Committee has repeatedly expressed its concern over allegations of **excessive force** being used when aliens are expelled: 'The State party should put an end to the excessive use of force when aliens are deported. Those responsible for effecting such deportations should be better trained and monitored.'[396]

The **Twenty Guidelines on Forced Return**[397] apply to procedures leading to the expulsion of non-nationals from the territory of Member States of the Council of Europe. According to the Guidelines, removal operations should be undertaken with the cooperation of the returnee, even where a form of supervised or forced return is carried out as a result of the returnee choosing not to voluntary comply with the removal order. The Guidelines further state that 'Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned organise their return, particularly on the **family, work**

395. Concluding Observations on Belgium, CCPR/C/79/Add.99, 19 November 1998, para. 15.
396. Concluding Observations on Belgium, CCPR/CO/81/BEL, 12 August 2004, para. 14.
397.http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf.

and psychological fronts. It is essential that those migrants being detained are **informed** sufficiently far in advance of their prospective deportation, so that they can begin to come to terms with the situation psychologically and are able to inform the people they need to let know and to retrieve their personal belongings. The Committee for the Prevention of Torture (CPT) has observed that a constant threat of forcible deportation hanging over detainees who have received no prior information about the date of their deportation can bring about a condition of anxiety that is exacerbated during deportation and that may often leave the individual in a violent, agitated state. The Guidelines also require that **personal data be protected,** impose restrictions on the processing of personal data and prohibit sharing information related to asylum applications.

Articles 2 and 3 ECHR are applicable in the context of forced returns. In particular, an assessment must be made as to whether the injury or harm that public officials may have caused to individuals within their custody and control is of sufficient gravity to invoke Article 3 ECHR. Moreover, an individual's particular vulnerabilities, such as those deriving from age or from **mental health,** must be taken into account.[398]

> In Popov v. France, concerning the administrative detention of a family for two weeks at the Rouen-Oissel Centre in France pending their removal to Kazakhstan, the Court found that the authorities had not considered the inevitably harmful effects on the children (aged five months and three years) of being held in a detention centre in conditions that exceeded the minimum level of severity required to fall within the scope of Article 3.

The ECtHR has held that Member States not only have 'negative' obligations not to harm individuals, but also 'positive' **obligations to protect** individuals against loss of life or serious injury, including from third parties or from themselves, as well as to provide access to medical services.

> In Kaya v. Turkey,[399] the ECtHR reiterated that the Member State must consider the force employed and the degree of risk that may result in the loss of life.
>
> In Ilhan v. Turkey,[400] the Court found that Article 3 of the ECHR rather than Article 2 was breached when the individual suffered brain damage as a result of the use of excessive force upon arrest.

398. ECtHR, *M.S.S.* v. *Belgium and Greece* (GC), Application No. 30696/09, Judgment of 21 January 2011; ECtHR, *Darraj* v. *France*, Application No. 34588/07, Judgment of 4 November 2010.
399. Ibid, *Kaya* v. *Turkey*, Application No. 22729/93, Judgment of 19 February 1998.
400. Ibid., *Ilhan* v. *Turkey* (GC), Application No. 22277/93, Judgment of 27 June 2000, paras. 77 and 87.

In Moldovan domestic law, on the basis of Article 4 of the Constitution, the above provisions also apply. Further, Article 55 of Regulation 492 on procedures for the return, expulsion and readmission of foreigners from the territory of the Republic of Moldova provides that 'the competent authority will issue a decision to inform the foreigner, in the state language or in an […] language which he/she understands, about the court decision on his/her expulsion from the Republic of Moldova. Where this is not possible, one shall use the services of an authorised interpreter, which will be recorded in the decision.'

Expulsion must be implemented in a humane and dignified manner. Due consideration must be given to the state of health, age and family bonds of the person to be expelled. States are bound by their obligation to respect the right to life, dignity and physical integrity.

Provisions under European Union Law (provided for comparative purposes)

Forced returns are regulated by **Directive 2008/115/EC (Return Directive)**, which states that return must be carried out with due respect for the **dignity and the physical integrity** of the person concerned (Article 8(4)) and that an effective **monitoring system** of forced returns must be established. The Return Directive requires that the individual's **state of health** be taken into account in the removal process and due consideration be given to the right to **family life** (Article 5). The person's physical and mental health condition may also be the reason for a possible postponement of the removal (Article 9). In the case of return by air, this typically requires medical staff to certify that the person is fit to travel. The Return Directive requires that **unaccompanied minors** only be returned to family members, a nominated guardian or an adequate reception facility (Article 10).

Directive 2001/40/EC on the **mutual recognition of decisions** on the expulsion of third country nationals applies to expulsion decisions based on a serious and present threat to public order or to national security (such as a conviction for an offence punishable by a penalty involving deprivation of liberty of at least one year) and failure to comply with national rules on the entry or residence of aliens. The objective of this Directive is to ensure more effective cooperation between the Member States by granting mutual recognition to expulsion decisions. **Decision 2004/191/EC** sets the appropriate criteria and practical arrangements for the **compensation of the financial costs** which may result from the application

of Directive 2001/40/EC where expulsion cannot be effected at the expense of the national(s) of the third country concerned.

Decision 2004/573/EC aims at coordinating joint removals by air, from two or more Member States, of third country nationals who are subjects of individual removal orders. In carrying out joint removals by air, Member States shall take into account the **'Common Guidelines on security provisions for joint removals by air'**,[401] which also provide guidance on, among other things, medical issues, the training and conduct of escort officers, and the use of coercive measures. Measures on assistance between the competent authorities at Member State airports of transit with regard to unescorted and escorted removals by air are defined by **Directive 2003/110/EC**.

Return operations are regulated by **Regulation No. 1168/2011**, which provides Member States with the necessary support in organising **joint return operations.** In this respect, **Decision 575/2007/EC** establishing the **European Return Fund** for the period 2008 to 2013 states that the general objective of the Fund shall be to support the efforts made by the Member States to improve the management of return in all its dimensions through the use of the concept of integrated management and by providing for joint actions to be implemented by Member States or national actions that pursue EU objectives in accordance with the principle of solidarity, taking into account EU legislation in this field and in full compliance with fundamental rights. A cooperation agreement 'with the overall objective of strengthening the respect of fundamental rights in the field of border management and in particular FRONTEX activities' was signed between the Fundamental Rights Agency (FRA) and FRONTEX. Article 7 of this agreement provides for the collaboration of the parties 'with a view to ensuring that forced removals are carried out in full respect of fundamental rights, as well as in a **humane and dignified manner**'[402]. On 31 March 2011, the Frontex Management Board also endorsed the **Frontex Fundamental Rights Strategy**.[403]

The relations between Moldova and Frontex are based on the Working Arrangement on the Establishment of Operational Cooperation of 12 August 2008[404] and the Cooperation Plan for 2015–2017. Cooperation includes exchange of information, training, research and development, risk analysis and joint operations.

401. Annex to Decision 2004/573/EC.
402. http://fra.europa.eu/sites/default/files/fra_uploads/891-Cooperation-Agreement-FRA-Frontex_en.pdf.
403. http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf.
404. http://frontex.europa.eu/assets/Partners/Third_countries/WA_with_Moldova.pdf

E) The right to privacy and family life

The **right to privacy** encapsulates the core of the liberal concept of freedom.[405] Privacy concerns individual autonomy where it does not touch others, and also includes private acts in public.[406] In other words: Privacy first and foremost means the right to enjoy a sphere of activity in which the State does not intervene. Beyond that, states also have positive obligations to ensure that nobody's privacy is violated. Privacy is a broad term and has not been exhaustively defined, but includes, *inter alia*, the following aspects:

1. The **physical and psychological integrity of a person,** this includes protection from forced medical treatment and psychological examinations;
2. The right to inviolability of one's **correspondence, communications and conversations.**
3. Protection from unlawful **searches and seizures.**

Closely connected with the right to privacy is the **right to family life,** which includes the right to **respect for family life,** including marital and non-marital partnerships, as long as they are closely knit and durable. This also includes protection of the relationship between parents and their dependent children, the right of a divorced parent to have access to their children and the access to family members in detention.

Article 4(1) ICCPR applies to the right to privacy and family life and allows suspension of this right in case of a **public emergency** which **threatens the life of the nation** and the existence of which is **officially proclaimed,** provided that such measures are **not inconsistent with their other obligations under international law** and do not involve discrimination **solely** on the ground of race, colour, sex, language, religion or social origin. Practical applications include the suspension of privacy rights in wartime, or in the case of an imminent terrorist threat.

The UN Human Rights Committee has dealt with many complaints regarding violations of the right to respect for private and family life. It has decided, for example, that a territorial expulsion separating an individual from other family members can lead to a violation (Madafferi v. Australia[407]).

405. M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR commentary*, 2nd ed., Engel 2005, p. 377.
406. I. Ziemele, *Privacy, Right to, International Protection*, Max Planck Encyclopedia of International Law, para. 2.
407. http://www1.umn.edu/humanrts/undocs/html/1011-2001.html.

Expelling a foreign citizen or a stateless person creates problems in terms of respect for private and family life. **Article 8 ECHR** stipulates that 'everyone has the right to respect for their private and family life, home and correspondence. There shall be no interference by a public authority with the exercise of this right except in special circumstances in accordance with the law and deemed necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others.' The ECtHR concluded that expulsion or deportation 'amounts to interference with the applicant's right to respect for his private and family life'. This interference must be balanced with the public interest to be served in the expulsion or deportation.

> In the Beldjoudi case,[408] the Court decided that the expulsion of the applicant born in France from parents originating from Algeria was not in proportion to the expected scope of expulsion measures to maintain public order, and that an infringement of Article 8 provisions occurred, even though the applicant's criminal record was extensive. Mr. Beldjoudi spent his entire life in France. He got married there and his wife was of French origin. Expulsion would have endangered the family unit or even the marriage. For these reasons, according to the Court, expulsion touched upon the proportionality between a healthy family life and the expected result (public order, etc.).

State action amounts to an interference with Article 8 of the ECHR when it consists of issuing an order of expulsion or deportation of aliens. In the Boultif case,[409] the ECtHR developed criteria to determine whether such an order is in accordance with the law, which include:

1. the nature and seriousness of the criminal offence;
2. the length of the stay in the host country;
3. the time elapsed since the offence was committed and the conduct during that period;
4. the nationalities of the various persons concerned;
5. the applicant's family situation;

408. ECtHR, *Beldjoudi* v. *France*, Application No. 12083/86, Judgment of 26 March 1992.
409. Ibid., *Boultif* v. *Switzerland*, Application No. 54273/00, Judgment of 2 August 2001.

6. whether the spouse knew about the offence when they entered into the relationship;
7. the age of the children; and
8. the seriousness of the difficulties that the spouse is likely to encounter in the country of origin.[410]

In general, as far as **regular migrants** are concerned, the Court's task consists in ascertaining whether the expulsion order in the circumstances struck a **fair balance** between the applicant's right to respect for his **private and family life,** on the one hand, and the interests of **public safety** and the prevention of disorder and crime, on the other. For the expulsion order to be legitimate, it is therefore necessary that the migrant to be expelled has committed a **serious crime,** such as a terrorism-related crime or a serious violent crime.

> In C.G. and others v. Bulgaria, it transpired that the only basis for the assessment that the applicant posed a threat to national security was his alleged involvement in drug-trafficking. The Court found that the allegations against the first applicant – as grave as they might be – could not reasonably be considered to be capable of threatening Bulgaria's national security.[411]

In addition, the ECtHR applies a distinctive approach to differences in treatment between EU citizens and third country nationals in the field of immigration by justifying such differences with reference to the EU as a 'special legal order'.

> In the Moustaquim v. Belgium case,[412] the ECtHR decided that the applicant should not be compared to Belgian delinquent minors, as they have a right to stay in their own country and cannot be expelled. Moreover, the Court considered that there is a reasonable justification for the preferential treatment granted to citizens from other EU Member States, since Belgium belongs to a 'special legal order' together with the other Member States. Therefore, there was no infringement of Article 14.

410. ECtHR., para. 48; ECtHR, Judgment of 18 October 2006 (GC), Application No. 46410/99, Üner v. *the Netherlands*, paras. 57-58 differentiates the best interests and the well-being of the children as well as the solidity of the family ties as two additional sub-criteria.
411. ECtHR, *C.G. and others* v. *Bulgaria*, Application No. 1365/07, Judgment of 24 April 2008.
412. Ibid., *Moustaquim* v. *Belgium*, Application No. 12313/86, Judgment of 18 February 1991.

Article 12 of Regulation 492 on procedures for the return, expulsion and readmission of foreigners from the territory of the Republic of Moldova takes into account the child's best interests and the family life of the foreigner, by providing that 'the deadline for voluntary departure from the territory of Moldova may be extended by the competent authority, where there are circumstances related to the existence of children attending school or the existence of other family and social ties. In this case, the foreigner is required to come monthly, or whenever he/she is called, to the competent authority and notify them of any change of residence or of status, and must submit documents confirming that he/she is obliged to remain in the Republic of Moldova.'

The expulsion or deportation of aliens amounts to an interference with the right to private and family life. The state must balance the rights of the individual with the public interest of safety and security. Expulsion of regular migrants is justified only when the person has committed a serious crime. Several elements must be taken into account, such as the as the time spent in the host country, age, state of health, family and economic situation, social and cultural integration into the host country and the extent of his/her links with the country of origin.

Provisions under European Union Law (provided for comparative purposes)

Directive 2004/38 grants EU citizens and their family members the right to move and reside freely. **Article 28** provides **protection against expulsion** echoing the provisions set out by ECtHR case law and the ECHR itself.

> In Murat Dereci and Others v. Bundesministerium für Inneres,[413] the CJEU decided that 'in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (Case C 400/10 PPU McB. [2010] ECR I-0000, paragraph 53). All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8. In the light of the foregoing observations the answer to the first question is that European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.
>
> '

Furthermore, the **Return Directive** also requires that states protect family life. **Article 5** provides that when implementing the Directive, Member States shall take due consideration of:

1. the best interest of the child,
2. family life,
3. the state of health of the third country national concerned, and
4. respect for the principle of *non-refoulement*.

Furthermore, it clearly does not allow states to violate their pre-existing human rights obligations. A reference to human rights is included in the Preamble and Article 5.

413. CJEU, Case C-256/11, *Murat Dereci and Others* v. *Bundesministerium für Inneres*, paras. 70-74.

F) The prohibition of collective expulsions

Collective or mass expulsions are expulsions of groups of aliens that are ordered without an individual decision regarding each of the affected persons taking into account the individual circumstances of each case.[414] Mass expulsions constitute violations of each affected individual's right to due process, which requires legal proceedings to be conducted in accordance with "generally accepted rules and principles providing for the protection and enforcement of private rights, including notice and the **right to a fair hearing before the court or administrative agency with the power to decide the case**".[415] (See also above Chapter 4 d)) Decisions made on the basis of general criteria, e.g. a particular country of origin, gender, age or occupation, do not comply with these requirements. The prohibition applies to groups of aliens regardless of whether or not their presence in the country is legal. Separate arrests and deportations made over a period of time directed against a group may amount to mass expulsion.[416]

Collective expulsions may be permissible in very exceptional cases, such as where the **security and existence of a State may otherwise be seriously endangered.** In any case, they must not be **discriminatory or violate other human rights.**[417]

The UN Human Rights Committee has stated that the right of each foreigner to have a decision taken in his or her case and to submit reasons against expulsions makes mass or collective expulsions incompatible with Article 13 of the ICCPR.[418] In its Concluding Observations on the Dominican Republic, the Committee found 'mass expulsions of non-nationals to be in breach of the Covenant since no account is taken of the situation of individuals for whom the Dominican Republic is their own country in the light of Article 12, paragraph 4, nor of cases where expulsion may be contrary to Article 7, given the risk of subsequent cruel, inhuman or degrading treatment, nor yet of cases where the legality of an individual's presence in the country is in dispute and must be settled in proceedings that satisfy the requirements of Article 13.'[419]

The Committee on the Elimination of Racial Discrimination has also stressed the importance of individual circumstances. It has recommended that foreigners

414. W. Kälin, *Aliens, Expulsion and Deportation*, Max Planck Encyclopedia of International Law, para. 22.
415. IOM, Glossary on Migration (op. cit.).
416. W. Kälin, *Aliens, Expulsion and Deportation*, Max Planck Encyclopaedia of International Law, para. 22.
417. W. Kälin, *Aliens, Expulsion and Deportation*, Max Planck Encyclopaedia of International Law, para. 23.
418. General Comment 15/27 of 22 July 1986, para. 10.
419. Concluding Observations on the Dominican Republic, CCPR/CO/71/DOM, 26 April 2001, para. 16.

not be subject to collective expulsions, particularly where there are insufficient guarantees that the personal circumstances of each person concerned have been taken into account.[420]

Collective or mass expulsions of foreign nationals are unequivocally **prohibited under Article 4 of Protocol No. 4 to the ECHR**. The ECtHR has defined collective expulsions as 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.[421] **Guideline 3** of the **'Twenty guidelines on forced return'** reiterates such principle.

> In Conka v. Belgium, the ECtHR found that there were no sufficient guarantees demonstrating that the authorities had genuinely taken into consideration the personal circumstances of each applicant, given that all the aliens concerned had been required to attend the police station at the same time, that the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms, that it was very difficult for the aliens to contact a lawyer, and that the asylum procedure had not been completed.[422]
>
> In Hirsi Jamaa and Others v. Italy, the ECtHR found that returning Somali and Eritrean migrants to Libya without examining their case amounted to a collective expulsion. It held that there had been a violation of Article 4 of Protocol No. 4 on the prohibition of collective expulsions.[423]

Collective expulsions are also contrary to the **European Social Charter** and its **Article 19(8)** on safeguards against expulsion.

> In its decision in European Roma and Travellers Forum v. France, the ECSR held that the administrative decisions during the period under consideration, ordering Roma of Romanian and Bulgarian origin to leave French territory, where they were resident, were incompatible with the ESC, as the decisions were not based on an examination of the personal circumstances of the Roma, and they did not respect the proportionality principle.[424]

420. General Recommendation No. 30 of 1 October 2004, para. 26.
421. ECtHR, *Andric* v. *Sweden*, Application No. 45917/99, Judgment of 23 February 1999, para. 1.
422. Ibid., *Conka* v. *Belgium*, Application No. 51564/99, Judgment of 5 February 2002.
423. Ibid., *Hirsi Jamaa and Others* v. *Italy* (GC), Application No. 27765/09, Judgment of 23 February 2012.
424. ECSR, *European Roma and Travellers Forum* v. *France*, decision of 24 January 2012.

Since each person is entitled to an individual decision on their expulsion, mass or collective expulsions are prohibited. This prohibition also applies in Moldovan domestic law by virtue of the Monist clause in Article 4 of the Moldovan Constitution.

Provisions under European Union Law (provided for comparative purposes)

Collective expulsions are mentioned in **Article 78 of the TFEU**, which requires the asylum *acquis* to be in accordance with 'other relevant treaties'. Collective expulsions are also prohibited by **Article 19 of the EU Charter of Fundamental Rights**.

G) Voluntary return

In terms of migration management, it is clear that the voluntary return of migrants to the countries from which they arrived is preferable to forced return, and that it presents far fewer risks with respect to human rights.

In order to promote voluntary return, States may take a number of concrete measures, in particular by affording the returnee a reasonable time for complying voluntarily with the removal order, by offering practical assistance such as incentives or meeting the transport costs, and by providing complete information to the returnee, in a language that he or she can understand, about the existing programmes of voluntary return, in particular those of the International Organisation for Migration (IOM) and other similar organisations.

While for forced returns, a significant number of human rights obligations arise for the sending State – the most important of which are detailed in this chapter – voluntary returns may be distinguished, insofar as the obligations of the sending State are considerably less burdensome and may be fulfilled at significantly lower cost than forced returns.

For a return to be voluntary:

1. the individual in question must be able to make a free and informed choice, including through the availability of complete, accurate and objective information concerning the situation in the country of origin;
2. there must be an absence of coercive measures that would compel the individual to return to the country of origin or to stay in the destination country; and

3. there should not be undue or unreasonable delays in completing the procedure[425].

Voluntary return should be the preferred option, rather than forced return, as the human rights risks associated with the former are considerably less burdensome.

In some cases, return, even when voluntary, will not be possible, owing to ongoing safety and security concerns or humanitarian considerations.

> The prohibition upon *refoulement* is absolute and non-derogable. Therefore, if the government is in possession of information indicating that the life or freedom of the would-be returnee would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, if he or she were returned to his home State or a third State, the government may not facilitate return, even if it is voluntary.

As a corollary of the right to return to one's own country, States are bound to admit their nationals and cannot compel any other State to keep them through measures such as denationalisation. The exercise of the right to return does not preclude the right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, and any other reparations provided for in international law.[426]

The right to return to one's own country is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right (and other non-derogable human rights guarantees)** and solely for the purpose of **promoting the general welfare in a democratic society.**

The **right to return** has been enshrined in various binding international human rights instruments, including the **International Covenant on Civil and Political Rights (Article 12(4))** and the **International Convention on the Elimination of all Forms of Racial Discrimination (Article 5(d))**, as well as in a number of regional human rights instruments and the national legislation of various coun-

425. *IOM, Twenty guidelines on forced return, pp7-8; Axel Kreienbrink, Voluntary and Forced Return of Third Country Nationals from Germany Research, Study in the framework of the European Migration Network (2006), pp 4-16, available at* http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/return-migration/4a._de_emn_ncp_return_country_study_final_may2007en_version_en.pdf *See also: ICRC Customary Rule no. 132,* https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter38_rule132

426. *Human rights and population transfer, Final report of the Special Rapporteur, Mr. Al-Khasawneh*, E/CN.4/Sub.2/1997/23, Annex II, Article 8

tries.[427]

Regarding the voluntary return of **children,** General Comment No. 6 (2005) of the Committee on the Rights of the Child clearly affirms the primacy of the **best interests** of the child. Paragraph 84 states that 'Return to the country of origin is not an option if it would lead to a 'reasonable risk' that such return would result in the violation of fundamental human rights of the child, and in particular if the principle of *non-refoulement* applies. Return to the country of origin shall in principle only be arranged if such return is in the best interests of the child. Such a determination shall *inter alia* take into account the: safety, security and other conditions, including socio-economic conditions, awaiting the child upon return, including through home study, where appropriate, conducted by social network organisations; availability of care arrangements for that particular child; views of the child expressed in exercise of his or her right to do so under Article 12 and those of the caretakers; the child's level of integration in the host country and the duration of absence from the home country; the child's right 'to preserve his or her identity, including nationality, name and family relations' (Art. 8); the 'desirability of continuity in a child's upbringing' and the child's ethnic, religious, cultural and linguistic background (Art. 20). In the absence of the availability of **care provided by parents or members of the extended family,** return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.'

Within the Council of Europe system, **Guideline 1 of the 'Twenty guidelines on forced return'** states that 'the host state should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.'[428]

In terms of Moldovan domestic provisions, Article 61 of Law No. 200 of 16 July 2010 on the Regime for Foreigners in the Republic of Moldova provides for assisted voluntary return by supporting foreigners (upon request) in their voluntary return to their home country or to another country through the provision of financial resources (only one time) if needed.

427. E.g. Germany (German Constitution, http://www.gesetze-im-internet.de/englisch_gg/index.html, Article 116(2)); Israel (Law of Return, http://www.knesset.gov.il/laws/special/eng/return.htm); Poland (Polish Constitution, http://www.servat.unibe.ch/icl/pl00000_.html, Article 52(5).
428. Council of Europe: Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 1.

On 7 July 2011, the government of Moldova adopted Regulation 492 on procedures for the return, expulsion and readmission of foreigners from the territory of the Republic of Moldova. Article 14 provides each case and individual person shall be assessed on their merits, especially their physical or mental capacity, the technical reasons for the removal, the lack of transportation means or the impossibility of removal because the person is not identified. In this situation, the case officer may request the postponement of the removal until the circumstances preventing this have ceased.' As regards children, Article 15 provides that 'If the return decision is issued in respect of an unaccompanied minor, the case officer shall request the necessary assistance from the bodies responsible for children's rights and will make sure that the unaccompanied minor is returned to a member of his/her family, an officially designated guardian or a specialised institution for children in the state of return.'

Host states should take measures to promote voluntary returns, which should be preferred to forced returns.

Provisions under European Union Law (provided for comparative purposes)

The return policy according to the Charter of Fundamental Rights of the European Union is based on voluntary return.

Article 7 of the Return Directive foresees that return decisions must allow time (between 7 and 30 days) for voluntary departure. During this period, a series of obligations may be imposed with the aim of avoiding the risk of absconding, such as the obligation to periodically appear before the authorities, to submit an adequate financial safeguard or documents, or the obligation to stay in a certain area. If there is a risk of absconding, if an application for a stay permit was rejected on the basis of being unfounded or fraudulent, or if the concerned person represents a threaten to public order or safety or national security, Member States may not grant the person the possibility to voluntarily depart or may grant the person a period shorter than 7 days. **Article 11** establishes that an **entry ban** shall be issued if no period for voluntary departure has been granted, or if the obligation to return has not been complied with.

Readmission agreements

Returns are usually made possible through the conclusion of readmission agreements and bilateral discussions at the political as well as operational level relating to their implementation. Both t**he EU and individual Member States** can conclude readmission agreements. The legal basis for EU readmission agreements is defined in **Article 79(3) of the Treaty on the Functioning of the European Union (TFEU):** 'The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.' Under **Article 218 of the TFEU,** the European Parliament must consent to EU readmission agreements. In the absence of such agreements, a large number of **bilateral agreements** linked to readmission regulate returns to the country from which migrants have departed. In cases where an EU-level readmission agreement has been concluded, such as that between the EU and Moldova, it shall take precedence over any bilateral readmission agreements between Moldova and individual Member States.[429]

Readmission agreements between the EU or one of its Member States and third countries aim at facilitating the return of expelled migrants.

The Agreement between the European Union and the Republic of Moldova on the readmission of persons residing without authorisation is divided into 8 sections (23 articles altogether). It also contains 6 integral annexes and 6 joint declarations. The readmission obligations set out in the Agreement are drawn up in a fully reciprocal way, comprising Moldova's own nationals as well as third country nationals and stateless persons. The readmission obligation with regard to its own nationals also covers family members (i.e. spouses and minor unmarried children) who hold another nationality than the person to be readmitted and who do not have an independent right of residence in the requesting state.

Section III of the Agreement contains the necessary technical provisions regarding the readmission procedure (the form and content of the readmission application, means of evidence, time limits, transfer modalities and modes of transportation). Under the accelerated procedure, readmission applications must be submitted, and replies must be given, within 2 working days, whereas under the normal procedure, the time limit for replies is 11 working days. Article

429. The Republic of Moldova signed a readmission agreement with the EU on 10 October 2007.

19 creates the possibility for the Republic of Moldova and individual Member States to conclude bilateral implementing protocols.

Moldova has signed readmission agreements with Turkey (GD 956/2012), Montenegro (GD 557/2012), Bosnia and Herzegovina (G 558/2012), Denmark (GD 509/2011), Serbia (GD 405 2011), Switzerland (GD 210/2004), Macedonia (GD 381/2009), Norway (GD 707/2006), Lithuania (GD 266/2002), Romania (GD 493/2005), Italy (GD 1612/2003) and the Czech Republic (GD 1392/2003). In this context, protocols to implement the EU-Moldova Readmission Agreement were signed with Romania, Bulgaria, Latvia, Germany, Austria, Georgia and Spain.

Negotiations have been initiated for readmission agreements with Ukraine, Albania, Kazakhstan, Armenia, and the Russian Federation. In addition, negotiations on implementing the agreement between Moldova and the European Union on the readmission of persons residing without authorisation have been initiated with the Benelux countries (Belgium, the Netherlands and Luxembourg), Slovenia, Cyprus, Portugal and Italy.[430]

430. http://www.mai.gov.md/.

CHAPTER V

THE RIGHTS OF MIGRANTS IN MOLDOVA (ECONOMIC, SOCIAL AND CULTURAL RIGHTS)

A) Understanding economic, social and cultural rights

Economic, social and cultural rights constitute essential components of international law on human rights. **These rights are considered to be more positive than negative in nature, meaning that they are difficult to observe without positive action on the part of the state.** For migrants, these rights are recognised in the Universal Declaration of Human Rights (UDHR) and guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as other treaties on human rights, both within the UN system (the International Convention on the Elimination of Racial Discrimination (ICERD), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD)) and at the regional level by instruments such as the revised European Social Charter. They are also protected by Moldovan domestic law and by the Moldovan Constitution. This multi-layered legal apparatus consists of a series of guarantees concerning the right to work, the right to be involved in a trade union, the right to health, education and social security, the right to an adequate standard of living, including housing, food and water, and the right to take part in cultural activities. The international legal provisions concerning economic, social and cultural rights commits states to respect and protect these rights,[431] and obliges them to not unreasonably interfere in cases when migrants exercise these rights.

The protection of economic, social and cultural rights is essential in order to ensure that migrants are capable of leading fruitful lives, settling within new communities and establishing themselves in the State in which they find themselves. Failure to protect such rights, by contrast, may have significant negative impacts upon migrants. The denial of economic, social and cultural rights can lead to violations of other human rights. For example, it is often harder for individuals who are denied education to find work and thus to make a contribution to society.

As noted by the UN High Commissioner for Human Rights, Louise Arbour:

"The importance of economic, social and cultural rights cannot be overstated. Poverty and exclusion lie behind many of the […] threats that we continue to face both within and across borders and can thus place at risk the promotion and protection of all human rights. Even in the most prosperous economies, poverty and gross inequalities persist and many individuals and groups live under conditions that amount to a denial of economic, social, civil, political and cultural hu-

431. ICJ, Courts and Legal Enforcement of Economic, Social and Cultural Rights available at http://www.refworld.org/docid/4a7840562.html.

man rights."[432]

Given that in many instances, migrants may be particularly likely to find themselves included in the lower income brackets, facing language barriers, administrative difficulties and problems with access to education and healthcare, respect for economic, social and cultural rights – or lack thereof – is likely to have a significant impact upon their well-being.

The manner in which economic and social rights may be addressed in courts, as well as ways to appeal against decisions that restrict these rights, varies according to the national legal system, the national legislation, and the extent to which international standards have been transposed into the national legislation. The efficacy of the observance of these rights also depends on the extent to which economic and social rights were incorporated into the national legislation, and to what extent they are actionable before national and regional courts. As noted in Chapter 1, the Moldovan judicial system provides a wide range of procedural guarantees concerning human rights protection, while the ECtHR system, to which Moldova is subject, represents the pinnacle of human rights protection via a regional international courts system. However, historically, it has been more difficult to sustain court actions on the basis of economic, social and cultural rights than other human rights norms.

In this chapter, the handbook provides an overview of a number of economic, social and cultural rights, and the legal sources that define them. The rights analysed are:

1. the right to work (with particular attention to non-discrimination, the prohibition of slavery and forced labour and child labour);
2. the rights applicable in the workplace;
3. the right to an adequate standard of living;
4. the right to social security;
5. the right to health and medical assistance;
6. the right to education; and
7. the right to family reunification.

432. Louise Arbour, United Nations High Commissioner for Human Rights (Geneva, 14 January 2005)

B) The right to work

The right to work is closely linked to human dignity. It is a means not only for **subsistence,** but also for **self-realisation, development of human personality, and inclusion in society.**[433] At its core is the notion that all people have a **right to work or engage in productive employment,** and cannot be prevented from doing so. It primarily aims to secure the survival of the individual and their family, and it is at the centre of the individual's recognition within the community, personal development and social and economic inclusion.[434]

Migrant workers across the world, especially those in an irregular situation, experience exploitation in numerous forms. The particular sectors in which many work, can be unregulated and lacking in protection in terms of labour rights and other human rights. Irregular migrants are particularly vulnerable to forced labour and servitude, including debt bondage. Moreover, they may be unable to complain if employers withhold their pay and may have no access to remedies for unfair dismissal. This section seeks to provide a discussion of some of the key protective legal mechanisms provided for migrants engaged in working activities in the Republic of Moldova.

'Work' comprises both **self-employment** and **dependent work**, but necessarily decent work respecting the fundamental rights of the human person. However, it cannot be understood as an unconditional and absolute right to obtain employment.[435] Policies and techniques to achieve steady economic, social, and cultural development and full and productive employment are not standardised, but must be adapted to the specific conditions in each country.[436]

Major components of the right to work include:

1. **Access to work:** While there is no unconditional and absolute right to obtain employment, states are obliged to promote a coherent social and economic policy aiming at availability and accessibility of work, and to prioritise the reduction of the number of workers outside the formal economy. Examples of a sound labour market policy include vocational guidance training and rehabilitation as well as the maintenance of free employment agencies.[437]

433. A. Nußberger, *Work, Right to, International Protection*, Max Planck Encyclopedia of International Law, para. 1.
434. Ibid., para. 17.
435. Ibid., para. 18.
436. Ibid., para. 21.
437. Ibid., para. 33.

2. **Guarantee of decent work:** The goal of employment policy is not just to create jobs, but rather to create jobs of acceptable quality. This includes the necessity to guarantee just and favourable conditions of work, work safety, and a fair remuneration that allows workers to support themselves and their families.[438]

3. **Collective bargaining rights:** Collective bargaining is a tool of fundamental importance in the formulation of employment policies.[439] This includes the right to conclude binding agreements, including for federations and confederations, as well as a State duty of non-interference with this right. States are also under an obligation to promote suitable machinery for voluntary collective bargaining between workers' and employers' organisations.[440]

4. **Prohibition of forced or compulsory labour:** See below.

5. **Non-discrimination:** See below.

6. **Protection of vulnerable groups, especially children**: See below.

Exceptions to the right

The right to work is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society.** In particular, limitations that lead to an indefinite suspension of the right to work are not allowed.

Examples of legitimate limitations to the right to work are limited work restrictions imposed on criminals, transitional periods in which immigrants are barred from holding employment or work restrictions imposed on pregnant women in case of danger to mother or child.

The right to work is protected by:

a) **Article 23(1) UDHR**, which states that everyone has the right to work, to free choice of employment, to just and favourable working conditions and

438. A. Nußberger, *Work, Right to, International Protection*, Max Planck Encyclopedia of International Law, para. 32..
439. CESCR General Comment No. 18, E/C.12/GC/18, para. 39
440. F.C. Ebert, C. la Hovary, *Labour Law, International*, Max Planck Encyclopedia of International Law, para.32.

to protection against unemployment;

b) **Article 6(1) ICESCR**, which requires states parties to recognise everyone's right to work and to take appropriate steps to safeguard this right;

c) **Article 5(e)(i) ICERD**, which guarantees the right to work, to free choice of employment, to just and favourable working conditions, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration;

d) **Article 11 CEDAW**, which declares the right to work as an inalienable right of all human beings and grants the following rights: the right to equal employment opportunities, including the application of the same criteria for candidates of employment; the right to freely choose a profession or employment; the right to promotion, job security and all benefits and conditions of service; and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurring training;

e) **Article 2 of the ILO Migration for Employment Convention** (Revised), 1949 (No. 97), which stipulates that states are obliged 'to maintain, or satisfy [themselves] that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information';

f) **The ILO Right to Organise and Collective Bargaining Convention**, 1949 (No. 98), which provides for protection from governmental interference in unionisation and collective bargaining; and

g) **Article 17(1) of the 1951 Refugee Convention, providing** provides that '[c]ontracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.'

According to the aforementioned instruments, this right is applicable to all migrants.

Within the Council of Europe,

1. **Article 1 of the ESC** (r) requires the parties, with a view to ensuring the exercise of the right to work, to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full em-

ployment. It also obliges states to effectively protect the right of the worker to earn their living in an occupation freely entered upon; to establish or maintain free employment services for all workers; and to provide or promote appropriate vocational guidance, training and rehabilitation.

2. **According to the appendix to the ESC** (r), the right to work is granted only to migrants who are legal residents and to nationals of other contracting states.

3. **Article 18 of the ESC** (r) expressly recognises 'the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties', and requires states to simplify the formalities and liberalise the employment of foreign workers.

In terms of domestic implementation of the right to work, **Article 43 of the Constitution of Moldova provides for the right to work and labour protection**, noting that each and every person shall benefit from the right to work, to freely choose their profession and workplace, and to equitable and satisfactory working conditions, as well as to protection against unemployment.

Law No. 275 of 10 November 1994 on the Legal Status of Foreign Citizens and Stateless Persons provides for the right to work and its protection in accordance with the laws in force (Article 7(1)), with specific reference to foreigners and those who are without a recognised nationality. Law No. 180 of 10 July 2008 on labour migration sets out the general conditions for immigration to the Republic of Moldova for the purpose of work for foreign citizens and stateless persons, for the temporary employment of Moldovan citizens abroad ('posted workers'), and for ensuring the observance of the legislation on labour migration. Law No. 274 of 27 December 2011 on integration of foreigners in the Republic of Moldova provides in article 12 that '**refugees and beneficiaries of humanitarian protection shall have access to the labour market**, the unemployment insurance system, and measures to prevent unemployment and stimulate employment, in conditions established by law for citizens'.

The right to work is recognised in the great majority of international human rights treaties. The right to work is granted to migrants legally residing in the Republic of Moldova.

Provisions under European Union Law (provided for comparative purposes)

While **all members of the European Union are also Council of Europe Member States, and are thus subject to the provisions of the ESC, as well as the obligations under public international law mentioned above** – thus being subject to identical obligations as the Republic of Moldova, it is clear that **a deeper level of integration has been achieved within the EU with respect to labour migration and the right to work, which constitutes one of the core tenets of EU law**. The following section will provide an overview of the main provisions in this regard.

The EU Charter of Fundamental Rights declares in Article 15:

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

In addition, there are several EU directives that involve third country nationals in terms of employment or research:

1. **Directive 2005/71/EC** provides for a fast-track procedure for the admission of non-EU researchers for stays of more than three months if the researcher has a 'hosting agreement' with a research organisation.
2. **Directive 2009/50/EC** sets out the conditions for the entry and residence of third country nationals (as well as their family members) in an EU Member State for the purpose of highly qualified employment for a period of more than three months. The Directive is designed to:
    - facilitate the admission of these persons by harmonising entry and residence conditions throughout the EU;
    - simplify admission procedures; and
    - improve the legal status of those already in the EU.

Non-EU nationals who are family members of EU nationals have the right to work in an EU country and be treated equally with EU nationals as regards working conditions. These rights depend on their status as family members of EU nationals and on their own nationality. In general, for non-EU nationals, the right to work in an EU country mainly depends on the laws of that country, unless they are members of an EU national's family.

3. **Directive 2011/98/EU** introduced: '(a) a single application procedure for issuing a single permit for third country nationals to reside for the purpose of work in the territory of a Member State, in order to simplify the procedures for their admission and to facilitate the control of their status; and (b) a common set of rights to third country workers legally residing in a Member State, irrespective of the purposes for which they were initially admitted to the territory of that Member State, based on equal treatment with nationals of that Member State'.

The prohibition upon slavery and forced labour

Problems of servitude, forced labour and slavery are likely to affect migrants to a greater extent than a country's native population. They are at significant risk of exploitation, often of being made to work in inhumane conditions, and may receive low wages compared to nationals or regular migrants for the same work. In one of many pathways to irregular status, recruitment agents may require migrants to sign fraudulent contracts or give them false information during the hiring process, while they may face servitude rather than gainful employment when they arrive. This can be exacerbated by the fact that legislation may prevent migrants from changing jobs and tie them to one employer. In order to escape abusive conditions once in the country of employment, migrants could be compelled to enter an irregular situation.

Slavery is defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[441] It includes:

1. all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery;

2. all acts involved in the acquisition of a slave with a view to selling or exchanging him;

441. Article 1(1) Slavery Convention, 60 UNTS 254.

3. all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged; and

4. in general, every act of trade or transport in slaves.[442]

The elements of **control and ownership**, often accompanied by the threat of violence, are central to identifying the existence of slavery. **Loss of other fundamental rights and freedoms**, including freedom of expression, peaceful, religion, association, and freedom to receive and communicate information often goes hand-in-hand with slavery. Contemporary forms of slavery in the context of the right to work include:

1. **Debt bondage:** The status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.[443] Debt bondage often occurs where an **individual incurs a debt to unscrupulous persons that cannot be repaid.** The work demanded to pay off the debt does not provide for means sufficient for the individual to subsist on, much less repay what is owed. Today, debt bondage affects millions of adults and children throughout the world, including **many migrant workers.** To avoid debt bondage, countries must ensure that bonded workers, once freed, do not promptly assume another loan, thus causing reversion back to indentured status.[444]

2. **Serfdom:** Serfdom is a form of slavery in which a statute, legal relationship, custom, or agreement requires one person to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not. The victim is not free to change his status. Such services might include working the land for the owner, doing other work such as chores around the home, or, most frequently, providing a portion of the crop to the landowner at harvest. Serfdom often ensnares entire families; the status of a serf is frequently hereditary in nature and permanent in status, not just for individuals, but also for their family.[445]

442. Article 1(2) Slavery Convention.
443. Article 1 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 UNTS 3.
444. D. Weissbrodt, *Slavery*, Max Planck Encyclopedia of International Law, pars. 9-10.
445. Ibid., para. 12.

3. **Forced prostitution:** Forced prostitution occurs when an individual is prostituted **against his or her will.** Force may include **physical abuse,** taking of a prostitute's children as **hostages, threats of abuse** to the prostitute or his or her children, or ensuring that the prostitute has **no freedom of movement.** Prostitution is any sexual act offered for reward or profit.[446]

Forced labour is defined as all **work or service** that is exacted from any person under the menace of any penalty and for which the said person **has not offered himself voluntarily.**[447] Forced labour is distinct from slavery in that it does not include an attribute of ownership, yet it imposes a similar degree of restriction on the individual's freedom.[448]

> **Derogations from the prohibition upon slavery and forced labour are not allowed under any circumstances. The prohibition is absolute in all circumstances.**

Slavery and forced labour are proscribed by a multitude of legal provisions at international level:

1. **Article 6(1) ICESCR** protects each person's right to earn their living by **freely chosen or accepted work.** This right ensures that a person is not unjustly deprived of a job and prohibits forced labour or slavery.

2. **The Slavery Convention**,[449] which defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'

3. **The ILO Forced Labour Convention**, 1930 (No. 29) **and the ILO Abolition of Forced Labour Convention**, 1957 (No. 105). The definition of forced and compulsory labour was established by the ILO in 1930 as all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered voluntarily.

4. **Peremptory norms of international law** *(ius cogens)* include the prohibition of slavery and forced labour.[450]

---

446. D. Weissbrodt, *Slavery*, Max Planck Encyclopedia of International Law, paras. 21-22.
447. Article 2 ILO Convention concerning Forced or Compulsory Labour, 1930 (No. 29).
448. D. Weissbrodt, *Slavery*, Max Planck Encyclopedia of International Law, para. 13.
449. Slavery Convention, signed at Geneva on 25 September 1926, entered into force: 9 March 1927.
450. Bassiouni, *Enslavement as an International Crime*, NYU Journal of Int'l Law and Politics, vol. 23, 1991, p. 445; YBILC 1963, vol. II, United Nations sales publication No. 63.V.2, pp. 198-199 ("[B]y way of illustration, some of the most obvious and best settled rules of jus cogens ... included trade in slaves."); HRC General Comment No. 24, UN Doc. HRI/GEN/1/Rev.5, para. 8; cf. ICJ, Barcelona Traction, 1970 ICJR 3, para. 33.

At the level of the Council of Europe, the **ECtHR** has held that servitude entails a serious form of denial of freedom, as does an obligation, under coercion, to provide one's services, and is linked with the concept of 'slavery'. The ECtHR held that there is forced or compulsory labour if there is a **physical or mental coercion** that forces the willingness of the concerned person.[451] Forced labour may also occur when a worker voluntarily agrees to perform work, but under economic constraints. The ECtHR underlined that **states have the obligation** not only to abstain from but also to **criminalise practices** of forced and compulsory labour and to efficiently investigate and punish persons guilty of such practices.

> In Rantsev v. Cyprus and Russia, the ECtHR, when considering the scope of 'slavery' under Article 4, referred to the classic definition of slavery contained in the 1926 Slavery Convention, which requires the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an 'object'. With regard to the concept of 'servitude', the Court held that what is prohibited is a 'particularly serious form of denial of freedom'. The concept of 'servitude' entails an obligation, under coercion, to provide one's services, and is linked with the concept of' 'slavery'.
>
> In Siliadin v. France, the ECtHR affirmed that the prohibition of forced or compulsory labour, like slavery and servitude, 'enshrines one of the basic values of the democratic societies making up the Council of Europe. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation'.

The right of victims of forced labour to take their cases to court is established in the treaties on human rights that prohibit forced labour. This right exists irrespective of the person's legal status. In addition to **criminal law measures necessary to punish traffickers,** the ECtHR found that Article 4 ECHR calls for Member States to **apply adequate measures** for regulating businesses that formerly concealed human trafficking. Moreover, legal provisions on immigration must discourage, hinder and criminalise trafficking. State authorities have the obligation to protect persons facing the risk of being trafficked or obliged to forced or compulsory labour.

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

In Moldovan law, compulsory (obligatory) work is defined as any work or any service imposed on a person without their consent and is forbidden according to the Constitution of the Republic of Moldova (Article 44(1)). The regulation governing labour relations and other relations directly connected to employment is based on freedom of labour, including the right to freely choose work, the right to utilise one's abilities, and the right to choose a trade and an occupation (Labour Code, Article 5(a)).

Forced and compulsory labour is prohibited, and victims of trafficking are entitled to protection and to take their case to court.

Provisions under European Union Law (provided for comparative purposes)

Again, **while all members of the European Union are also Council of Europe Member States, and are thus subject to the provisions of the ESC, as well as the obligations under public international law mentioned above** – thus being subject to identical obligations as the Republic of Moldova, a number of further provisions with respect to the prohibition of servitude and forced labour apply within the EU. The following section will provide an overview of the main provisions in this regard.

1. **The Treaty on the Functioning of the European Union** (TFEU) declares that the EU shall constitute an area of freedom, security and justice with respect for fundamental rights (Article 67) and shall adopt measures in combating trafficking in persons, in particular women and children (Article 79).

2. **Article 5 of the EU Charter of Fundamental Rights** states that no one shall be held in slavery or servitude, that no one shall be required to perform forced or compulsory labour and that human trafficking is prohibited.

3. **Directive 2011/36/EU** includes the requirement that '[v]ictims of trafficking who have already suffered the abuse and degrading treatment which trafficking commonly entails, such as sexual exploitation, sexual abuse, rape, slavery-like practices or the removal of organs, should be protected from secondary victimisation and further trauma during the criminal proceedings.'

4. Relevant provisions are also included in several directives, including, but not limited to:

   - **Directive 2002/90/EC**, which defines the facilitation of unauthorised entry, transit and residence;
   - **Directive 2004/80/EC**, which covers compensation for crime victims; and
   - **Directive 2004/81/EC**, which provides for the issuance of residence permits to third country nationals who are victims of human trafficking or who have been the subject of an action to facilitate illegal immigration, and who cooperate with the competent authorities.

Non-discrimination in working conditions and equal treatment

Non-discrimination constitutes a **basic and general principle relating to the protection of human rights** in international law.[452] In the context of migration, it manifests itself in the requirement of **most favourable treatment,** meaning that migrants must not be treated less favourably by a state than its own nationals. This particularly concerns the following areas:

1. Working conditions, including overtime, working time, weekly rest, safety and health;
2. Remuneration, including family allowances where applicable and the enjoyment of the benefits of collective bargaining;
3. Paid leave and work-related suspension;
4. Minimum employment age;
5. Work restrictions; and
6. Apprenticeship and training.

Specific protection is afforded to **migrant women,** which includes:

1. Eliminating **discriminatory restriction**s on migration, including those excepting women from different types of activities;
2. Ensuring **specific rights for female migrant workers**, including legal

452. HRC General Comment No. 18, HRI/GEN/1/Rev.1 at 26, para. 1.

protection of these rights, such as free movement, personal integrity and protection from torture or other cruel, inhumane and degrading treatment; and

3. Ensuring access to **procedures to take a case to court** in case of abuse.

The right to non-discrimination and equal treatment is subject to **several limitations**:

1. Measures against individuals who are justifiably suspected of, or engaged in, activities **prejudicial to the security of the State** are not considered discrimination, however, due process law must still be accorded to these individuals;

2. Article 4(1) ICCPR applies to the right to non-discrimination and equal treatment and allows suspension of this right in case of a **public emergency which threatens the life of the nation** and the existence of which is **officially proclaimed,** provided that such measures are **not inconsistent with their other obligations under international law** and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

> With regard to the international legal framework, Article 25 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), which applies to all **migrants irrespective of their legal status, states that migrant workers must not enjoy a less favourable treatment compared to that enjoyed by the citizens of the employing state as regards remuneration, working conditions (including overtime), working time, weekly rest, paid leave, safety, health, work-related suspension, minimum employment age and work restrictions.**

These rights cannot be subject to derogation in private contracts or when the migrant worker is illegally resident on the state territory. The ICRMW also obliges states parties to 'take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity'[453].

453. Article 25(3) of the ICRMW.

The ILO Migration for Employment Convention (Revised), 1947 (No. 97) **obliges the state to eliminate discrimination on grounds of nationality, race, religion or sex for all persons (including non-citizens) on their territory, ensuring that they do not receive a less favourable treatment than the state's own nationals** as regards 'remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons' (Article 6).

The ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) stipulates in Article 1 that states 'undertake to respect the basic human rights of all migrant workers'.

The 1951 Refugee Convention features wording that is similar to ILO Convention No. 97, stating that a legal **refugee** on a state's territory enjoys the same treatment as the state's own citizens regarding 'remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining' (Article 24).

For migrant women, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) emphasises specific measures to be taken by Member States in order to comply with their international obligations in guaranteeing the equal rights of women workers. Such measures include: eliminating discriminatory restrictions on migration, including those excepting women from different types of activities; ensuring specific rights for female migrant workers (including legal protection of these rights), such as free movement, personal integrity and protection from torture or other cruel, inhumane and degrading treatment; and ensuring access to procedures to take a case to court in case of abuse.

> For example, in an individual claim against the Netherlands, the Committee on the Elimination of Racial Discrimination ascertained that a woman's rights based on the ICEDR were violated following her dismissal during her pregnancy as a result of discrimination on grounds of sex and non-national status.[454]

454. CERD, *Yilmaz-Dogan* v. *the Netherlands*, Communication No. 1, CERD/C/36/D/1/1984.

Within the Council of Europe system, in accordance with **Article E of the ESC (r), the European Committee of Social Rights has stressed the necessity of having legislation in place that prevents all forms of discrimination (direct or indirect) in employment, based on sex, race, ethnic origin, religion, disability, age, sexual orientation, political opinion, et cetera**. It concerns both the recruitment procedure and the general conditions of employment, including remuneration, promotion, training, transfer and dismissal.

In Moldovan domestic law, Law No. 180 on labour migration of 10 July 2008, which entered into force on 29 August 2008, regulates the main conditions for immigration to the Republic of Moldova for work purposes of foreign and stateless persons, the temporary employment abroad of Moldovan citizens, and the monitoring of the observance of legislation on labour migration. The Moldovan legislation concerning labour relations embodies the principle of equality. Any direct or indirect form of discrimination of the employee on the basis of sex, age, race, nationality, creed, political conviction, social origin, place of residence, physical or mental disability, membership of trade unions or participation in a trade union, or other criteria not connected to the professional qualifications of the worker, is forbidden.

However, the above does not entail that further restrictions to the right to work cannot be applied to foreigners that do not apply to Moldovan citizens. **The right of foreigners to work in Moldova is subject to specific restrictions, which do not, in and of themselves, violate the non-discrimination principle.** In the Republic of Moldova, labour migration of foreign citizens is accepted if vacancies cannot be filled by Moldovan citizens. A company's representatives must submit an application to the Bureau for Migration and Asylum in the Ministry of Internal Affairs according to the law. In this context, long-stay visas are issued for:

1. entrepreneurial activity – for foreigners intending to invest in the Moldovan economy; and
2. employment – for foreigners coming to the Republic of Moldova for employment, for those temporarily seconded by foreign companies, for trainees and for seasonal workers.

National Employment Agency analyses each file for a period of up to 30 days from registration and takes the decision to grant or prolong or reject the grant or prolongation of the right to work. The rejection of the right to work is regulated by law in some cases (e.g. if false data is found following the review of documents submitted by the applicant; if the migrant suffers from a malady or

an infectious disease, endangering the health of the population; or if the applicant has immigration restrictions in the Republic of Moldova).

Law No. 270 on Asylum in the Republic of Moldova includes the principle of non-discrimination, providing in article 10 that 'the provisions of the national legislation shall apply to asylum-seekers and beneficiaries of a form of protection without discrimination as to race, nationality, ethnic origin, language, religion, political membership, social category, beliefs, gender, sexual orientation or age'. This essentially entails that the **non-discrimination provisions concerning working rights in Moldova shall also be extended to those who benefit from a form of international protection.**

Migrants entitled to work shall be guaranteed equal working conditions and receive the same treatment as nationals of the country in which they work.

Provisions under European Union Law (provided for comparative purposes)

A number of further provisions with respect to non-discrimination apply within the EU. The following section will provide an overview of the main provisions in this regard.

Article 15(3) of the EU Charter of Fundamental Rights stipulates that 'nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union'. In addition, several EU directives prohibit discrimination in employment-related matters:

1. **The Employment Equality Directive (2000/78/EC)** prohibits discrimination in employment and occupation – access to employment, access to vocational training, working conditions, and membership of trade unions – on the grounds of religion or belief, disability, age, or sexual orientation.
2. **The Racial Equality Directive (2000/43/EC)** prohibits discrimination on the grounds of race and ethnic origin, not only in the field of employment, but also with regard to social protection and benefits, education, and access to public goods and services, such as housing.
3. **The Gender Equality Directive (2006/54/EC)**, states that '[t]he purpose of this Directive is to ensure the implementation of the principle of equal

opportunities and equal treatment of men and women in matters of employment and occupation.' Therefore, it does not exclude protection for third country nationals.

The prohibition of child labour

Migrant children constitute a highly vulnerable group, and must be protected against engagement in child labour. A child is defined as a person **below the age of eighteen years** unless under the law applicable to the child, majority is attained earlier.[455] International human rights law does not generally prohibit child labour; however, there are several limitations to employment of children (in addition to those provided to everyone):

1. States are obliged to provide a **minimum age of employment,** below which child labour is **absolutely prohibited.** There is agreement in the international community that, generally, this age should not be lower than **15 years.**[456]

2. States are obliged to provide for appropriate regulation of the **hours and conditions of employment** of children.[457]

3. States must ensure that children are protected from **economic exploitation** and from performing any work that is likely to be **hazardous** or to **interfere with the child's education,** or to be harmful to the child's **health or physical, mental, spiritual, moral or social development.**[458]

4. Children may not be employed in what is termed the **'worst forms of child labour'**, including all forms of slavery or practices similar to slavery, including the compulsory recruitment of children for use in armed conflict;[459] child prostitution and pornography;[460] using children for illicit activities, in

455. Article 1 CRC.
456. According to ILO minimum age convention (C138) of 1973, child labour refers to any work performed by children under the age of 12, non-light work done by children aged 12–14, and hazardous work done by children aged 15–17. Light work was defined, under this Convention, as any work that does not harm a child's health and development, and that does not interfere with his or her attendance at school. This convention has been ratified by 135 countries, including Moldova, which sets the minimum age for work at 16 (the Convention allows flexibility in this respect, but with a minimum of 15 years, though a declaration of 14 years is also possible when work may only be carried out for a specified number of hours).
457. Ibid.
458. Ibid.
459. First Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000).
460. Second Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000).

particular for the production and trafficking of drugs;[461] and work that is likely to harm the health, safety, or morals of children.[462]

For the most part, **the limitations set for the employment of children cannot be suspended under any circumstances.** Exceptions are possible regarding the minimum age of employment in specialised cases, for example in cases of artistic performances.

Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) calls on Member States to establish a minimum employment age. Moreover, the Committee on Economic, Social and Cultural Rights stated that states 'must take effective measures, in particular legislative measures, to prohibit labour of children under the age of 16'. If children are employed, the state has additional obligations to protect them: '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.'

Article 24 ICCPR declares that generally every child shall have, without any discrimination, '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 32 CRC demands that states parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development.

The effective abolition of child labour is a mandatory obligation for all ILO Member States. In this regard, the **ILO** decided that a child cannot be employed before the age they finalise their mandatory studies and not before the age of 15. This principle may be subject to some limited exceptions in the national legislation, for example, as regards artistic performances. The following ILO conventions specifically deal with the issue of child labour: **the Minimum Age Convention, 1973 (No. 138), the Worst Forms of Child Labour Convention, 1999 (No. 182) and the Domestic Workers Convention, 2011 (No. 189).**

At the European level, the issue of employment of children is dealt with in **Article 7 ESC,** which also prohibits labour under the age of 15, but provides an exception for carrying out 'light work', i.e. work that is very light in nature and for a lim-

461. Protocol to the Convention against Transnational Organised Crime Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the Trafficking Protocol or UN TIP Protocol) (2000).
462. See, *inter alia*, the ILO minimum age convention (C138) of 1973, discussed above.

ited length of time. Under the System of Collective Complaints of the European Social Charter, a complaint was made against Portugal regarding child labour.[463] The European Committee of Social Rights (ECSR) concluded that there was a violation of Article 7(1) and transmitted its decision on the merits of the complaint to the parties and to the Committee of Ministers, which adopted Resolution CHS (99)4 on 15 December 1999.

In domestic law, **the prohibition of child labour in the Republic of Moldova** is stipulated primarily by the Constitution of the Republic of Moldova in Article 50(4), which forbids the exploitation of minors and their involvement in activities which might damage their health or moral integrity, or endanger their life or proper development; and by the Labour Code, which states that workers who have not reached the age of 18 are allowed to work only after a preliminary medical examination. However, they are forbidden from performing heavy work, work in dangerous working conditions and underground work, as well as work that can harm their health or moral integrity. In addition, they are not allowed to lift or carry a weight that exceeds the limit established for them. Other important Moldovan laws are Law No. 625-XII of 2 July 1991 on protection of labour, Law No. 338 of 15 December 1994 on children's rights and Law No. 241-XVI of 20 October 2005 on preventing and combating trafficking in human beings.

Children shall be protected from economic exploitation and from performing any work that is likely to be hazardous. The age of 15 is internationally recognised as the limit below which exploitation is automatically assumed to occur (with the exception of 'light work'). Young people who work must enjoy working conditions appropriate to their age.

Provisions under European Union Law (provided for comparative purposes)

Within the EU context, **Article 32 of the EU Charter of Fundamental Rights** prohibits the employment of children. The minimum age for employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people who work must have working conditions appropriate to their age and be protected from economic exploitation and any work likely to harm their

463. *International Commission of Jurists* v. *Portugal*, Complaint No. 1/1998.

safety, health, or physical, mental, moral or social development or interfere with their education. Other relevant provisions are included in **Directive 94/33/EC** on the protection of young people at work and in **Decision 779/2007/EC** on the establishment of a specific programme (for the period 2007–2013) to combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme).

C) Rights in the workplace

> **The protection of all workers against exploitation and abuse is a core component of labour-related human rights, particularly in situations of vulnerability and a large power imbalance between workers and employers.**

It is clear that this is applicable in the case of migrant workers, who may be poorly versed in local laws concerning labour protection, have limited language skills, and who may be in desperate need of money and legal status to prolong their stay. This situation may be exacerbated in circumstances when such individuals are in an irregular situation. Norms on workers' rights are thus of key importance for such individuals.

International law specifically provides for the protection of human rights in the workplace. These rights are essential for migrants, and are applicable to all workers, irrespective of their migrant status, and include:

1. The right to **equal conditions between women and men,** with equal pay for equal work;
2. The right to **a wage guaranteeing just and favourable conditions** (see also below Chapter 5 D), criteria for setting this wage include the needs of workers and their families, the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.
3. The right to safe and healthy working conditions, which includes:
    a. A state's duty to adopt a national policy regarding the prevention of health and safety risks, to adopt occupational safety and health regulations with appropriate enforcement mechanisms, to consult with the national social partners, and to ensure appropriate arrangements at the enterprise level.

b. A worker's right to remove themselves from the workplace in the event of a risk to his or her health or security.

c. The principle that occupational safety and health matters may not involve expenditures for the worker.

4. The right to **equal opportunity to be promoted** in their employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

5. The **right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay,** as well as remuneration for public holidays, examples of this are the principle of the eight-hour day, the 40-hour week, a period of 24 hours of rest every seven days, and a minimum annual leave of three working weeks;

6. The right to **non-discrimination** in the realisation of all components of the right to work and of workplace rights (see above Chapter 5 B).

Rights in the workplace are only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society.**

In terms of legal protection the ICESCR includes protection of the right to **fair wages and equal remuneration** for work of equal value without discrimination of any kind. In particular, Article 7 guarantees a series of rights at workplace:

1. the right to equal conditions between women and men, with equal pay for equal work;

2. the right to a decent living for workers and their families;

3. the right to safe and healthy working conditions;

4. the right to equal opportunity to be promoted in their employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

5. the right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays; and

6. the right to non-discrimination in the realisation of all components of the right to work and of workplace rights (together with Articles 6 and 2(2)).

Similar rights are recognised by the International Convention on the Elimination of Racial Discrimination (ICERD), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and, with the exception of the provisions from the 4th Part of the ICRMW, all are applicable to migrants, irrespective of their status on the state territory. Moreover, **Article 11 CEDAW** guarantees **women** equal rights to **protection of health and to safe working conditions,** including the safeguarding of the function of reproduction. It requires states to provide special protection to women during pregnancy in types of work harmful to them. In its General Recommendation on Women and Health (No. 24, 1999), the Committee on the Elimination of all forms of Discrimination against Women called on states to give special attention to the needs of migrant women, who may suffer detrimental effects on their health due to vulnerabilities and discrimination. A series of international legal provisions forbid women from having their employment terminated on grounds of **pregnancy,** as well as from being subject to a pregnancy test before leaving the origin state or before employment beings. These provisions also require that pregnant women are able to benefit from paid maternity leave or adequate social protection. The Committee on Human Rights decided that practices such as an employer's request for pregnancy tests before employment violates the principle of gender equality in the light of the right to privacy (Article 3 and 17 of the ICCPR).[464]

Two key provisions for migrants are mentioned in Article 49(2) and Article 51 of the ICRMW. They require that a migrant worker who becomes unemployed be granted a **period of time to seek another job** before losing their right to residence.

The ILO Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers Convention (Supplementary Provisions), 1975 (No. 143), and their accompanying recommendations provide for policies to promote equality of treatment and opportunity between migrant workers with a regular status and nationals in the areas of remuneration, including family allowances; hours of work; overtime arrangements; holiday with pay; restrictions on home work; minimum age for employment; apprenticeship and training; and trade union rights, employment taxes, and access to legal proceedings. Finally, **Article 9** includes an additional protection clause for migrant workers, which states that even if the migrant is in an **irregular situation,** they must benefit from remuneration, social security and other benefits resulting from the work performed.

464. CCPR, General Comment No. 28, CCPR/C/21/Rev.1/Add.10.

Regarding **refugees**, the following rights are granted by the Refugee Convention in the same way as for all other foreign citizens: the right of association, limited to non-political and non-profit organisations and trade unions (Article 15), the right to be employed in paid work (Article 17) and the right to exercise liberal professions (Article 19).

Within Europe, via the Council of Europe system, a similar array of rights is subject to protection. The **European Social Charter (ESC)** provides for the right to safe and healthy working conditions (Article 3), the right to just conditions at work (Article 2), the right to remuneration (Article 4), the right to protection in case of dismissal (Article 24), the right to protect one's own claims in case of an employer's insolvency (Article 25), the right to dignity at the workplace (Article 26), and the right of workers with domestic responsibilities to equal opportunities and treatment (Article 27). According to the appendix to the ESC, the rights contained in Articles 2 to 4 and 24 to 27 ESC are applicable to nationals from other states parties lawfully resident, or those in possession of a work permit, on the territory of the party in question, including refugees and stateless persons 'lawfully staying in its territory'.

The states that have accepted the **obligations of Article 19 of the ESC**[465] are obliged to guarantee workers legally staying on their territory treatment no less favourable than that accorded to their own citizens as regards remuneration and other working conditions, membership of trade unions, labour taxation, and fees and contributions owed by employees. Article 19 of the ESC guarantees equal treatment in legal proceedings; family reunification; appropriate services for health; good hygienic conditions during the departure, journey and reception of migrants; protection against expulsion, etc.

The Constitution of the Republic of Moldova, via Article 4, ensures the incorporation of the standards listed above as part of Moldovan domestic law. Such standards are also protected by the Labour Code: Chapter II: Basic principles, which provides that every person shall benefit from the right to work, to freely choose their profession and workplace, to equitable and satisfactory working conditions, to protection against unemployment and to social protection. Protection measures shall cover labour safety and hygiene, working conditions for women and young people, the introduction of a minimum wage, weekends and annual paid leave, as well as difficult working conditions and other specific situations.

465. The Republic of Moldova ratified the Revised European Social Charter on 8 November 2001, accepting inter alia paras. 19.7 and 19.8 of the Charter.

Conditions in the workplace encompass a series of rights such as: safety, health and dignity, fair wages and equal remuneration for work of equal value, protection in case of dismissal, membership of trade unions, limitation of working hours, right to rest, etc.

Migrants in an irregular situation must also benefit from remuneration, social security and other benefits resulting from the work performed.

Provisions under European Union Law (provided for comparative purposes)

Within the EU, a deeper integration concerning workplace rights has taken place, as the free movement of workers is one of the cornerstones of EU law, and since having better protection in one State vis-à-vis another would result in a potential competitive advantage within the Internal Market. As a result, harmonisation of standards has been mandated, in the form of a 'race to the top' – that is, States have been encouraged to bring protection into line with the best standards obtaining within other EU Member States. This has been formalised via EU law.

The **EU Charter of Fundamental Rights** provides for labour rights in **Articles 27–31,** especially the right to fair and just working conditions (Article 31). Every worker has the right to working conditions that respect their health, safety and dignity. In addition, every worker has the right to a limitation of working hours, to daily and weekly rest periods, and to an annual period of paid leave. This is a right guaranteed to all workers, not just citizens or legal residents. Beyond the provisions of the CFR, one may also mention a number of relevant directives:

1. **Directive 2009/52/EC** targets employers who take advantage of irregular migrants' precarious position and employ them in low-paid jobs with poor working conditions. The Directive strengthens the rights of the individual migrant by requiring employers to pay any outstanding wages.
2. **Directive 91/383/EEC** covers individual employment conditions and health and safety in fixed-term and temporary employment.
3. **Directive 91/533/EEC** established the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

4. **Working Time Directive 2003/88/EC** covers matters related to the working time of employees.

5. **Directive 2008/94/EC** ensures payment of employees' outstanding claims in the event of employer insolvency.

D) The right to an adequate standard of living

For many migrants, it is often rather difficult to achieve an adequate standard of living. **The insecure conditions in which many such individuals find themselves entail that they may be restricted in terms of their access to adequate housing, food, water and sanitation.** It is also clear that inadequate access to one or more of these rights tends to undermine the enjoyment of many other rights by such individuals. Particularly in urban areas and in border areas, where many migrants tend to find themselves, some may be compelled, by law or by chance, to live in segregated, run-down and poorly maintained residential areas or detention facilities, with poor services and facilities. Thus, protection of the right to an adequate living standard is instrumental in ensuring meaningful enjoyment of human rights by such migrants.

International human rights law provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.[466] The main components of this right include:

1. The right to **food and nutrition**, particularly **regular, permanent and free access** to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs. States have a duty to ensure that **everyone is free from hunger** and to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems so as to achieve the most efficient development and utilisation of natural resources.

2. The right to **adequate housing**. Criteria for adequacy in this respect[467] include:

    a. **legal security of tenure;**

    b. **basic services, materials, facilities, and infrastructure** such as

466. Article 25(1) UDHR.
467. CESCR General Comment No. 4, contained in document E/1992/23, para. 7.

safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities;

c. **means of storage, refusal disposal, site drainage, and emergency services** must be available;

d. **affordability** for the majority of inhabitants without exclusion due to means; and

e. **habitability** in the sense of having adequate space and protection from the vagaries of nature such as cold, damp, heat, rain, wind, and other threats to health, structural hazards, and disease vectors.

3. The right to **medical care** (see below); and

4. The right to **social security** (see below).

The right to an adequate standard of living is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society.**

Article 11 ICESCR requires that 'States Parties to the present Covenant recognize the right of everyone to an **adequate standard of living** for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

The right to water and food is intrinsically linked to the right to life and human dignity, as well as to the right to health. Article 11(2) of the ICESCR recognises 'the fundamental right of everyone to be free from hunger' as a right with immediate effect. In accordance with this right, the state has 'to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger'. The right to adequate food is fully achieved when 'every man, woman and child, alone or in a community with others, has physical and economic access at all times to adequate food or means for its procurement '.[468] The right to water 'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use'.[469] States have the immediate responsibility to ensure minimum access to water under safe and non-discriminatory conditions.

468. CESCR, General Comment No. 12 E/C.12/1999/5.
469. CESCR, General Comment No. 15 E/C.12/2002/11.

Another right which is of particular relevance to migrants is the **right to adequate housing**. This right is protected by Article 11 of the ICESCR, Article 5(e) of the ICERD, Article 27 of the CRC[470], Article 28(1) of the ICRPD and Article 14 (2(h)) of the CEDAW. The right to adequate housing guarantees the right to shelter and accommodation and also includes the right to security of possessions; the right to legal protection against forced eviction; the right to housing with minimum facilities for health and security, as well as acceptable financial costs; and the right to access jobs, health services, schools, childcare centres and other social facilities. **The prohibition of forced eviction** is directly linked to the respect of the right to housing, and it has immediate effect. Victims of a forced eviction should have the possibility to take their case before the court, even if the eviction is ordered by the state. The CESCR defines 'forced eviction' as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.[471]

The Refugee Convention grants the right to housing **(Article 21)** to refugees in the same way as for all other foreign citizens.

Within the Council of Europe system, **Article 16 ESC** requires that 'the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing (…)'. **Article 19(4)** obliges states 'to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of (…) accommodation'. **Article 31** states that '[w]ith a view to ensuring the effective exercise of the **right to housing,** the Parties undertake to take measures designed:

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

470. Article 27 recognises every child's right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The parents of the child have the primary responsibility to secure this right within their abilities, while the state must take appropriate steps to assist parents and others responsible for children. States must, if necessary, provide material assistance, particularly in relation to nutrition, clothing and housing.
471. General Comment No. 7, The right to adequate housing: forced evictions, E/1998/22.

The ECHR also protects the right to housing by providing the right to property (Article 1, Protocol 1 of the ECHR). According to the appendix to the ESC, the right to housing is granted only to migrants who are lawful residents and to nationals of another contracting state.

The ESCR held that the **right to shelter (Article 31(2) of the ESC)** is applicable to all persons – citizens and non-citizens – irrespective of their status and calls upon states to provide accommodation to irregular migrants as long as they are subject to its jurisdiction. The right to shelter is to be granted to all children, including unaccompanied or undocumented children because, as the ECSR declared, 'the right to shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity. The Committee observes that if all children are vulnerable, growing up in the streets leaves a child in a situation of outright helplessness. It therefore considers that children would adversely be affected by a denial of the right to shelter.'[472]

The ECHR provides for **protection against the destruction of housing and forced evictions**, according to the right to respect for a person's home, family and private life (Article 8 ECHR).

> However, in Chapman v. Great Britain, the ECtHR underlined that Article 8 does not contain the right to be given housing.[473]

Article 8 stipulates that public authorities are permitted to interfere with the exercise of this right as long as it is 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

In Moldovan domestic law, Article 47 of the Constitution, covering the right to social assistance and protection, provides that the state is bound to ensure that every person has a decent standard of living and the protection of their health and welfare, including food, clothing, shelter, medical care and the necessary social services. Law No. 275 of 10 November 1994 on the Legal Status of Foreign Citizens and Stateless Persons provides that foreign citizens and stateless persons residing in the Republic of Moldova enjoy the same right to housing as nationals of the Republic of Moldova.

472. ECSR, *Defence for Children International (DCI)* v. *the Netherlands*, Complaint No. 47/2008.
473. ECtHR, *Chapman* v. *Great Britain* (GC), Application No. 27238/95, Judgment of 18 January 2001, para. 99.

Everyone, including migrants, is entitled to an adequate standard of living for themselves and their family, including adequate food, shelter, clothing and housing, and protection against forced evictions, and to the continuous improvement of living conditions.

Provisions under European Union Law (provided for comparative purposes)

Article 34(3) of the EU Charter of Fundamental Rights provides that, in order to combat social exclusion and poverty, the European Union recognises and respects **the right to social and housing assistance** that ensures a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European law and national laws and practices. The right to adequate living conditions is guaranteed in different forms to the various categories of third country nationals:

1. **Asylum seekers** should receive material reception conditions, including an adequate standard of living for applicants, which guarantees their subsistence according to **Article 17 of the Reception Conditions Directive (2013/33/EU)**.
2. **Refugees and beneficiaries of subsidiary protection** shall receive access to accommodation under conditions equivalent to those provided to other third-country nationals legally resident in the Member State's territory, according to **Article 32 of the Qualification Directive (2011/95/EU)**.
3. **Victims of trafficking** are entitled to special assistance and support measures that include 'at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation' as established by **Article 11 of the Anti-Trafficking Directive (2011/36/EU)**.

Social security

The right to social security is considered a basic human right and a fundamental means for creating social cohesion; it is closely linked to the concept of human dignity. Protecting the right of migrant workers to social security is important for

securing equality of treatment in social security for migrant workers and for extending social security coverage. States are required to ensure that benefits are provided for the relevant social risks and contingencies,[474] which include:

1. Health care;
2. Benefits in case of sickness, old age, unemployment, employment injury, maternity, and disability;
3. Family and child support; and
4. Benefits for survivors and orphans.

There is no preference for any specific system of social security. Contributory or insurance-based schemes, non-contributory schemes, privately run schemes and self-help measures such as community based or mutual schemes are all acceptable, however, it is considered to be important that a **sustainable system,** composed of a single scheme or a variety of schemes, is in place.[475]

The right to social security is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society.**

The Universal Declaration of Human Rights (UDHR) recognises the right to social security in **Article 22,** which states that 'Everyone, as a member of society, has the right to social security', and **Article 25** which states that '[e]veryone has (…) the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises 'the right of everyone to social security, including social insurance'.[476]

474. A. Nußberger, *Social Security, Right to, International Protection*, Max Planck Encyclopedia of International Law, para. 1.
475. A. Nußberger, *Social Security, Right to, International Protection*, Max Planck Encyclopedia of International Law, para 36.
476. In General Comment No. 19 (2007) on the right to social security, the UN Committee on Economic, Social and Cultural Rights clarified that the right to social security as enshrined in the ICESCR covers 'the right to access and maintain benefits, whether in cash or in kind, from:
    a. lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member;
    b. unaffordable access to health care;
    c. insufficient family support, particularly children and adult dependents'.

The CESCR stated that 'Article 2, paragraph 2, prohibits discrimination on grounds of nationality (…) where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country. A migrant worker's entitlement should also not be affected by a change in workplace. Non-nationals should be able to access non-contributory schemes for income support, affordable health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable.'[477]

The right to social security is recognised in the International Convention on the Elimination of Racial Discrimination (ICERD), which, in its **Article 5**, requires that **state parties must prohibit racial discrimination in all forms**, and to guarantee the right of everyone 'without distinction as to race, colour, or national or ethnic origin, to **equality before the law, notably in the enjoyment of (...) the right to public health, medical care, social security and social services**'. All the aforementioned instruments protect the right to social security for everyone, including migrants.

Article 11(1)(e) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) guarantees **women** the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave. The CRC in **Article 26** recognises every **child's** right to benefit from social security, including social insurance. **Article 6 (b) of the ILO Migration for Employment Convention (Revised), 1949 (No. 97) and the ILO Convention on Equality of Treatment (Social Security), 1962 No. 118** affirm the obligation of a host country to apply treatment to migrant workers that is no less favourable than that applied to its own nationals, without discrimination in respect of nationality, race, religion or sex, in respect of 'social security…' **Article 23 of the Refugee Convention** guarantees the right to benefit from public assistance, equal to that granted to citizens of the receiving state, while **Article 24** contains a similar provision concerning social security.

In the Council of Europe system, the right to social security is protected by the revised ESC and the European Code of Social Security,[478] which set standards in social security on the basis of a minimum harmonisation of the level of social security. These standard-setting instruments provide the underlying principles of the **European social security model**.

477. CESCR, General Comment No. 19.
478. http://conventions.coe.int.

Article 12(4)(a) ESC protects the rights of migrant workers and their families to social security. **States have the obligation to take steps**, through the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions prescribed by such agreements, **to ensure equal treatment of the nationals of other parties with their own nationals in terms of social security rights**, including the retention of benefits according to social security legislation, irrespective of the movements that the persons protected may take between the territories of the parties. According to the appendix to the Charter, Article 12(4) also applies to nationals of other states parties who no longer reside on the territory concerned but who did reside or worked regularly there in the past and acquired social security rights. Refugees, stateless persons and self-employed workers are also covered.

Related to the right to social security, the ECtHR has held that the **right to benefits** (i.e. a pension) is a pecuniary right protected by the right to property **(Article 1 of Protocol 1 of the ECHR)**. That protection applies when a person residing in the country has paid contributions to the pension scheme.[479]

In the case of Gaygusuz v. Austria,[480] the ECtHR found that the non-recognition by the Austrian authorities of the applicant's right to emergency assistance based on the sole fact of his foreign nationality was unreasonable and in violation of the prohibition of non-discrimination (Article 14 of the ECHR).

In Koua Poirrez v. France,[481] the ECtHR established that the prohibition of discrimination on the sole basis of nationality applied also to non-contributory social schemes.

The ECtHR has found that the right to respect for family life (Article 8 of the ECHR) covers **maternity benefits and child allowances.**

In the case Okpisz v. Germany,[482]the Court held that granting child benefit to non-nationals who were in possession of a stable permit and not to other categories of non-nationals constituted arbitrary discrimination under Article 14 of the ECHR, read together with Article 8.

479. ECtHR, Müller v. *Austria*, Application No. 5849/72, Decision, 16 December 1974, on protection triggered once the person has paid contributions to the pension scheme.
480. Ibid., *Gaygusuz* v. *Austria*, Application No. 17371/90, Judgment of 16 September 1996.
481. Ibid., *Koua Poirrez* v. *France*, Application No. 40892/98, Judgment of 30 September 2003.
482. Ibid., *Okpisz* v. *Germany*, Application No. 59140/00, Judgment of 15 February 2006.

In terms of domestic law, the provisions are somewhat more limited, though it is important to recall that Article 4 of the Moldovan Constitution ensures that the human rights guarantees listed above are part of domestic law in any case. Article 47 of the Moldovan Constitution provides that all citizens shall have the right to social protection if they lose their means of subsistence due to certain circumstances beyond their control. The portability of social security rights is ensured in Moldova by means of bilateral agreements signed with Austria, Belgium, Bulgaria, the Czech Republic, Estonia, and Luxembourg. For unemployment, disease, disability, widowhood, old age or other cases, agreements have been signed with Poland, Portugal, Romania, the Russian Federation, Ukraine (pensions), Uzbekistan (pensions), and Hungary.[483]

Foreigners and stateless persons who have been granted temporary residence in the Republic of Moldova for family reunification, for study or for humanitarian or religious activities are required to insure themselves individually, paying the same mandatory health insurance premium as citizens of Moldova. Moldovan citizens and foreign nationals residing legally on the territory of Moldova who do not meet the requirements for pension entitlements, people with disabilities, and children who have lost their breadwinner shall receive the state social allowance, according to the Law on state social benefits for certain categories of citizens.

Everyone, including migrant workers and their families, as well as refugees, has the right to social security, particularly in cases of retirement, unemployment, sickness, maternity, invalidity and old age and other incapacity to work, as well as the right to paid leave.

483. http://www.mpsfc.gov.md.

Provisions under European Union Law (provided for comparative purposes)

Article 34(3) of the EU Charter of Fundamental Rights states that the EU 'recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.'

Regulations (EC) No. 883/2004 and (EC) No. 987/2009 on the coordination of social security created a system that coordinates the social security schemes of EU Member States for persons who move within the EU. The rules were extended in 2003 to cover all third country nationals legally residing in the EU and 'in a situation which is not confined in all respects within a single Member State' (currently incorporated in **Regulation (EU) No. 1231/2010).**

Social assistance is guaranteed in different forms to the various categories of third-country nationals:

- **Asylum seekers** should receive material reception conditions, according to **Article 17 of the Reception Conditions Directive (2013/33/EU)**. This can be done 'in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals'.
- **Refugees and beneficiaries** of subsidiary protection shall receive 'necessary social assistance' equal to that provided to a national in the host Member State, according to **Article 29 of the Qualification Directive (2011/95/EU)**.
- **Victims of trafficking** shall receive assistance and support by Member States on the basis of a series of criteria established by **Article 11 of the Anti-Trafficking Directive (2011/36/EU)**.

E) The right to health and medical assistance

Migrants' access to health care may be impeded by their own legal status, and – in the case of irregular migrants – by their own fear that they may be reported, detained or expelled.

The right to health includes both migrants' freedom to control their own health and their right to access a system of health protection which produces equality of opportunity for people to enjoy the highest attainable level of health.[484] The obligations of States regarding the right to health include:

1. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
2. The improvement of all aspects of environmental and industrial hygiene;
3. The prevention, treatment and control of epidemic, endemic, occupational and other diseases; and
4. The creation of conditions to ensure adequate medical services and medical attention for all persons on the State's territory in the event of sickness.

Also part of the right to health is the right to find within state underlying preconditions for living a healthy life, such as:

1. Access to safe and drinkable **water**;
2. Adequate **sanitary facilities**;
3. An adequate supply of safe and nutritious **food**;
4. **Housing**;
5. Healthy **occupational and environmental conditions**; and
6. Access to **health-related education and information**, such as education regarding sexual and reproductive health.

The right to health should be understood as a dynamic concept in the sense that it is receptive to new medical discoveries, scientific progress, and changing environmental conditions.[485]

The right to health is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society**.

484. CESCR General Comment No. 14, contained in document E/C.12/2000/4, para. 8.
485. E. Riedel, *Health, Right to, International Protection*, Max Planck Encyclopedia of International Law, para. 31.

Article 25 UDHR states that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.' The right to health is also included in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 12(2) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Article 5(e)(iv) of the International Convention on the Elimination of Racial Discrimination (ICERD), Article 24 of the Convention on the Rights of the Child (CRC) and Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

As with all economic and social rights, states must respect the principle of **non-discrimination** and to prohibit any measures affecting the right to health. Therefore, states have the obligation 'to ensure the right of non-citizens to an adequate standard of physical and mental health, including the abstention from refusing or limiting the access to preventive, curative and palliative health services'[486] and 'all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical assistance'.[487]

The Committee on Economic, Social and Cultural Rights observed that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.[488]

> **The right to health should be accessible for everyone, without any discrimination, including for socially and culturally disadvantaged groups.**

In terms of women's right to health and medical assistance, the CEDAW obliges states to adopt adequate measures to guarantee **women** access to health and medical care, with no discrimination whatsoever, including access to family planning services. It also requires that states commit to guaranteeing adequate maternal and child health care (Article 12(2)).

The provision of health care should also be in line with Articles 24 and 39 of the CRC, and for **children** with disabilities, with Article 23. The provisions in the CRC

486. CERD, General Recommendation No. 30, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).
487. CESCR, General Comment No. 19, E/C.12/GC/19.
488. CESCR, General Comment No. 14, E/C.12/2000/4.

relating to health and welfare are derived from the right of the child to survive and develop. The emphasis on development is paramount in the article about disabled children. They should 'enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community' (Article 23). Article 24 of the CRC recognises the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Access to health care services for children and adolescents belonging to especially vulnerable groups, such as asylum seekers, refugees, irregular migrants and minorities, must be ensured.[489]

The ILO Migration for Employment Convention (Revised), 1949 (No. 97) provides for duties of states parties related to migrants' right to health. They pertain to medical examinations, care and hygiene before the migration journey, during the journey and on arrival. Also relevant for migrants are the provisions of the **Domestic Workers Convention, 2011 (No. 189)** which stipulates in Article 13 that every domestic worker has the right to a safe and healthy working environment. Each Member State shall take, in accordance with national laws, regulations and practice, effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers.

In the context of the Council of Europe, the same basic rights as those protected under the UN system are reflected. **Article 11 ESC** expressly guarantees the right to protection of health. The states parties are required to take appropriate measures, either directly or in cooperation with public or private organisations, designed to remove, as far as possible, the causes of ill health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; and to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

> In International Federation of Human Rights Leagues (FIDH) v. France, the ECSR emphasised that rights relating to health embodied in the two treaties are inextricably linked, since 'human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights – and health care is a prerequisite for the preservation of human dignity'.[490]

489. Concluding Observations: Bosnia and Herzegovina (UN Doc. CRC/C/15), 2005, Add. 260, para. 47.
490. *International Federation of Human Rights Leagues (FIDH)* v. *France*, Complaint No. 14/2003, Decision on the merits of 3 November 2004, para. 31.

The ECSR has clarified that restrictions on the application of Article 11 may not be interpreted in such a way as to impede disadvantaged groups' exercise of their right to health. In its 2004 Conclusions, it pointed out 'that the Parties to the Charter (in its 1961 and revised 1996 versions) have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties – in particular the European Convention of Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations.'[491]

The right to access to health care has been interpreted as requiring the cost of health care to not be an excessive financial burden for individuals,[492] especially the most disadvantaged ones. Measures should be taken to avoid unnecessary delays in the provision of health care[493] and to ensure that the number of health care professionals and availability of equipment are adequate.[494]

The ECtHR has recognised that states have an obligation to ensure that the right to health and to a healthy environment, including sufficient funding for the treatments, is respected and guaranteed both by public authorities and private entities. Such obligation derives from the right to life (Article 2 of the ECHR) and the prohibition of torture (Article 3), as well as the right to respect for private life (Article 8).[495]

In terms of domestic law, Article 36 of the Moldovan Constitution provides that the right to health protection shall be guaranteed. The minimum health insurance provided by the state shall be free. Law No. 275 of 10 November 1994 on the Legal Status of Foreign Citizens and Stateless Persons provides in article 8(1, 2) that 'foreign citizens and stateless persons have the same right to rest and health protection on a general basis as nationals of Moldova. (2) Foreigners and stateless persons mentioned in article 2(1) a)-f) of Law No. 274 of 27 December 2011 on integration of foreigners in the Republic of Moldova who are employed in the Republic of Moldova on the basis of an individual employment contract, foreign citizens and stateless persons with permanent

491. ECSR, Conclusions 2004, Statement of Interpretation on Article 11.
492. Ibid., Conclusions XVII-2, Portugal, p. 681.
493. Ibid., Conclusions XV-2, United Kingdom, p. 599.
494. Ibid., Conclusions XV-2, Addendum, Turkey, p. 257.
495. ECtHR, *López Ostra* v. *Spain*, Application No. 16798/90, Judgment of 9 December 1994, paras. 51-58 (Article 8 ECHR); ECtHR, *Oneryildiz* v. *Turkey*, Application No. 48939/99, Judgment of 30 November 2004, paras. 71, 90, 94-96 (Article 2 ECHR); ECtHR, *Guerra and Others* v. *Italy* (GC), Case No. 116/1996/735/932, Judgment of 19 Februry 1998, paras. 56-60 (Article 8 ECHR); ECtHR, *Gülay* Çetin *c. Turquie*, Application no. 44084/10, Judgement of 5 March 2013, paras.130-133 (Article 3 ECHR).

residence in the Republic of Moldova, and refugees and beneficiaries of humanitarian protection shall have the same rights and obligations regarding the mandatory health insurance as citizens of Moldova, in accordance with the legislation in force unless the international treaties Moldova is party to provide otherwise. Foreigners and stateless persons who have been granted temporary residence in the Republic of Moldova for family reunification, for study or for humanitarian or religious activities are required to insure themselves individually, paying the same mandatory health insurance premium as citizens of Moldova, unless the international treaties Moldova is party to provide otherwise.'

The right to health should be accessible to everyone, without any discrimination, including medical examinations, care and hygiene.

Within the EU, the exercise of the right to health care is subject to national law and practice and third country nationals are usually required to have health insurance before obtaining a legal status.

Provisions under European Union Law (provided for comparative purposes)

Article 35 of the EU Charter of Fundamental Rights declares that 'everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.' The exercise of the right to healthcare is subject to national law and practice and third country nationals are usually required to have health insurance before obtaining a legal status.

Article 168 of the Treaty on the Functioning of the European Union (TFEU) established that '[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.'

Return Directive (2008/115/EC) states that "[p]articular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided to those whose removal has been suspended or who have been given time to depart voluntarily". Similarly, **Article 19 of the**

Reception Conditions Directive (2013/33/EU) prescribes the duty to ensure that **asylum seekers** receive the necessary health care, including at least emergency care and essential treatment for illness, as well as necessary medical or other assistance for those with special needs. **Article 30 of the Qualification Directive** grants **refugees** and people under subsidiary protection access to health care equal to the Member State's own nationals.

Finally, assistance and support measures to be given to **victims of trafficking** encompass necessary medical treatment, including psychological assistance, counselling and information **(Article 11(5) of the Anti-Trafficking Directive)**.

F) The right to education

Education, for migrants, is a necessary condition of their participation and progress within the society of the host State. However, even where the right to education is generally recognised in law, its implementation is inconsistent, owing to persistent discriminatory practices in many States.

Education, in the context of human rights, means formal institutional instruction imparted within a national, provincial, or local education system (whether public or private) at the primary, secondary, and tertiary levels.[496] A central tenet of the right is that education shall be accessible to all, irrespective of their citizenship. A particular focus is placed on the education of **children,** especially those with special needs and/or disabilities, and **women.**

The right to education is only subject to such limitations as **determined by law** and only insofar as they are **compatible with the nature of the right** and solely for the purpose of **promoting the general welfare in a democratic society.**

The right to education is protected by Article 26 UDHR and Articles 13 and 14 ICESCR. According to the ICESCR, the right to education includes:

1. the right for all to a free compulsory primary education;
2. secondary education accessible to all, particularly through the progressive introduction of free secondary education; and
3. equal access to higher education, especially through the progressive introduction of free higher education.

496. D. Hodgson, *Education, Right to, International Protection*, Max Planck Encyclopedia of International Law, para. 1.

The right to education was reaffirmed in the **1960 UNESCO Convention against Discrimination in Education**, in which states parties commit 'to give foreign nationals resident within their territory the same access to education as that given to their own nationals'[497].

The CESCR emphasised in its General Comment No. 13 that 'education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination'[498].

For unaccompanied and separated **children,** the CRC stressed that states should ensure permanent access to education. Every child unaccompanied or separated, irrespective of their status, must have full access to education in the host country, according to Articles 28, 29, 30 and 32 of the Convention and in line with the general principles developed by the Committee. Such access must be granted without any discrimination and **girls,** in particular, must have equal access to formal and informal education, including professional training. Children with special needs, especially children with disabilities, must be granted access to education.[499]

Within the Council of Europe, per **Article 17 ESC,** States must ensure an 'effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities'. It further stipulates that in order to ensure the realisation of this right, they must take all the necessary measures to ensure that children and teenagers receive the needed care, assistance and training. States must also provide them with free primary and secondary education, and encourage them to regularly attend school. Equal access to education must be guaranteed for all children, including vulnerable groups, such as children seeking asylum and children who are refugees. Children belonging to these groups must be integrated into mainstream educational programmes.

The right to education is also guaranteed by the ECHR in Article 2 of Protocol No. 1. It states that 'no person shall be denied the right to education. In the

497. Article 3(e), UNESCO Convention against Discrimination in Education, adopted on 14 December 1960.
498. CESCR, General Comment No. 13, E/C.12/1999/10. The **principle of non-discrimination** extends to all persons of school age living on a state party's territory, including non-citizens, irrespective of their legal status. Similarly, in one of its general recommendations, the CESCR specified that according to **Article 5**, states must 'ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party (…) [and] avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education'. CERD, General Recommendation No. 30, CERD/C/64/Misc.11/rev.3 (2004).
499. General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6.

exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. These provisions are applicable to all persons, including non-citizens. The ECtHR has called the right to education one of the 'most fundamental values of the democratic societies making up the Council of Europe'[500] and, as such, it constitutes a right to which every person is entitled.

In the case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium, the ECtHR held that the right to education includes the right to obtain 'in conformity with the rules in force in each state, official recognition of the studies which have been completed'[501]

In the case Timishev v. Russia,[502] the applicant's children, aged seven and nine, were no longer permitted to attend a school they had attended for two years because their father no longer had a migrant's card, which he had been obliged to surrender in exchange for compensation for property he had lost in Chechnya. The government confirmed that Russian law did not allow a child's right to education to be made conditional on the registration of their parents' residence. The applicant's children were, therefore, denied the right to education provided for by domestic law. As a result, the ECtHR held that there had been a violation of Article 2 (right to education) of Protocol No. 1 to the Convention.

In Moldovan law, the right to education is realised via the compulsory schooling system, the lyceum education system (secondary school) and the vocational training system, as well as the higher education system and other types of education programmes. The state education system is free for all individuals legally present on Moldovan territory. The state lyceum, vocational and higher education systems shall be accessible to everyone on the basis of personal merits, per Article 35 of the Moldovan Constitution. Article 86(1) of Law No. 200 on the Regime for Foreigners in the Republic of Moldova provides that 'minor foreigners residing in Moldova shall have access to primary (general compulsory) education under the same conditions as minor citizens of Moldova'.

500. ECtHR, *Timishev* v. *Russia*, Applications Nos. 55762/00 and 55974/00, Judgment of 13 December 2005.
501. Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968.
502. Source http://www.echr.coe.int/Documents/FS_Childrens_ENG.pdf.

Foreign citizens residing on a state's territory should generally benefit from the same access to education as nationals. Every unaccompanied or separated child, irrespective of their status, must have full access to education in the host country.

Provisions under European Union Law (provided for comparative purposes)

Article 14 of the Charter of Fundamental Rights of the European Union (CFR EU) stipulates that '[e]veryone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education...'

Articles 165 and 166 of the Treaty on the Functioning of the European Union (TFEU) endow the EU with certain powers in the fields of education and vocational training:

1. **Directive 2011/95/EU** includes the requirement that 'Member States shall grant full access to the education system to all minors granted international protection, under the same conditions as nationals' (Article 27(1)).
2. **Directive 2011/36/EU** notes in its recitals that access to education would help child victims of trafficking reintegrate into society. Therefore, as part of the support made available to child victims, Member States are required to 'provide access to education for child victims and the children of victims who are given assistance and support' (Article 14).
3. **Directive 2008/115/EC** includes the requirement that '[m]inors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.' (Article 17).
4. **Directive 2004/114/EC** sets rules on admission procedures for third country nationals for studies, exchange of pupils, unremunerated professional training or voluntary services on the Member State's territory for a period exceeding 2 months. The Directive defines the main criteria for admission, especially the need for sufficient resources, and, if needed, acceptance by an education establishment to participate in a pupil exchange programme, acceptance by a professional trainer to participate in a training programme or an agreement with a recognised organisation to participate in a voluntary service programme.

G) The right to privacy and family life

The **right to privacy** encapsulates the core of the liberal concept of freedom.[503] Privacy concerns individual autonomy where it does not touch others, and also includes private acts in public.[504] In other words: Privacy first and foremost means the right to be left alone. Beyond that, states also have positive obligations to ensure that nobody's privacy is violated. Privacy is a broad term and has not been exhaustively defined, but includes, *inter alia*, the following aspects:

1. The **physical and psychological integrity of a person**, this includes protection from forced medical treatment and psychological examinations;
2. Aspects of an individual's **physical and social identity**, particularly the right to know one's origins and parents, the right to choose and change one's personal name, and the question of seizure of documents needed to prove one's identity;
3. The right to one's **picture**, including the right now to have one's picture taken and/or publicised without consent;
4. The question of **sexual orientation**;
5. The right to choose or change one's **appearance**;
6. The right to inviolability of one's **correspondence, communications and conversations**; and
7. Protection from unlawful **searches and seizures**.

Closely connected with the right to privacy is the **right to family life,** which includes:

1. The **right to marry**, if the partners are of marriageable age and consenting. States must ensure the equality of rights and duties of spouses as to marriage during marriage and its dissolution, after which provision shall be made for the protection of the children. Children born out of wedlock shall have the same rights as those born in wedlock.
2. The **right to found a family**, including the right of married couples to adopt children.
3. The **right to respect for family life**, including marital and non-marital

503. M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR commentary*, 2nd ed., Engel 2005, p. 377.
504. I. Ziemele, *Privacy, Right to, International Protection*, Max Planck Encyclopedia of International Law, para. 2.

partnerships, as long as they are closely knit and durable. This also includes protection of the relationship between parents and their dependent children, the right of a divorced parent to have access to their children and the access to family members in detention.

There are, however, a number of limited exceptions to the above rights:

1. The right to found a family may be lawfully interfered with by the serving of a prison term or by measures of expulsion.
2. Article 4(1) ICCPR applies to the right to privacy and family life and allows suspension of this right in case of a **public emergency** which **threatens the life of the nation** and the existence of which is **officially proclaimed,** provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Practical applications include the suspension of privacy rights in wartime, or in the case of an imminent terrorist threat.

According to the UDHR, the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. Family reunification is also related to the UDHR right for everyone to leave any country, including their own. **Article 23 ICCPR** applies similar wording, declaring that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

> In Madaferri vs. Australia,[505] the UN Human Rights Committee found that 'in the present case (…) a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered 'interference' with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case' and considered that 'the removal by the State party of Mr. Madaferri would, if implemented, constitute arbitrary interference with the family, contrary to Article 17, paragraph 1, in conjunction with Article 23, of the Covenant in respect of all of the authors, and additionally, a violation of Article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors'.

505. CCPR/C/81/D/1011/2001 (2004).

Article 10 ICESCR stipulates that '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.' In one of its concluding observations, the CESCR[506] emphasised that 'the subsistence requirement imposes an undue constraint on the ability of some foreigners, including those who have been granted a residence permit on humanitarian grounds, to be reunited with their closest family members' and encouraged the state party 'to consider easing restrictions on family reunification in order to ensure the widest possible protection of, and assistance to, the family'.

In the case of **children,** the obligations of international law related to family reunification are derived from the child's right to family life and are reinforced by the right of children not to be separated arbitrarily from their parents (Article 9 CRC) and the principle that the best interests of the child must be the basis for any decision related to the child (Article 3 CRC). According to **Article 10 of the Convention on the Rights of the Child**, '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'.

The **CEDAW** dealt with family reunification in its General Recommendation 21 on Equality in marriage and family relations.[507] It argued that 'migrant **women** who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them'.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states in Article 44(1) that 'States parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state, shall take measures to ensure the protection of the unity of the families of migrant workers.'

At Council of Europe level, the right to family reunion is included in several Council of Europe conventions, such as the European Social Charter (1961), the revised European Social Charter (1996) and the European Convention on the Legal Status of Migrant Workers (1977), as well as the United Nations Convention on the Rights of the Child (1989).

According to the **ESC** (r), Member States that are bound by **Article 19** of the Charter have an obligation to 'facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory.' This

506. CESCR, Norway, E/C.12/2005/SR.14.
507. HRI/GEN/1/Rev.6 at 250 (2003).

obligation must include 'at least the worker's spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker'. It is noteworthy that this provision applies only to family members of migrant workers and nationals of other contracting parties, legally established in their territory.

The **ECHR** provides for the protection of family life in its **Article 8** entitled 'Right to respect for private and family life', which states: 'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' The ECtHR jurisprudence on Article 8 with respect to family reunification is extensive.

> In Gül v. Switzerland, the ECtHR stated that '[i]n view of the length of time Mr and Mrs Gül have lived in Switzerland, it would admittedly not be easy for them to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey. That possibility is all the more real because Ersin has always lived there and has therefore grown up in the cultural and linguistic environment of his country.'[508]
>
> A similar approach was taken by the Court in the case of Abdulaziz, Cabales and Balkandali v. United Kingdom, where the ECtHR concluded that '[t]he duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them.[509]

508. ECtHR, Gül v. Switzerland, Application No. 23218/94 Judgment of 19 February 1996.
509. Ibid., *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*, Application Nos. 9214/80; 9473/81; 9474/81; Judgment of 28 May 1985.

> In Schalk and Kopf v. Austria, the Court stated that 'the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.[510]

The issue of family reunification is also the subject of **Recommendation Rec(2002)4 of the Committee of Ministers** on the legal status of persons admitted for family reunification, who should receive 'an establishment permit, a renewable residence permit of the same duration as that held by the principal'.

The Parliamentary Assembly (PACE) also expressed its opinion for a broad interpretation of the concept of family, in line with the above-mentioned principles.[511]

In terms of Moldovan domestic provisions, law No. 270 of 18 December 2008 on Asylum in the Republic of Moldova provides for the principle of family unity. As a result, article 12(2) provides that family members enjoy the same form of protection and status as the beneficiary. Paragraph 5 provides that the status of refugee shall be maintained for the family members in case of divorce, separation or the refugee's death. Article 38 of Law 200/2010 states that foreigners granted the right to temporary residence, other than those granted this right for purposes of study, may request the competent authority for foreigners to grant the right for family reunification to their:

a. spouse;

b. minor unmarried children born either in or outside marriage, as well as those adopted by both or one of the spouses, and children entrusted to both or one of the spouses by a decision of a competent authority of the state of origin, provided that these children are actually in the care of either spouse;

c. parents dependent on the holder of the temporary residence permit; and

d. persons placed under tutorship or guardianship.

The application for family reunification is approved if the following conditions are met: there is no polygamy; the applicant has a place to live; and the applicant has the means of support in the amount corresponding to the category of their

510. Ibid., *Schalk and Kopf* v. *Austria*, Application No. 30141/04, Judgment of 24 June 2010.
511. See Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe; Recommendation 1686 (2004) on human mobility and the right to family reunion.

residence right.

Migrant workers, refugees and persons who are beneficiaries of subsidiary protection have the right to family reunification, which includes at least the worker's spouse and unmarried children, as long as the latter are considered to be minors by the receiving state and are dependent on the migrant worker.

Provisions under European Union Law (provided for comparative purposes)

The right to family reunification is one which applies to nationals of non-EU Member States and may be exercised, in principle, by migrants lawfully residing in a Member State, persons having obtained refugee status according to the 1951 Refugee Convention, and persons having been granted complementary or subsidiary protection. One of the most important documents on family reunification recently adopted within the EU framework is **Directive 2003/86/EC** on the right to family reunification.[512] The Directive lists a number of conditions that must be fulfilled, prescribes procedural rules concerning the treatment of applications for family reunification and specifies the rights of family members once the application is accepted. Member States are allowed to grant family reunification under more favourable provisions than the Directive, but not more restrictive ones. In general, Member States may make family reunification contingent on meeting a number of minimum conditions, as defined in Article 7 and Article 8. These include having stable and regular resources, accommodation, and health insurance. The right to family reunification may be limited on grounds of public policy, security or health. In the preamble, family reunification is defined as 'a necessary way of making family life possible' since it creates socio-cultural stability that facilitates the integration of third country nationals in the Member State. The Directive provides that the material conditions for exercising the right to family reunification be determined on the basis of common criteria.

In the Directive, the right to family reunification is limited to nuclear family members. This includes:

1. the sponsor's spouse;
2. the minor and unmarried children (including adopted children) of the spon-

512. The Directive does not apply to Denmark, Ireland or the United Kingdom.

sor and the spouse; and

3. the minor, unmarried and dependent children (including adopted children) within the custody of the sponsor or the sponsor's spouse (Article 4(1)).

4. Member States may also authorise the reunification of an unmarried partner, and of the unmarried minor children (including adopted children) and dependent unmarried adult children – in limited circumstances – of such persons (Article 4(3)).

The Directive only applies to sponsors holding a residence permit issued by a Member State that is valid for at least one year and who have reasonable prospects of obtaining the right of permanent residence (Article 3(1)).

SOURCES

Books, Articles, and Publications

Abiew, Francis Kofi, *The Evolution of the Doctrine and Practice of Humanitarian Intervention,* Kluwer Law International, 1999

Akehurst, Michael (Peter Malanczuk, ed.), *A Modern Introduction to International Law,* Routledge, 1997

Alston, Philip, and James Crawford, T*he future of UN human rights treaty monitoring,* Cambridge University Press, 2000

Alvarez, José E., *International Organisations as Law-Makers,* Oxford University Press, 2005

Aust, Anthony, *Handbook of International Law,* Cambridge University Press, 2010

Bassiouni, M. Cherif, *Enslavement as an International Crime,* NYU Journal of Int'l Law and Politics, vol. 23, 1991

Berkowitz, Philip M., and Thomas Müller-Bonanni, eds., *International Labor and Employment Law,* Section of International Law, American Bar Association, 2006

Bernhardt, Rudolf, *Encyclopedia of Public International Law,* Elsevier, 1995

Bloed, Arie and Pieter van Dijk, eds., *Protection of Minority Rights through Bilateral Treaties,* Kluwer Law International, 1999

Boczek, Boleslaw Adam, *International Law: A Dictionary*, Scarecrow Press, 2005

Bogusz, Barbara et al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives,* Martinus Nijhoff, 2004

Bothe, Michael, Peter Macalister-Smith and Thomas Kurzidem, eds., *National Implementation of International Humanitarian Law,* Martinus Nijhoff, 1990

Brownlie, Ian, ed. *Basic Documents in International Law,* Oxford University Press, 2002

Brownlie, Ian, *Principles of public International Law,* Oxford University Press, 2003

Buergenthal, Thomas, Human Rights, Max Planck *Encyclopedia of Public International Law*

Cassese, Antonio, *International Law,* Oxford University Press, 2001

Castañeda, Jorge G. (Alba Amoia, tr.), *Legal Effects of United Nations Resolutions,* Columbia University Press, 1969

Craven, Matthew, *The International Covenant on Economic, Social and Cultural Rights*, Clarendon Press, 1995

Donnelly, Jack, *Universal human rights in theory and practice,* Cornell University Press, 2013

Dörr, Oliver, *Detention, Arbitrary,* Max Planck Encyclopedia of Public International Law

Ebert, Franz Christian, Claire la Hovary, *Labour Law, International,* Max Planck Encyclopedia of Public International Law

Evans, Malcom, *International Law,* Oxford University Press, 2014

Fatima, Shaheed, *Using International Law in Domestic Courts,* Hart, 2005

Global Migration Group, *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights,* 2008

Guild, Elspeth, *Criminalisation of Migration in Europe: Human Rights Implications,* https://wcd.coe.int/ViewDoc.jsp?id=1579605

Hathaway, James C. *The Rights of Refugees Under International Law,* Cambridge University Press, 2005

Hodgson, Douglas, *Education, Right to, International Protection,* Max Planck Encyclopedia Public of International Law

IOM, *Glossary on Migration,* available at: http://publications.iom.int/bookstore/free/IML_1_EN.pdf

Janis, Mark W., *An Introduction to International Law,* Aspen, 1999

Juss, Satvinder Singh, *International Migration and Global Justice,* Ashgate, 2006

Kälin, Walter, Aliens, *Expulsion and Deportation*, Max Planck Encyclopedia of Public International Law

Kreienbrink, Axel, *Voluntary and Forced Return of Third Country Nationals from Germany Research, Study in the framework of the European Migration Network,* pp 4-16, 2006, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/return-migration/4a._de_emn_ncp_return_country_study_final_may2007en_version_en.pdf

Ku, Charlotte, and Paul F. Diehl, eds., *International Law: Classic and Contemporary Readings,* Lynne Rienner, 2003

Lauterpacht, Hersch, Sir., *The Development of International Law by the International Court,* Praeger, 1958

Life through the children's eyes. Children's report on how the Convention on the Rights of the Child is observed in Moldova, 2008, Available at: http://www.childrights.md/files/publications/ochii13jun_mictip1.pdf

Memorandum of Understanding between the Council of Europe and the European Union, http://ec.europa.eu/justice/international-relations/files/mou_2007_en.pdf

Nollkaemper, André, *Universality*, Max Planck Encyclopedia of Public International Law

Nowak, Manfred, *U.N. Covenant on Civil and Political Rights – CCPR commentary,* Engel, 2005

Nußberger, Angelika, *Social Security, Right to, International Protection,* Max Planck Encyclopedia of International Law

OSCE, *Domestic violence in the Republic of Moldova. Judicial practice and national and European legislation,* http://www.osce.org/ro/moldova/121520?download=true

O'Flaherty, Michael, *Human Rights and the UN Practice before the Treaty Bodies,* Martinus Nijhoff, 2002

Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *Jacobs, White and Ovey: the European convention on human rights,* Oxford University Press, 2014

Riedel, Eibe, *Health, Right to, International Protection,* Max Planck Encyclopedia of Public International Law

Shaw, Malcom N., *International Law,* Cambridge University Press, 2008

Simma, Bruno, T*he Charter of the United Nations: A commentary,* Vol. 2, Oxford University Press, 2002

Somavia, Juan, ILO Director-General,
http://www.ilo.org/public/english/support/lib/century/index6.htm

The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, *A new global partnership: eradicate poverty and transform economies through sustainable development,* 2013

Van Boven, Theo, *Racial and Religious Discrimination,* Max Planck Encyclopedia of Public International Law

Weissbrodt, David, *Slavery,* Max Planck Encyclopedia of Public International Law

Wheatley, Steven, *Democracy,* Minorities and International Law, Cambridge University Press, 2005

Wolfrum, Rüdiger and Volker Röben, eds., *Developments of International Law in Treaty Making,* Springer, 2005

Ziemele, Ineta, *Privacy, Right to, International Protection,* Max Planck Encyclopedia of Public International Law

Official Documents

Concluding Observations of the Human Rights Committee, Lithuania, U.N. Doc. CCPR/C/79.

Annex to Resolution 428 (V), adopted by the UN General Assembly on 14 December 1950.

CCPR, General Comment No. 28, CCPR/C/21/Rev.1/Add.10.

CCPR/C/102/D/1876/2009, Human Rights Committee, 102nd session, 11–29 July 2011, available at http://www.ccprcentre.org/doc/OP1/Decisions/102/1876%20 2009%20France_en.pdf.

CERD, General Recommendation No. 30, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

CERD, *Yilmaz-Dogan v. the Netherlands,* Communication No. 1, CERD/ C/36/D/1/1984.

CESCR General Comment No. 14, contained in document E/C.12/2000/4, para. 8.

CESCR General Comment No. 14, contained in document E/C.12/2000/4, para. 8.

CESCR General Comment No. 18, E/C.12/GC/18

CESCR General Comment No. 4, contained in document E/1992/23

CESCR, General Comment No. 12 E/C.12/1999/5

CESCR, General Comment No. 13, E/C.12/1999/10

CESCR, General Comment No. 14, E/C.12/2000/4.

CESCR, General Comment No. 15 E/C.12/2002/11

CESCR, General Comment No. 19, E/C.12/GC/19.

CESCR, Norway, E/C.12/2005/SR.14.

CERD, General Recommendation No. 30, CERD/C/64/Misc.11/rev.3 (2004).

Committee on the Right of the Child, General Comment No. 6, http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf

Concluding Observations of the Human Rights Committee, Lithuania, U.N. Doc. CCPR/C/79.

Concluding Observations on Belgium, CCPR/C/79/Add.99, 19 November 1998

Concluding Observations on Belgium, CCPR/CO/81/BEL, 12 August 2004

Concluding Observations on the Dominican Republic, CCPR/CO/71/DOM, 26 April 2001

Concluding Observations, Belarus, ICCPR, A/47/40 (1992) 124, http://www.bayefsky.com/themes/leave_concluding-observations.php.

Concluding Observations: Bosnia and Herzegovina (UN Doc. CRC/C/15), 2005, Add. 260

Convention and protocol relating to the status of refugees available at: http://www.unhcr.org/3b66c2aa10.html

Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings,* 16 May 2005, CETS 197

Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence,* 11 May 2011

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14,* 4 November 1950, ETS 5

Council of Europe, *European Convention on the Legal Status of Migrant Workers,* 24 November 1977, ETS 93

Council of Europe, E*uropean Social Charter (Revised),* 3 May 1996, ETS 163
Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967)

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

Directive 2008/115/EC

Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

Directive 2013/33/EU of the European Parliament and of the Council, of 26 June 2013, laying down standards for the reception of applicants for international protection (recast)

ECRI, General Policy Recommendation on combating racism and racial discrimination in policing

ECSR, Conclusions 2004, Statement of Interpretation on Article 11

ECSR, *Defence for Children International (DCI) v. the Netherlands,* Complaint No. 47/2008

ECSR, *European Roma and Travellers Forum v. France,* decision of 24 January 2012

ECtHR, European Commission on Human Rights, *The right to leave a country,* October 2013, available at: http://www.refworld.org/docid/52848e724.html

European Union, *Charter of Fundamental Rights of the European Union,* 26 October 2012, 2012/C 326/02

European Union, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement"), 19 June 1990

Gender Equality Directive (2006/54/EC)

General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005

General Comment No. 7, The right to adequate housing: forced evictions, E/1998/22

German Constitution, http://www.gesetze-im-internet.de/englisch_gg/index.html

Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR, 2012, available at http://www.unhcr.org/505b10ee9.html

HRC General Comment No. 18, HRI/GEN/1/Rev.1 at 26

HRC General Comment No. 22, UN Doc. U.N. Doc. HRI/GEN/1/Rev.1

Human rights and population transfer, Final report of the Special Rapporteur, Mr. Al-Khasawneh, E/CN.4/Sub.2/1997/23, Annex II, Article 8

ICJ, Courts and Legal Enforcement of Economic, Social and Cultural Rights available at http://www.refworld.org/docid/4a7840562.html

ICRC Customary Rule no. 132, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter38_rule132

ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958

ILO Convention concerning Forced or Compulsory Labour, 1930 (No. 299)

ILO minimum age convention (C138) of 1973

Law of Return (Israel) http://www.knesset.gov.il/laws/special/eng/return.htm)
Polish Constitution, http://www.servat.unibe.ch/icl/pl00000_.html

Protocol to the Convention against Transnational Organised Crime Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the Trafficking Protocol or UN TIP Protocol) (2000)

Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe

Recommendation 1686 (2004) on human mobility and the right to family reunion

Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity, CM/Rec(2010)5, adopted by the Committee of Ministers on 31 March 2010

Regulation (EU) No 603/2013, Chapter 2, Article 9 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0603&from=EN

Regulation No. 492/2011 on freedom of movement for workers within the EU

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/11/13/Add.1, p. 3.

Residence Act, http://www.gesetze-im-internet.de/englisch_aufenthg/index.html
Second Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)

Slavery Convention, signed at Geneva on 25 September 1926, entered into force: 9 March 1927

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 UNTS 3

Terrorism Act 2000, http://www.legislation.gov.uk/ukpga/2000/11

UN GA Res. 48/141; UN Doc. A/RES/48/141

UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women,* 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly,* 24 January 2007, A/RES/61/106

UN General Assembly, *Convention on the Rights of the Child,* 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

UN General Assembly, *Convention Relating to the Status of Refugees,* 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

UN General Assembly, *Convention Relating to the Status of Refugees,* 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance,* 20 December 2006

UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination,* 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,* 18 December 1990

UN General Assembly, *International Covenant on Civil and Political Rights,* 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime,* 15 November 2000

UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly,* 8 January 2001, A/RES/55/25

UN General Assembly, *Universal Declaration of Human Rights,* 10 December 1948, 217 A (III)

UN OHCR, *Migration and human rights, Improving Human Rights Based Governance of International Migration,* 2015

UN Special Rapporteur on the human rights of migrants, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12640&LangID=E and www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12858&LangID=E

UNHCR, Detention Guidelines, http://www.unhcr.org/505b10ee9.html

UNHCR, *GUIDELINES ON INTERNATIONAL PROTECTION: 'Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* http://www.unhcr.org/3d58de2da.html

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* UN Doc. HCR/IP/4/Eng/REV.1, http://www1.umn.edu/humanrts/instree/refugeehandbook.html

United Nations Convention Against Torture 1465 UNTS 85.

United Nations Convention on Transnational Organized Crime and its protocol against the smuggling of migrants (Smuggling of Migrants Protocol).

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

United Nations, Statute of the International Court of Justice, 18 April 1946

Vienna Convention on Consular Relations, 596 UNTS 261.

Visa Code (Regulation No. 810/2009 on establishing a Community Code of Visas)

Cases

A and Another v Minister for Immigration and Ethnic Affairs and Another, [1997], Australia: High Court, 24 February 1997, available at: http://www.refworld.org/docid/3ae6b7180.html

A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997)

A. and Others v. United Kingdom (GC), Application No. 3455/05, Judgment of 19 February 2009

Abdolkhani and Karimnia v. Turkey, Application No. 30471/08, Judgment of 22 September 2009

Abdollahi v. Turkey, Application No. 23980/08, Judgment of 3 November 2009

Abdulaziz, Cabales and Balkandali v. United Kingdom, Application Nos. 9214/80; 9473/81; 9474/81; Judgment of 28 May 1985

Abdulaziz, Cabales and Balkandali v. United Kingdom, Plenary, Case No. 15/1983/71/107-109, Judgment of 24 April 1985

Aerts v. Belgium, Application No. 25357/94, Judgment of 30 July 1998

Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia, Communication No. 1069/2002, U.N. Doc. CPR/C/79/D/1069/2002 (2003)

Amuur v. France, Case No. 17/1995/523/609, Judgment of 20 May 1996

Boultif v. Switzerland, Application No. 54273/00, Judgment of 2 August 2001.

Bozano v. France, Application No. 9990/82, Judgment of 18 December 1986.

C. v. Australia, CCPR/C/76/D/990/1999, 28 October 2002.

C. v. Australia, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002).

Case C-33/07, Ministerul Administrației şi Internelor - Direcția Generală de Paşapoarte Bucureşti v. Gheorghe Jipa, Judgment of 10 July 2008.

Celepli v. Sweden, Communication No. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991 (1994).

Chahal v. United Kingdom (GC), Application No. 22414/93, Judgment of 15 November 1996.

CJEU, Association nationale d'assistance aux frontières pour les étrangers (ANAFE) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'immigration, C-606/10, Judgment of 14 June 2012

CJEU, Case C23/12 Mohamad Zakaria, Judgment of 17 January 2013. Case C-23/12, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0023

CJEU, Case C-256/11, Murat Dereci and Others v. Bundesministerium für Inneres

CJEU, Rahmanian Koushkaki v. Bundesrepublik Deutschland, C-84/12, Judgment of 19 December 2013

Conka v. Belgium, Application No. 51564/99, Judgment of 5 February 2002.

Corfu Channel Case (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4

D. v. United Kingdom, Application No. 30240/96, Judgment of 2 May 1997

Dalea v. France, Application No. 964/07, Judgment of 2 February 2010.
Dougoz v. Greece, ECtHR, Application No. 40907/98, Judgment of 6 March 2001

ECJ (GC), Joined Cases N.S. (C-411/10) v. Secretary of State for the Home Department and M.E. (C-493/10) and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, 21 December 2011.

ECJ, Case C-479/93 [1995] ECR I-03843, Francovich v. Italian Republic, 9 November 1995.

ECJ, Joined Cases C-6/90 and C-9/90 [1991] ECR I-05357, Francovich and Bonifaci and Others v. Italian Republic, 19 November 1991

ECtHR , Phull v. France, Decision of 11 January 2005

ECtHR, Al-Nashif v. Bulgaria, Application No. 50963/99, Judgment of 20 June 1992

ECtHR, Andric v. Sweden, Application No. 45917/99, Judgment of 23 February 1999

ECtHR, Bankovic and Others v. Belgium and Others, Application No. 52207/99, Judgment of 12 December 2001

ECtHR, Beldjoudi v. France, Application No. 12083/86, Judgment of 26 March 1992

ECtHR, C.G. and others v. Bulgaria, Application No. 1365/07, Judgment of 24 April 2008

ECtHR, Chapman v. Great Britain (GC), Application No. 27238/95, Judgment of 18 January 2001

ECtHR, Drozd and Janousek v. France and Spain, Application no. 12747/87

ECtHR, East African Asians v. United Kingdom, Application Nos. 4715/70; 4783/71; 4827/71, Decision of 6 March 1978

ECtHR, El Morsli v France 15585/06, 4 March 2008

ECtHR, Eminbeyli v. Russia, Application No. 42443/02, Judgment of 26 February 2009

ECtHR, Engel and others v. the Netherlands, Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 2 June 1976

ECtHR, Guerra and Others v. Italy (GC), Case No. 116/1996/735/932, Judgment of 19 Februry 1998

ECtHR, Gül v. Switzerland, Application No. 23218/94 Judgment of 19 February 1996.

ECtHR, Gülay Çetin c. Turquie, Application no. 44084/10, Judgement of 5 March 2013
ECtHR, Judgment of 18 October 2006 (GC), Application No. 46410/99, Üner v. the Netherlands

ECtHR, Kaya v. Turkey, Application No. 22729/93, Judgment of 19 February 1998.

ECtHR, Kaya v. Turkey, Application No. 22729/93, Judgment of 19 February 1998

ECtHR, Leander v. Sweden, Application No. 9248/81, Judgment of 26 March 1987

ECtHR, López Ostra v. Spain, Application No. 16798/90, Judgment of 9 December 1994

ECtHR, M.S.S. v. Belgium and Greece (GC), Application No. 30696/09, Judgment of 21 January 2011; ECtHR, Darraj v. France, Application No. 34588/07, Judgment of 4 November 2010.

ECtHR, Matthews v. the United Kingdom [GC], No. 24833/94, ECHR 1999-I, para. 32; ECtHR, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], No. 45036/98, ECHR 2005-VI

ECtHR, McCann and Others v. United Kingdom, Application No. 18984/91, Judgment of 27 September 1995

ECtHR, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, Application No. 13178/03, Judgment of 12 October 2006

ECtHR, Müller v. Austria, Application No. 5849/72, Decision, 16 December 1974, on protection triggered once the person has paid contributions to the pension scheme.

ECtHR, Musial v. Poland, Application No. 28300/06, Judgment of 20 January 2009.

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

ECtHR, Omwenyeke v. Germany, Application No. 44294/04, Judgment of 20 November 2007.

ECtHR, Oneryildiz v. Turkey, Application No. 48939/99, Judgment of 30 November 2004

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

ECtHR, Saadi v. Italy (GC), Application No. 37201/06, Judgment of 28 February 2008.

ECtHR, Saadi v. Italy, App. No. 37201/06, para. 147; ECtHR, Klein v. Russia, App. No. 24268/08

ECtHR, Saadi v. United Kingdom (GC), Application No. 13229/03, Judgment of 29 January 2008.

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

ECtHR, Soering v. United Kingdom, Plenary, Application No. 14038/88, Judgment of 7 July 1989.
ECtHR, Timishev v. Russia, Applications Nos. 55762/00 and 55974/00, Judgment of 13 December 2005.

ECtHR, Witold Litwa v. Poland, Application no. 26629/95, para. 78.

Eminbeyli v. Russia, Application No. 42443/02, Judgment of 26 February 2009.

Filiz Uyan v. Turkey, Application No. 7496/03, judgment of 8 January 2009, paragraph 32

Gaygusuz v. Austria, Application No. 17371/90, Judgment of 16 September 1996.
H.L.R. v. France (GC), Application No. 24573/94, Judgment of 29 April 1997.

Hirsi Jamaa and Others v. Italy (GC), Application No. 27765/09, Judgment of 23 February 2012.

ICJ, Barcelona Traction, 1970 ICJR 3

ICJ, South West Africa Advisory Opinion

ICTY, Prosecutor v. Anto Furundzija, Case no. IT-95-17/1-T, Judgement of 10 December 1998, para. 151.

Ilascu and Others v. Moldova and Russia (GC), Application No. 48787/99, Judgment of 8 July 2004.

Ilhan v. Turkey (GC), Application No. 22277/93, Judgment of 27 June 2000

International Commission of Jurists v. Portugal, Complaint No. 1/1998.

International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, Decision on the merits of 3 November 2004

Kalashnikov v. the Russian Federation, ECtHR, Application No. 47095/99, Judgment of 15 July 2002

Khaboka v. Secretary of State for the Home Department, [1993] Imm AR 484, United Kingdom: Court of Appeal (England and Wales), 25 March 1993, available at: http://www.refworld.org/docid/3ae6b6210.html.
Koua Poirrez v. France, Application No. 40892/98, Judgment of 30 September 2003.

Kurt v. Turkey, Case No. 15/1997/799/1002, Judgment of 25 May 1998.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16

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

Mamatkulov and Askarov v. Turkey (GC), Application Nos. 46827/99 and 46951/99, Judgment of 4 February 2005.

Mannai v. Italy, Application No. 9961/10, Judgment of 27 March 2012

Mansour Ahani v. Canada, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004).

Medvedyev and Others v. France (GC), Application No. 3394/03, Judgment of 29 March 2010; see also Hirsi Jamaa and Others v. Italy, Application No. 27765/09, Judgment of 23 February 2012.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States [1986] ICJ Rep 1

Moustaquim v. Belgium, Application No. 12313/86, Judgment of 18 February 1991

Nada v. Switzerland, Application No.10593/08, Judgment of 12 September 2012;

Nolan and K. v. Russia, Application No. 2512/04, Judgment of 12 February 2009.

Öcalan v. Turkey (GC), Application No. 46221/99, Judgment of 12 May 2005.

Okpisz v. Germany, Application No. 59140/00, Judgment of 15 February 2006.

Orchowski v. Poland, Application No. 17885/04, Judgment of 22 October 2009.
Othman (Abu Qatada) v. United Kingdom, Application No. 8139/09, Judgment of 17 January 2012.

Peers v. Greece, ECtHR, Application No. 28524/95, Judgment of 19 April 2001

Queen on the Application of Ruslanas Bagdanavicius, Renata Bagdanaviciene v. Secretary of State for the Home Department, [2003] EWCA Civ 1605, United Kingdom: Court of Appeal (England and Wales), 11 November 2003, available at: http://www.refworld.org/docid/416299c24.html

R v. Uxbridge Magistrates Court and Another, Ex parte Adimi, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, available at: http://www.refworld.org/docid/3ae6b6b41c.html .

Rahimi v. Greece, Application No. 8687/08, Judgment of 4 April 2011.

Saadi v. United Kingdom, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008.

Samba Jalloh v. the Netherlands, Communication No. 794/1998, U.N. Doc. CCPR/C/74/D/794/1998 (2002).

Samuel Lichtensztejn v. Uruguay, Communication No. 77/1980, U.N. Doc. CCPR/C/OP/2 at 102 (1990).

Sarigiannis v. Italy, Application No. 14569/05, Judgment of 5 July 2011.

Schalk and Kopf v. Austria, Application No. 30141/04, Judgment of 24 June 2010.

Seda Kücükdeveci v. Swedex GmbH & Co. KG., ECJ, Case C-555/07, Judgment of the Court (Grand Chamber) of 19 January 2010.

Sharifi and Others v. Italy and Greece, Application No. 16643/09, Judgment of 21 October 2014.

Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius, Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981).

T.I. v. United Kingdom, Application No. 43844/98, Judgment of 7 March 2000.
Tatishvili v. Russia, 1509/02, Council of Europe: European Court of Human Rights, 22 February 2007, available at: http://www.refworld.org/docid/4667e2912.html

Timishev v. Russia, Applications Nos. 55762/00 and 55974/00, Judgment of 13 December 2005.

Torres v. Finland, CCPR/C/38/D/291/1988, UN Human Rights Committee (HRC), 5 April 1990

V.R.M.B. v. Canada, CCPR/C/33/D/236/1987, 18 July 1988, para. 6.3; Karker v. France, CCPR/C/70/D/833/1998, 26 October 2000

Van der Ven v. the Netherlands, ECtHR, Application No. 50901/99, Judgment of 4 February 2003.

Vilvarajah and Others v. United Kingdom, Applications Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87; Judgment of 30 October 1991.

Zontul v. Greece, Application No. 12294/07, Judgment 17 January 2012.

Websites

ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/index_en.htm

http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22007A1219(10)&from=EN

http://conventions.coe.int

http://Conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=093&CM=4&DF=&CL=ENG

http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1420638657515&uri=URISERV:l33020

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0539:20110111:EN:PDF

http://europa.eu/about-eu/index_en.htm

http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm

http://fra.europa.eu/sites/default/files/fra_uploads/891-Cooperation-Agreement-FRA-Frontex_en.pdf

http://frontex.europa.eu/assets/Partners/Third_countries/WA_with_Moldova.pdf

http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf

http://human-rights-convention.org/our-rights-and-liberties/

http://human-rights-convention.org/our-rights-and-liberties/

http://particip.gov.md/public/documente/139/ro_539_Raport-initial-privind-implementarea-Conventiei-ONU-privind-drepturile-persoanelor-cu-dizabilitati.pdf

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx

http://www.coe.int/t/dg3/children/monitoring/introduction_en.asp

http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf

http://www.coe.int/t/dghl/monitoring/trafficking/Docs/CommitteeParties/Recommendations/CP_2012_6_rec_MDA_en.pdf

http://www.coe.int/t/dghl/standardsetting/convention-violence/AboutMonitoring_en.asp

http://www.coe.int/t/dghl/standardsetting/convention-violence/brief_en.asp

http://www.cpt.coe.int

http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

http://www.echr.coe.int/Documents/FS_Childrens_ENG.pdf

http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf

http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html

http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html

http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102695

http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm

http://www.ilo.org/global/about-the-ilo/lang--en/index.htm

http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm

http://www.ilo.org/public/english/standards/relm/country.htm

http://www.mai.gov.md

http://www.mpsfc.gov.md

http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx

http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx

http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx

http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx

http://www.presedinte.md/titlul1#sthash.hHR6Ybzo.dpuf

http://www.un.org/disabilities/default.asp?id=150

http://www.un.org/disabilities/default.asp?id=150

http://www.un.org/en/sections/about-un/main-organs/index.html

http://www.unhcr.org.au/pdfs/detentionguidelines.pdf

http://www.unhcr.org/505b10ee9.html

http://www.unhcr.org/pages/49c3646c137.html

http://www.unhcr.org/pages/49c3646c2.html

http://www1.umn.edu/humanrts/undocs/html/1011-2001.html

https://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en

https://www.du.edu/korbel/hrhw/researchdigest/minority/Africa.pdf

http://www.registru.md/img/law/legi/HG_655_md.pdf

www.justice.gov.md

Understanding Migrants' Rights

A Handbook for the Republic of Moldova

International Centre for Migration Policy Development, 2015

This handbook has been drafted within the project 'Supporting the Republic of Moldova to Implement the EU-Moldova Action Plan on Visa Liberalisation' (Fighting IRregular Migration in Moldova – FIRMM), funded by the European Union and implemented by the International Centre for Migration Policy Development (ICMPD). The aim of this handbook is to provide a self-contained, systematic guide to the relevant provisions concerning the rights of migrants in the Republic of Moldova. It is a tool for practitioners and officials from the judiciary, law enforcement and the Bureau for Migration and Asylum as well as from non-governmental organisations which provide legal support and counselling to asylum seekers, refugees, and migrants.