

Access to Justice for Economic, Social and Cultural Rights

Training Materials on Access to Justice
for Migrant Children, Module 3

FAIR Project, April 2018

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INTERNATIONAL AND EU LAW AND STANDARDS
ICJ SUMMARIES AND EXPLANATIONS

This training module (a part of a series of training materials¹ relevant to protecting the rights of migrant children) provides the lawyers in the EU with the international legal framework on ESC rights. A more detailed elaboration is available in the [ICJ's Practitioners Guide: Adjudicating Economic, Social and Cultural Rights at National Level](#).

I. INTRODUCTION

All children², including migrant children, are holders of rights and have the right to economic, social and cultural rights (ESC rights) under international and EU law.

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

Although heard less frequently nowadays, a distinction has sometimes been made between the nature of economic, social, and cultural rights (ESC rights) on one hand, and civil and political rights on the other. Under contemporary human rights law, this view is not sustainable. The UN Charter (1945) does not differentiate between the two sets of rights in its Articles 55 and 56. Similarly, the Universal Declaration of Human Rights (UDHR) of 1948 does not make a distinction. When the rights were enshrined in international treaties (ICCPR and ICESCR), the two sets of rights were placed in separate instruments for reasons that reflected political dynamics of the times. As treaties, both sets of rights were given equal normative force as legal rights subject to legal obligations of States to realize those rights. And the Vienna Declaration on Human Rights, adopted by consensus of all UN Member States at the World Conference on Human Rights of 1993, affirmed that "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." ([Vienna Declaration and Programme of Action on Human Rights, para. 5](#)).

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

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

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

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

¹ These training materials on access to justice for migrant children were developed as part of the FAIR (Fostering Access to Immigrant children's Rights) project and include the following training modules:

0. Guiding principles and definitions,
 - I. Access to fair procedures including the right to be heard and to participate in proceedings,
 - II. Access to justice in detention,
- III. Access to justice for economic, social and cultural rights,
- IV. Access to justice in the protection of their right to private and family life,
 - V. Redress through international human rights bodies and mechanisms,
- VI. Practical handbook for lawyers when representing a child.

² Children are persons under the age of 18 (for more information on the definitions, please see the Training module 0. Principles and definitions).

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

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

2. Sources of ESC Rights

The principal universal instrument governing ESCR Rights is the CESCR. However, in respect of the rights of children, the Convention on the Rights of the Child, the content of which contains both CP and ESC rights, many of the rights are elaborated in greater detail. The Convention on the Elimination of Discrimination against Women and the Convention on the Rights of Persons with Disabilities also contain important ESC Rights Obligations.

Essential to clarifying nature and scope of ESCR rights under the CESCR are the General Comments of the Committee on Economic, Social and Cultural Rights, the body charged with provided the authoritative interpretation of the Covenant. To date the Committee has issued 23 General Comments, covering most of the rights and obligations (the Committee on the Rights of the child and the CEDAW Committee have also issued General Comments and General Recommendations). Also important is the body of expert-elaborated standards related to ESC Rights, which have been informed by and also informed the work of the CESCR, UN Special Procedures and other international authorities. These include the [1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights](#) (adopted 8 January 1987, reproduced in UN DOC. E/CN.4/1987/17); the [1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights](#) (reproduced in 20 Human Rights Quarterly 459, 691-704 (1998)); the [2011 Maastricht principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights](#) (reproduced, with Commentary, in 34 Human Rights Quarterly 1084).

Regional human rights instruments also address ESC Rights. In Europe, the [European Social Charter](#) or the [European Convention on Human Rights](#). For other key sources, see the [ICJ's Practitioners Guide: Adjudicating Economic, Social and Cultural Rights at National Level](#).

3. The Obligation to Respect, Protect, Fulfill

ESC rights carry legally binding obligations on States to **respect, protect and fulfill**. The CESCR has adopted and developed this three-tier classification of State obligations to guarantee the Covenant rights.

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

While not all methods of achieving the full enjoyment of a human right and not all State acts or omissions neatly fit within these categories since most processes overlap several categories, this issue has been of great importance in shaping the development of the jurisprudence of regional and international protection mechanisms.³

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

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

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

[...]

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

[...]

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

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

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

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

The obligations to respect and protect are of **immediate effect**. For the “fulfill” level of obligation, the principle of “progressive realization” applies. Article 2 of the ICESCR requires that States Parties “undertake steps”...“to the maximum of... available resources” to the undertaking of “taking steps” to **progressively realize** the rights it protects.

³ ICJ, [ICJ’s Practitioners Guide: Adjudicating Economic, Social and Cultural Rights at National Level](#), p. 53.

International Covenant on Economic, Social and Cultural Rights, article 2

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

Progressive realization in the fulfillment of ESC Rights and non-retrogression

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

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

The CESCR Committee therefore recognizes that full realization of ESC rights in their entire scope may take time to achieve for certain States. There are, however several important caveats. First, any standstill in progress towards the protection of ESC rights contravenes their obligations – steps towards full realization must be targeted and not of indefinite duration. Second, retrogression (going backwards in the realization of the right) is in principle not permitted. Finally, and critically, not all rights of the Covenant are subject to the notion of progressive realization. The Committee indicates that non-discrimination, the “taking of steps”, and minimum core obligations are obligations of immediate effect.

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

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

2. The other is the undertaking in article 2 (1) “to take steps”, which in itself, is not qualified or limited by other considerations. [...] Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. [...]

10. [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for

example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. [...]

4. Minimum core obligations

When assessing the ESC rights of migrant children, it is important to look at the minimum core obligations, including the "minimum essential levels" of rights. These are the obligations under the Covenant that States are bound to, irrespective of the status of implementation of the rights of the Covenant. The underlying idea is that these core obligations must be prioritized in the apportionment of resources by States. The lack of resources cannot excuse the failure to fulfill these basic obligations.

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

10. [...] By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

Each of the rights protected in the Covenant has elements that have to be considered as part of the minimum core. The full realization of the right would then be much more elaborate.

5. Justiciability

Human rights defenders often face difficulties when trying to ensure the legal protection of ESC rights for their clients. This is due to the fact that in many national and international jurisdictions, ESC rights are considered not suited for direct application by courts in the same manner as civil and political rights. This may arise from a number of factors, including the unwillingness of courts to protect ESC rights because they are unwilling to encroach on government prerogatives on how to allocate limited resources. There is also often an unfamiliarity with the nature of the rights paradigm as a means of ensuring social and economic needs. In their iterations in international treaties, such as the CESCR, rights obligations are formulated in general terms, which in turn may lead to difficulties in the (direct) applications by the courts. This has led to issues with justiciability, and to a practice where courts have granted considerable discretion to State officials in the application and normative interpretation of these (internationally guaranteed) obligations. However, the once common notion that ESC rights are inherently unsuited to justiciability, has now been largely dispelled. (See [ICJ's Practitioners Guide: Adjudicating Economic, Social and Cultural Rights at National Level](#)).

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

As with civil and political rights, the scope and precise content of ESC rights obligations cannot be

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

CESCR, [General Comment No. 9](#), The domestic application of the Covenant, UN Doc. E/C.12/1998/24

3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties of 1969, is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. [...]

15. It is generally accepted that domestic law should be interpreted as far as possible in a way, which conforms to a State's international legal obligations. [...]

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

CESCR, [General Comment No.9](#), The domestic application of the Covenant, UN Doc. E/C.12/1998/24

10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 it cited, by way of example, articles 3, 7 (a) (i), 8, 10.3, 13.2 (a), 13.3, 13.4 and 15.3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. [...] The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered "non-self-executing" were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. [...] It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

6. Remedies and Reparation

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

For States that are party to the Optional Protocol to the Covenant on ESC rights, which gives individuals access to an international complaint procedure, some of these requirements are spelled out in greater depth. Similarly, the third optional protocol to the Convention on the Rights of the Child addresses remedies for ESC rights of children.

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

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

And:

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

24. For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.

25. As noted in paragraph 6 above, the Committee emphasizes that economic, social and cultural rights, as well as civil and political rights, must be regarded as justiciable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.

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

CESCR, [General Comment No. 9](#), The domestic application of the Covenant, UN Doc. E/C.12/1998/24

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

7. The best interest of the child

Where the ESC rights of children are concerned, the Convention on the Rights of the Child and its article 3 in which the best interest of the child principle has been laid down will be a primary source.

(For more information on the best interest of the child principle see the FAIR training module 0. Guiding principles and definitions: section 3.1)

8. Non-discrimination

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

Where children only because of their age and development can be considered vulnerable, this is even more so for migrant children. Many migrant children are confronted with discrimination on the basis of their refugee / asylum seeker / irregular status, and nationality. Not only of themselves, but also of their parents or (primary) care providers. Such discrimination may result in exploitation and difficulties accessing ESC rights.

The principle also applies to discrimination based on race, colour, gender, disability, sexual orientation, gender identity, religion, language, political or other opinion, national social or ethnic origin, property, birth or other status. In many situations involving migrants, there may be multiple bases of discrimination that compound the violations *(For more details on the Non-discrimination principle see the FAIR training module 0. Guiding principles and definitions: section 3.3).*

The principle of non-discrimination applies to non-nationals and the enjoyment of ESC rights must be protected equally, without discrimination. There are however treaties that apply an exclusionary clause to unlawfully residing aliens. One such example can be found in the European Social Charter.

[European Social Charter \(Revised\) - Annex](#)

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

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

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

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

65. The Committee recalls that pursuant to paragraph 1 of the Appendix the persons covered by Articles 1 to 17 and 20 to 31 of the Charter include foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.

66. When human dignity is at stake the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter nor to impair their fundamental rights such as the right to life or to physical integrity or human dignity (*Defence for Children International (DCI) v. Belgium* Complaint No. 69/2011 decision on the merits of 23 October 2012 §28).

The prohibition of discrimination itself is featured in every human rights treaty at international and regional level, irrespective of whether it enshrines civil and political rights or ESC rights.

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

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. [...]

26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. [...]

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

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

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

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

(b) **Substantive discrimination**: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is

often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

In relation to the (ESC) right to social security, the European Court of Human Rights (ECtHR) has determined that because of the socio-economic implications, States have a wide margin of appreciation in the choice of a system. Note, however, that under the CESCR, the concept of "margin of appreciation" does not apply, and has in fact been rejected by the Committee and States in their elaboration of the Optional Protocol. In the application of the system, the State should act in a non-discriminatory way.

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

51. Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article [...]. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment [...].

52. The scope of this margin will vary according to the circumstances, the subject matter and the background [...]. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention [...]. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy [...]. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (ibid.).

53. Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that Article 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention. [...]

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

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

Next to direct discrimination – *i.e.* discrimination based on the status or characteristic of the child – migrant children may also face discrimination on the basis of the status of their parents. This type of indirect discrimination, may be caused, for instance, by the lack of residence status of the parent. An example where a child was considered not to be eligible for orphans benefits because of the marital status of the parents was considered to be discriminatory by the UN Human Rights Committee:

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

9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. [...] The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them.

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

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

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

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

9. Extra-territorial obligations

Human Rights law recognizes that human rights obligations apply extraterritorially as well on the territory of the responsible State, although the scope of extraterritorial obligations (ETOs) may be narrower than those related to the rights of people within a States territorial. ETOs have been recognized by International Court of Justice, human rights courts and UN treaty bodies. They have been developed in the Maastricht Principles (see above), as explained in the commentary.

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

II. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

1. Introduction

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

International Covenant on Economic, Social and Cultural Rights, Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. [...]

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

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

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

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

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

2. The right to water

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

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

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

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

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

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

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

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

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

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

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

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

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

13. The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. [...] The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

14. States parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. [...]

15. With respect to the right to water, States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.

16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:

(a) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated;

(b) Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency; [...]

(f) Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas. Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals; [...]

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

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

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

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

3. The right to food

The CESCR identified the minimum core obligation under the right to an adequate standard of living:

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

17. Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. [...]

21. [...] Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. [...]

Food needs to be available and accessible to rights holders. This means food is available in sufficient quantity, as well as affordable and that it can be physically reached.

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

8. The Committee considers that the core content of the right to adequate food implies:

The **availability** of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The **accessibility** of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

[...]

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

13. Accessibility encompasses both economic and physical accessibility:

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

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

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

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

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

10. Free from adverse substances sets requirements for food safety and for a range of protective measures

by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

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

Food needs to be available to everyone without discrimination.

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

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

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

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

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

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

In relation to migrants living in or facing destitution, a number of cases have been dealt with by international courts and tribunals under the right to life in light of the principle of human dignity. In *M.S.S. v. Belgium and Greece*, the Court assessed whether article 3 ECHR permitted the Belgian authorities to return migrants to Greece even though they were aware of the inhumane conditions in Greek migration shelters.

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

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

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

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

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

359. [...] The Court considers, however, that it was in fact up to the Belgian authorities, faced with the

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

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

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

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

121. It is nevertheless unable to consider that the denial of emergency shelter to those individuals who continue to find themselves in the territory of the Netherlands is an absolutely necessary measure for achieving the aims of the immigration policy. No indications on the concrete effects of this measure have been referred to by the Government.

122. The Committee observes, similarly, that the persons concerned by the current complaint undeniably find themselves at risk of serious irreparable harm to their life and human dignity when being excluded from access to shelter, food and clothing. It refers to its established case-law under the reporting procedure (see paragraphs 73, 106) and holds that access to food, water, as well as to such basic amenities as a safe place to sleep and clothes fulfilling the minimum requirements for survival in the prevailing weather conditions are necessary for the basic subsistence of any human being. [...]

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

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

95. Nevertheless, it should be stated in that regard that the refugee whose residence permit is revoked pursuant to Article 24(1) of Directive 2004/83 retains his refugee status, at least until that status is actually ended. Therefore, even without his residence permit, the person concerned remains a refugee and as such remains entitled to the benefits guaranteed by Chapter VII of that directive to every refugee, including protection from refoulement, maintenance of family unity, the right to travel documents, access to employment, education, social welfare, healthcare and accommodation, freedom of movement within the Member State and access to integration facilities. In other words, a Member State has no discretion as to whether to continue to grant or to refuse to that refugee the substantive benefits guaranteed by the directive. [...]

97. As those rights conferred on refugees result from the granting of refugee status and not from the issue of the residence permit, the refugee, as long as he holds that status, must benefit from the rights guaranteed to him by Directive 2004/83 and they may be limited only in accordance with the conditions set by Chapter VII of that directive, since Member States are not entitled to add restrictions not already listed there. [...]

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

55. Article 14 of Directive 2008/115 provides for certain safeguards pending return, including during periods for which removal has been postponed in accordance with Article 9 of the directive.

56. Article 9(1)(b) of Directive 2008/115 provides that Member States are to postpone removal for as long as a suspensory effect is granted in accordance with Article 13(2) of the directive.

57. It is apparent from the general scheme of Directive 2008/115, which must be taken into account when interpreting its provisions (see, to that effect, judgment in *Abdullahi*, C 394/12, EU:C:2013:813, paragraph 51), that Article 9(1)(b) of that directive must cover all situations in which a Member State is required to suspend enforcement of a return decision following the lodging of an appeal against the decision.

58. It follows from the foregoing that Member States are required to provide to a third country national suffering from a serious illness who has appealed against a return decision whose enforcement may expose him to a serious risk of grave and irreversible deterioration in his state of health the safeguards, pending return, established in Article 14 of Directive 2008/115.

59. In particular, in a situation such as that in the main proceedings, the Member State concerned is required, pursuant to Article 14(1)(b) of Directive 2008/115, to make provision, in so far as possible, for the basic needs of a third country national suffering from a serious illness where such a person lacks the means to make such provision for himself.

60. The requirement to provide emergency health care and essential treatment of illness under Article 14(1)(b) of Directive 2008/115 may, in such a situation, be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned. [...]

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

Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida, CJEU, Case C 562/13, Opinion of Advocate General BOT

155. In my view, the respect for human dignity and the right to life, integrity and health enshrined in Articles 1, 2, 3 and 35 of the Charter respectively, as well as the prohibition of inhuman or degrading treatment contained in Article 4 of that Charter, mean that, in a situation such as that in the main proceedings, an illegally staying third-country national whose removal has been de facto suspended must not be deprived of the means necessary to meet his basic needs pending the examination of his appeal.

156. To have one's most basic needs catered for is, in my opinion, an essential right which cannot depend on the legal status of the person concerned.

157. Although the extent of the provision for basic needs must be determined by each of the Member States, given the discretion conferred on them by Directive 2008/115, it seems to me that such provision must be sufficient to ensure the subsistence needs of the person concerned are catered for as well as a decent standard of living adequate for that person's health, by enabling him, inter alia, to secure accommodation and by taking into account any special needs that he may have.

5. The right to adequate housing

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

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

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

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

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

Where migrants are concerned, the right to housing is limited to a right to be accommodated.

EU Reception Directive, article 18 (Modalities for material reception conditions)

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

Next to these examples of specific housing rights it is sometimes possible to advocate for adequate housing rights on the basis of for instance article 8 ECHR (private and family life), article 1 of Protocol 1 ECHR (right to property), and article 3 ECHR (prohibition of inhuman and degrading treatment).

5.1 Minimum core obligation: Shelter

The CESCR in its General Comment on the Right to Housing does not describe the content of the minimum core obligation. The reason given by CESCR is that the States in their reports have not provided sufficient description for CESCR to draw generally applicable conclusions. At the same time, the Committee recognizes homelessness as a problem that needs to be solved.

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

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

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

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

46. The Committee recalls that Article 31§2 (prevention and reduction of homelessness) is specifically aimed at categories of vulnerable people. It obliges Parties to gradually reduce homelessness with a view

to its elimination. Reducing homelessness implies the introduction of emergency and longer-term measures, such as the provision of immediate shelter and care for the homeless as well as measures to help such people overcome their difficulties and to prevent them from returning to a situation of homelessness (Conclusions 2003, Italy, Article 31 and FEANTSA v. France, Complaint 39/2006, decision on the merits, 5 December 2007, § 103).

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

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

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

63. Finally, the Committee recalls that under Article 31§2 States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and must make alternative accommodation available [...]. Accordingly, the Committee holds that, since in the case of unlawfully present persons no alternative accommodation may be required by States, eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect for their human dignity.

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

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

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

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

37. Moreover, the risk of impairing fundamental rights is all the more likely where children – a fortiori migrant children unlawfully present in a country – are at stake. This is due to their condition as "children" and to their specific situation as "unlawful" migrants, combining vulnerability and limited autonomy. As a result, in particular, of their lack of autonomy children cannot be held genuinely responsible for their place

of residence. Children are not able to decide themselves whether to stay or to leave. Furthermore, if they are unaccompanied, their situation becomes even more vulnerable and the State should be managed entirely by the State, which has a duty to care for children living within its territory and not to deprive them of the most basic protection on account of their “unlawful” migration status.

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

81. The Committee considers that immediate assistance is essential and allows assessing material needs of young people, the need for medical or psychological care in order to set up a child support plan. [...]

“§34. Poverty renders children, in particular girls, vulnerable to exploitation, neglect and abuse. States must respect and promote the rights of children living in poverty, including by strengthening and allocating the necessary resources to child protection strategies and programmes, with a particular focus on marginalized children, such as street children, child soldiers, children with disabilities, victims of trafficking, child heads of households and children living in care institutions, all of whom are at a heightened risk of exploitation and abuse.”

82. In the light of the above, the Committee considers that the fact that the Government has, since 2009, no longer guaranteed accompanied foreign minors unlawfully present in the country any form of accommodation in reception centres (through either through the FEDASIL network or other alternative solutions) breaches Article 17§1 of the Charter. The persistent failure to accommodate these minors shows, in particular, that the Government has not taken the necessary and appropriate measures to guarantee the minors in question the care and assistance they need and to protect them from negligence, violence or exploitation, thereby posing a serious threat to the enjoyment of their most basic rights, such as the rights to life, to psychological and physical integrity and to respect for human dignity. [...]

Two years later, the ESCR decided that the same norm applies to adult undocumented migrants. The ESCR explains that the exclusion of unlawfully residing migrants in itself is allowed, as long as it does not result in inhumane living conditions.

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

142. With regard to the Netherlands, the Committee recalls that the domestic situation has been found not to be in conformity with Article 31§2 of the Charter due to the lack of a legal requirement to provide shelter to irregular migrant children for as long as they were in the jurisdiction of the Netherlands (Conclusions 2011, the Netherlands).

143. With regard to the instant complaint, the Committee has held under Article 13§4 that the large majority of adult migrants in an irregular situation are provided shelter neither in law, nor in practice.

144. In light of the Committee’s established case-law, shelter must be provided also to adult migrants in an irregular situation, even when they are requested to leave the country and even though they may not require that long-term accommodation in a more permanent housing be offered to them. The Committee again refers to its findings above under Article 13§4 and reiterates that the right to shelter is closely connected to the human dignity of every person regardless of their residence status. It considers that the situation, on the basis of which a violation has been found under Article 13§4, also amounts to a violation of Article 31§2. [...]

5.2 Adequacy of housing

The quality of housing forms part of the substance of what can be considered adequate housing.

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

7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. [...] "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities all at a reasonable cost".

8. [...] "[A]dequate housing" for the purposes of the Covenant. [...] include[s] the following:

(a) Legal security of tenure. [...]

(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability. [...]

(d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. [...]

9. As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. [...] Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing. [...]

The Committee on the Rights of the Child links the qualitative elements of the right to housing specifically to the right to health:

CRC, General Comment No. 15, The right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN Doc. CRC/C/GC/15

49. States should take measures to address the dangers and risks that local environmental pollution poses to children's health in all settings. Adequate housing that includes non-dangerous cooking facilities, a smoke-free environment, appropriate ventilation, effective management of waste and the disposal of litter from living quarters and the immediate surroundings, the absence of mould and other toxic substances, and family hygiene are core requirements to a healthy upbringing and development.

5.3 Access and Security of Tenure, Forced evictions

The right to housing requires that people should be able to secure access to that housing. In practice, access to usually requires a system through which this is arranged, which may trigger questions in relation to equality and non-discrimination.

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

8(e) Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups

as [...] children [...] should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. [...]

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

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

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

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

4. The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.

[...]

11. Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.

[...]

14. In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality. [...] [I]nterference with a person's home can only take place "in cases envisaged by the law".

[...]

15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. [...]

5.4 Non-discrimination

The right to housing, similar to all rights in the convention, needs to be applied without discrimination. Some grounds for discrimination are particularly relevant, as housing may impact women and disadvantaged groups in society more negatively.

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

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

This same approach is taken by the European Committee on Social Rights where undocumented migrants are concerned. Even though the European Social Charter itself excludes undocumented migrants from its scope, the Committee is giving preference to the protection of human dignity (see above page 7).

Another approach for the protection of migrants can be found in treaty provisions that require States to treat migrants no less favorable than nationals, or other aliens, in respect of housing. In essence, the non-discrimination clause in these cases has been connected to the substantive rights as protected by the treaty. In most cases however, there needs to be a link to the treaty goal and there must be a situation of lawful residence.

The Refugee Convention, for instance, requires treatment no less favorable than other aliens. This requirement is of course only effective once a person is recognized as a refugee.

The 1951 Refugee Convention, Article 21 (housing)

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

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

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

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

51. As regards the proportionality of the means employed to realise this legitimate aim, the Court has had regard to the specific circumstances of the applicant's case. Without underestimating the anxiety which

the applicant must have suffered as a result of being threatened with homelessness, the Court observes that she was never actually homeless and that, as pointed out by the Government (see paragraph 24 above), there were duties imposed by legislation other than section 193 of the Housing Act 1996 which would have required the local authority to assist her and her son had the threat of homelessness actually manifested itself. [...] In the applicant's case, she moved back to Southwark when she was offered a social housing tenancy seventeen months later, which was within a similar timescale as that in the case of a person accorded priority need.

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

EU Qualification Directive, Article 31 (Access to accommodation)

The Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories.

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

ILO Convention No. 97 – Migration for Employment Convention, Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities—

(i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;

(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

(iii) accommodation; [...]

5.5 Remedies

As with other rights, the Committee concludes that violations can only be effectively solved when a legal or administrative remedy is available. In relation to the right to housing, the Committee provides a non-exhaustive list of examples that underpin the importance of housing in relation to other human rights.

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

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

III. THE RIGHT TO SOCIAL SECURITY

The right to social security is protected in a number of different treaties. It can be argued that it forms part of the right to an adequate standard of living. On the other hand, the right to social security is also specifically protected in Article 9 ICESCR.

International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 9

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

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

2. The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from [...] (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents. [...]

12. The social security system should provide for the coverage of the following nine principal branches of social security.

(a) Health care [...]

(f) Family and child support

(g) Maternity [...]

(h) Disability

(i) Survivors and orphans [...]

18. Benefits for families are crucial for realizing the rights of children and adult dependents to protection under articles 9 and 10 of the Covenant. In providing the benefits, the State party should take into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child or adult dependent, as well as any other consideration relevant to an application for benefits made by or on behalf of the child or adult dependent. Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate. [...]

Compared to means of subsistence, including the right to food, the right to social security is not always accessible and available to migrants. Many countries have a separate system for newly arrived migrants and their children in order to avoid residency claims. In general, this practice is accepted by international law as long as migrants receive at least the means of subsistence. This means there is no absolute claim to accessing social benefits schemes for migrants.

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

37. Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.

38. Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.

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

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

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

Core obligations

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

(a) To ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. [...]

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

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

[Gaygusuz v. Austria](#), ECtHR, Application no. 17371/90, Judgment of 16 September 1996

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

41. The Court considers that the right to emergency assistance - in so far as provided for in the applicable legislation - is a pecuniary right for the purposes of Article 1 of Protocol No. 1 (P1-1). That provision (P1-1) is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay “taxes or other contributions”. Accordingly, as the applicant was denied emergency assistance on a ground of distinction covered by Article 14 (art. 14), namely his nationality, that provision (art. 14) is also applicable [...]

46. The Court notes in the first place that Mr Gaygusuz was legally resident in Austria and worked there at certain times (see paragraph 10 above), paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.

47. It observes that the authorities’ refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality as required by section 33 (2) (a) of the 1977 Unemployment Insurance Act (see paragraph 20 above).

48. In addition, it has not been argued that the applicant failed to satisfy the other statutory conditions for the award of the social benefit in question. He was accordingly in a like situation to Austrian nationals as regards his entitlement thereto.

49. Admittedly, sections 33 and 34 of the 1977 Unemployment Insurance Act (see paragraph 20 above) lay down certain exceptions to the nationality condition, but the applicant did not fall into any of the relevant categories.

50. The Court therefore finds the arguments put forward by the Austrian Government unpersuasive. It considers, like the Commission, that the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any “objective and reasonable justification”. [...]

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

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

47. In the instant case, the Court notes in the first place that the applicant was legally resident in France, where he received the minimum welfare benefit, which is not subject to the nationality condition. It reiterates that the domestic authorities' refusal to award him the allowance in issue was based exclusively on the fact that he did not have the requisite nationality, which was a precondition for obtaining the allowance under Article L. 821-1 of the Social Security Code as applicable at the material time.

48. In addition, it has not been established, or even alleged, that the applicant did not satisfy the other statutory conditions entitling him to the social benefit in question. In that connection, the Court can only note that the applicant did receive the AAH after the 11 May 1998 Act had abolished the nationality condition. He was therefore in a like situation to that of French nationals or nationals of a country that had signed a reciprocity agreement as regards his right to receive the benefit. The Court notes that the Court of Cassation also considered that the refusal – solely on grounds of foreign nationality – to award the supplementary allowance payable by the National Solidarity Fund to a claimant resident in France who received an invalidity pension under the French scheme breached Article 14 of the Convention and Article 1 of Protocol No. 1 (see paragraph 26 above).

49. The Court therefore finds the arguments advanced by the Government unpersuasive. The difference in treatment regarding entitlement to social benefits between French nationals or nationals of a country having signed a reciprocity agreement and other foreign nationals was not based on any "objective and reasonable justification" (see, conversely, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 20, § 49). Even though, at the material time, France was not bound by reciprocity agreements with the Ivory Coast, it undertook, when ratifying the Convention, to secure "to everyone within [its] jurisdiction", which the applicant indisputably was, the rights and freedoms defined in Section I of the Convention (see *Gaygusuz*, cited above, p. 1143, § 51).

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

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

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

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

31. By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision [...]. It follows that Article 14 – taken together with Article 8 – is applicable.

32. According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, among other authorities, *Willis*, cited above, § 39).

33. [...] Like the Federal Constitutional Court, the Court does not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention. [...]

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

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

37. The Court observes that, flowing from the relevant provisions of the Act, a family with children of a Hungarian mother and a foreign father are entitled to maternity benefits. However, this was not the situation of the second and the third applicants as their father is Hungarian and their mother a foreigner. They were therefore prevented from benefitting from such an allowance on the basis of this difference.

38. The Court finds no reasonable justification for this practice. It considers that the entitlement to an allowance due to a family under sections 1 and 2 of the Act cannot be dependent on which of the two biological parents of the children is a Hungarian national. The Court would add that it is irrelevant that, as of 1 January 2008, the applicants' mother became entitled to the allowance under the same conditions as Hungarian nationals, because by then she was barred from claiming it as the request had to be made within 180 days of the children's birth and could not be made retroactively.

39. In sum, since the Government have failed to put forward any convincing argument to justify the second and third applicants' exclusion from the benefit of the allowance in question, the Court concludes that this difference in treatment amounted to discrimination. [...]

The ECtHR has in a number of cases found that the right to respect for family life may require granting the parents access to social benefits, even if they would ordinarily not be eligible.

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

79. Furthermore, there is no indication that the judicial authorities analysed in any depth the extent to which the inadequacies of the child's upbringing were attributable to the applicant's incapacity or unwillingness to provide requisite care, as opposed to her financial difficulties, to which she referred in the domestic proceedings and which could have been overcome by appropriate financial and social assistance and effective counselling. [...]

80. It is not the Court's role to determine whether the promotion of family unity in this case entitled the applicant to an adequate standard of living at public expense. It is, however, a matter which falls to be discussed by the relevant public authorities and, subsequently, in the course of court proceedings. There is no evidence in the case-file that such matters were ever considered by the authorities or the courts.

81. [...] The Court finds that obtaining information in this regard was required by domestic law (see paragraphs 37 and 40 above) and would have been pertinent in evaluating whether the authorities had discharged their Convention obligation to promote family unity and had explored sufficiently the effectiveness of less far-reaching alternatives before seeking to separate the child from the applicant by withdrawing the applicant's parental authority. [...]

3. Children of (undocumented) migrants

One group of children deserves a separate mention – children of (undocumented) migrants. These children may well have the nationality of the State, but are excluded from social benefits and social security because of the residency status of their parents. This can be direct, if for instance any benefits are to be awarded to the parent, but also indirect, if the parent is not allowed to generate an income, which will affect the child. The first issue has been discussed earlier when discussing indirect discrimination. The latter is an issue that is often interlinked with questions concerning residence status.

The CJEU dealt with the issue of residence of children with EU citizenship in a number of cases. In the case of *Zambrano v. Office national de l'emploi (ONEm)* the court held that the (unlawfully residing) parent of an EU citizen should be allowed to work if it would otherwise mean that the EU citizen had to leave the territory of the EU.

Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), CJEU, Case C-34/09, Judgment of 8 March 2011

40. Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State [...]. Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down [...], they undeniably enjoy that status [...].

41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States [...].

42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, Rottmann, paragraph 42).

43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45. Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen. [...]

In a later judgment the CJEU added that the primary care taker should be allowed to reside with the EU citizen, irrespective of the involvement of the other (lawfully residing) parent.

Adzo Domenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v Ministre du Travail, de l'Emploi et de l'Immigration, CJEU, Case C-86/12, Judgment of 10 October 2013

30. In the present case, it is for the referring court to ascertain whether Mrs Alokpa's children satisfy the conditions set out in Article 7(1) of Directive 2004/38 and have, therefore, the right to reside in a host Member State on the basis of Article 21 TFEU. In particular, that court must determine whether those children have, on their own or through their mother, sufficient resources and comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of Directive 2004/38. [...]

33. Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.

34. In that regard, as the Advocate-General stated in points 55 and 56 of his Opinion, Mrs Alokpa, as the mother of Jarel and Eja Moudoulou and as sole carer of those children since their birth, could have the benefit of a derived right to reside in France.

35. It follows that, in principle, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of

residence cannot result in her children being obliged to leave the territory of the European Union altogether. It is, however, for the referring court to determine whether, in the light of all of the facts of the main proceedings, that is in fact the case. [...]

Whereas in the *Zambrano* and *Alokpa* judgments the court decided that there should not be dependence on public services, the decision in *Secretary of State of the Home Department v. NA* followed the opinion of the Advocate General that the sufficient resources test does not exclude income from benefits.

Secretary of State for the Home Department v. NA, CJEU, Case C 115/15, Opinion of Advocate General Wathelet

87. In the judgment in *Alokpa and Moudoulou* (C-186/12, EU:C:2013:645), the Court recalled that, in the context of a case in which a Union citizen was born in the host Member State and had not made use of the right of free movement, the expression 'have' sufficient resources, which appears in Article 7(1)(b) of Directive 2004/38 and is a condition of the legality of a period of residence lasting more than three months, 'must be interpreted as meaning that it suffices that such resources are available to the Union citizens, and that that provision lays down no requirement whatsoever as to their origin, since they could be provided, inter alia, by a national of a non-Member State, the parent of the citizens who are minor children at issue'.

88. That finding gives rise to settled case-law to the effect that, 'while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State'.

89. After all, 'a refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence'.

90. Since the facts of the dispute in the main proceedings are similar, I see no reason to depart from that settled case-law or from the consequence that it is for the referring court to ascertain whether NA's children satisfy the conditions set out in Article 7(1) of Directive 2004/38 and have, therefore, a right of residence in the host Member State on the basis of Article 21 TFEU.

91. It is therefore necessary, 'in particular, ... to determine whether those children have, on their own or through their mother, sufficient resources and comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of Directive 2004/38'. [...]

The ECtHR takes a similar approach to the right of residence in light of dependence on benefits:

Jeunesse v. The Netherlands, ECtHR, Application no. 12738/10, Judgment of 3 October 2014

119. Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. [...] The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant's children and Suriname, a country where they have never been.

120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children [...].

However, the Court considers that they fell short of what is required in such cases and [...] it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit.

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. In view of the particular circumstances of the case, it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands. [...]

Following the *Zambrano* ruling (cited above) the Dutch authorities have applied a strict test by only allowing the parent responsible for the day-to-day care of the child residency, if the other parent was unable to take up that role. A number of cases concerning denial of various benefits resulted in the Central Council of Appeal to request a preliminary reference ruling from the Court of Justice of the EU on the application of this strict test in 2015. The court confirmed the international standard that the interest of the child should be a primary consideration:

***Chavez-Vilchez and others v. The Netherlands*, CJEU, Case C-133/15, Judgment of 10 May 2017**

73. By the third question submitted for a preliminary ruling, the referring court seeks in essence to ascertain whether Article 20 TFEU must be interpreted as precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State, and for whose primary day-to-day care that parent is responsible, is subject to the condition that the third country national must establish that the other parent, who is a national of that same Member State, is not in a position to provide the primary day-to-day care of the child.

74. According to the Netherlands Government, pursuant to the general rule that a party who seeks to rely on certain rights must establish that those rights are applicable to his situation, a rule that is accepted in EU law (see, to that effect, judgments of 8 May 2013, *Alarape and Tijani*, C-529/11, EU:C:2013:290, paragraph 38, and of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16, paragraphs 25 to 27), the burden of proof of the existence of a right of residence under Article 20 TFEU lies on the applicants in the main proceedings. It is for them to demonstrate that, because of objective impediments that prevent the Union citizen parent from actually caring for the child, the child is dependent on the third-country national parent to such an extent that the consequence of refusing to grant that third-country national a right of residence would be that the child would be obliged, in practice, to leave the territory of the European Union.

75. In that regard, it must be stated that, in the event that a third-country national, the parent of a minor child who is a national of a Member State and for whose primary day-to-day care that parent is responsible, seeks to obtain from the competent authorities of that Member State recognition of a derived right of residence based on Article 20 TFEU, it is for that third-country national to provide evidence on the basis of which it can be assessed whether the conditions governing the application of that article are satisfied, in particular, evidence that a decision to refuse a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights attached to his or her status as a Union citizen by obliging the child to leave the territory of the European Union, as a whole.

76. However, as stated by the European Commission, while it is, as a general rule, for the third-country national parent to provide evidence to prove that he or she has a right of residence under Article 20 TFEU, in particular evidence that, if residence were to be refused, the child would be obliged to leave the territory of the European Union, the fact remains that, when undertaking the assessment of the conditions required in order for the third-country national to be able to qualify for such a right of residence, the competent national authorities must ensure that the application of national legislation on the burden of proof such as that at issue in the disputes in the main proceedings does not undermine the effectiveness of Article 20 TFEU.

77. Accordingly, the application of such national legislation on the burden of proof does not relieve the authorities of the Member State concerned of the obligation to undertake, on the basis of the evidence provided by the third-country national, the necessary inquiries to determine where the parent who is a national of that Member State resides and to examine, first, whether that parent is, or is not, actually able and willing to assume sole responsibility for the primary day-to-day care of the child, and, second, whether there is, or is not, such a relationship of dependency between the child and the third-country national parent that a decision to refuse the right of residence to the latter would deprive the child of the genuine enjoyment of the substance of the rights attached to his or her status as a Union citizen by obliging the child to leave the territory of the European Union, as a whole.

IV. THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

Migrants face many challenges where it concerns the right to health. Migrants may, for a variety of reasons, be excluded from regular health care systems. This may result in migrants having access to emergency medical care, but not to preventive care. This distinction will affect vulnerable migrants such as children even more. Migrants with a refugee or asylum background will often have more serious medical issues relating to trauma and prolonged periods in which effective medical treatment was not available. This has an impact on the need for accessing proper medical care through health care systems.

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

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

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

4. [...] [T]he reference in article 12.1 of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment. [...]

8. The right to health is not to be understood as a right to be healthy. [...]

The obligations that the CESCR describes in relation to children extend to preventive as well as reactive medical care since children need to be able to develop. A reactive approach with only emergency medical care is not sufficient.

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

22. Article 12.2 (a) outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children. Subsequent international human rights instruments recognize that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness. The Convention on the Rights of the Child directs States to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services. [...]

23. States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.

24. In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration. [...]

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

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

43. In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. [...] these core obligations include at least the following obligations:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;

44. The Committee also confirms that the following are obligations of comparable priority:

- (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- (b) To provide immunization against the major infectious diseases occurring in the community;
- (c) [...]

The right to health: non-discrimination

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

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

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. [...]

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. [...]

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally

prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health. [...]

34. In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy. [...]

The ECSR in its early case law decided that it was in violation of the ESC to distinguish in the access to health care between two types of migrant status for children. This case is also the first case in which the ECSR expanded the scope of protection of the Annex to the ESC to include undocumented migrant children. Later on this was confirmed in the case of *DCI v. The Netherlands* and, in relation to adults in *CEC v. The Netherlands* (cases cited on pp. 10, 18, 22, 23).

FIDH v. France, European Committee of Social Rights, Complaint No. 14/2003, Decision of 8 September 2004

29. Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i. e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.

30. As concerns the present complaint, the Committee has to decide how the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1-17 and impacts on them differently. In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment. [...]

32. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter. [...]

35. With respect to Article 17 the Committee recalls that several provisions of the Revised Charter guarantee the Rights of Children and young persons. [...]

36. Article 17 of the Revised Charter is further directly inspired by the United Nations Convention on the Rights of the Child. It protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance. Yet, the Committee notes that

- a) medical assistance to the above target group in France is limited to situations that involve an immediate threat to life;
- b) children of illegal immigrants are only admitted to the medical assistance scheme after a certain time.

37. For these reasons, the Committee considers that the situation is not in conformity with Article 17. [...]

As mentioned earlier, the ESC rights of migrants are often interlinked with residence rights issues. This was also the case in regard to medical treatment in the case of *N. v the United Kingdom*. The ECtHR was faced with the question of whether a less effective medical treatment in the country of origin should entitle a migrant residence in the United Kingdom. The conclusion from this case (and other cases) is that lack of effective medical treatment in general does not create a right of residence (or prevent forced return).

N. v. The United Kingdom, ECtHR, Application no. 26565/05, Judgment of 27 May 2008

42. [...] The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. [...]

44. [...] Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States. [...]

V. THE RIGHT TO EDUCATION

This right to education appears in both civil and political rights treaties, as well as in treaties concerning economic, social, and cultural rights. Although treaties differ in the way in which the right to education is described, the elements of free access to education and parental choice of schools are present in all.

International Covenant on Economic, Social and Cultural Rights (ICESCR), article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. [...]
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; [...]
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
[...]

Convention on the Rights of the Child (CRC), Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;[...]

Protocol 1 of the European Convention on Human Rights, (ECHR) Article 2

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

The right to education is recognized as crucial to people's development, and to the understanding and protection of (other) human rights.

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

1. Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their

communities. Education has a vital role in [...] safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.[...]

4. States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1). [...] education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. [...] [P]erhaps the most fundamental is that "education shall be directed to the full development of the human personality". [...]

9. The Committee obtains guidance on the proper interpretation of the term "primary education" from the World Declaration on Education for All which states: "The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied [...]"

12. While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities. [...]

13. According to article 13 (2) (b), secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education". The phrase "generally available" signifies, firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. [...]

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

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

Although large parts of the right to education have to be achieved through progressive realization, there are certain aspects of the right that have immediate effect.

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

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

obligation “to take steps” (art. 2 (1)) towards the full realization of article 13. Such steps must be “deliberate, concrete and targeted” towards the full realization of the right to education.

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

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

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

Given the importance of education it is of equal importance that every individual has equal access to education, irrespective of financial possibilities, or the choice of a carer or the government.

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

6. Compulsory. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. [,,,] It should be emphasized, however, that the education offered must be adequate in quality, relevant to the child and must promote the realization of the child’s other rights.

7. Free of charge. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee’s examination on a case-by-case basis. [...]

Not only primary education should be free of charge, also secondary education should be made progressively free of charge. In the case *Ponomaryovi v. Bulgaria* the ECtHR links the right of access – free of charge – to the increased importance of secondary education in a modern society.

[Ponomaryovi v. Bulgaria](#), ECtHR, Application no. 5335/05, Judgment of 21 June 2011

57. Secondary education, which is in issue in the present case, falls between those two extremes. The distinction is confirmed by the difference of wording between sub-paragraphs (a), (b) and (c) of Article 28 § 1 of the United Nations Convention on the Rights of the Child, the first of which enjoins States to “[m]ake primary education compulsory and available free to all”, whereas the second and the third merely call upon them to “[e]ncourage the development of different forms of secondary education ... and take appropriate measures such as the introduction of free education and offering financial assistance in case of need” and

to “[m]ake higher education accessible to all on the basis of capacity by every appropriate means” (see paragraph 33 above).[...] However, the Court is mindful of the fact that with more and more countries now moving towards what has been described as a “knowledge-based” society, secondary education plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned. Indeed, in a modern society, having no more than basic knowledge and skills constitutes a barrier to successful personal and professional development. It prevents the persons concerned from adjusting to their environment and entails far-reaching consequences for their social and economic well-being.

Although the obligation to make secondary education free of charge is a progressive one, it is restricted by the limitations caused by the prohibition to take deliberate retrogressive measures. This means that, once secondary education has been made free of charge, it can only be reversed in very dire (economic or other) situations.

Non-discrimination and the Right to Education

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

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

10. Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. [...]

And:

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

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

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

34. The Committee [...] confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status. [...]

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

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

Exclusion of children from education due to lack of registration as regular migrants of the parents violates the right to education.

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

64. Article 2 of Protocol No. 1 prohibits the denial of the right to education. This provision has no stated exceptions and its structure is similar to that of Articles 2 and 3, Article 4 § 1 and Article 7 of the Convention ("No one shall"), which together enshrine the most fundamental values of the democratic societies making up the Council of Europe. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 137, ECHR 2005-XI). This right is also to be found in similar terms in other international instruments such as the Universal Declaration of Human Rights (Article 26), the International Covenant on Economic, Social and Cultural Rights (Article 13), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (e) (v)), and the Convention on the Rights of the Child (Article 28). There is no doubt that the right to education guarantees access to elementary education which is of primordial importance for a child's development.

65. The Court observes that the applicant's children were refused admission to the school which they had attended for the previous two years. The Government did not contest the applicant's submission that the true reason for the refusal had been that the applicant had surrendered his migrant's card and had thereby forfeited his registration as a resident in the town of Nalchik.

66. As noted above, the Convention and its Protocols do not tolerate a denial of the right to education. The Government confirmed that Russian law did not allow the exercise of that right by children to be made conditional on the registration of their parents' residence. It follows that the applicant's children were denied the right to education provided for by domestic law. Their exclusion from school was therefore incompatible with the requirements of Article 2 of Protocol No. 1. [...]

In a case on access to secondary education, the ECtHR decided that material inequality and lack of real alternatives in other countries did amount to discrimination.

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

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

58. These considerations militate in favour of stricter scrutiny by the Court of the proportionality of the measure affecting the applicants.

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

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

62. However, the authorities did not take any of these matters into account. [...] [I]t does not seem that the authorities could have done so.

63. The Court, for its part, finds that in the specific circumstances of the present case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. [...]

In *D.H. and others v. the Czech Republic*, the Grand Chamber of the ECtHR concluded that members of a group had been systematically excluded from the regular schooling system, which amounted to indirect discrimination. This may be relevant to migrant children, as many States opt to have a less elaborate curriculum where it concerns migrants who are awaiting residency. Although these migrants may not end up residing in the country, the effects of a lesser degree of education can be detrimental to future development and career.

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

183. [...] In their submission, all that has to be established is that, without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.

184. The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. [...] [S]uch a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent. [...]

198. The Court accepts that the Government's decision to retain the special-school system was motivated by the desire to find a solution for children with special educational needs. However, it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes. [...]

202. As regards parental consent, the Court notes the Government's submission that this was the decisive factor without which the applicants would not have been placed in special schools. In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify an acceptance of the difference in treatment, even if discriminatory, in other words a waiver of the right not to be discriminated against. However, under the Court's case-law, the waiver of a right guaranteed

by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent [...].

203. In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. [...]

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

207. The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards (see paragraph 28 above) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class [...]. Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.

208. In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. [...]

209. Lastly, since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases. [...]

Annex – Case studies

Facts:

Four cases have been brought to your attention of an NGO called Protect the Children International (PCI) concerning a member state of the European Union. This state is also a party to all UN human rights treaties, as well as the European Convention on Human Rights and the Revised European Social Charter.

There are similarities between the cases in the sense that they concern children and their economic, social and cultural rights. As the cases were decided in final instance in a relatively short period of time, PCI is considering to bring the cases to an international human rights court or other mechanism as individual petitions.

Contacted by PCI you are asked to advise on the applicable law and strategy to be used in these cases.

1. Provide a legal assessment of any international and EU law applicable to the situation of the clients.
2. Which rights were violated? Which Articles of which international standards were breached in your opinion?
3. Set out an analysis of the advocacy priorities and venues (even the use of multiple venues from different mechanisms) to ensure that children in a similar situation see their rights respected, protected and fulfilled under both international and EU law, with explanation for the choice of venue and strategy in terms of capacity to produce effective change or to defend the human rights law framework.

Case 1:

The first case concerns an undocumented migrant mother with two children. The first child is an 11-year-old girl who is also undocumented migrant. The second child is a three-year-old boy, who has citizenship via his father. The father is not involved in the upbringing of his son. Because of his citizenship the boy is entitled to general benefits to an amount of €230 per month. The mother and two children are offered shelter in a single room by a charity organization. There is no other income.

The final instance court decides that the amount of €230 a month is a sufficient amount for the living costs of the boy. PCI argues that the boy also needs a mother for his care, as well as family life with his sister. Therefore the amount awarded should include their living costs.

Case 2:

The second case concerns another undocumented mother of a five-year-old boy. The boy has citizenship. The child is awarded general benefits (€230 per month) and on top of that the municipality pays for the rent. The lawyer has applied for child benefits (€66 per month) on behalf of the child.

The final instance court decides that child benefits do not have to be awarded because it is an allowance that is awarded to the parent, not the child, and it is not part of the so-called "means of subsistence". And, since the parent is not lawfully residing, the law prohibits the awarding of child benefits. PCI argues that child benefits, although not means-tested, benefit the child, and should be awarded without discrimination.

Case 3:

A woman whose asylum request has failed gives birth to a baby girl. The father does not want to get involved with the upbringing, but has recognized the girl as his child, through which she has obtained citizenship. The municipality provides the mother with full benefits, in the name of her child. Because the

mother and her baby have no home, they are offered temporary shelter at a so-called "baby-home". The shelter is offered for a limited period of three months, in which time the mother has to find housing by herself. The three months have elapsed and the baby-home starts an eviction procedure before the courts.

The final instance court awards the eviction order as, in their view, the mother has not done enough to secure housing by herself. As the mother receives general benefits she should be able to secure housing. The court considers that there are (untested) alternatives available. According to the court, it was always known the accommodation was for limited duration, and there is a waiting list. PCI argues that the mother cannot obtain housing due to her residence status, that it is unlawful to render a child homeless, and that the state is responsible via the courts.

Case 4:

A family consisting of a mother, father, and three children are living in an asylum reception centre. The oldest son (7 years old) is a diabetic, and is in need of a special diet devised by a dietician. The boy's doctor has made an official statement that with the diet the boy would likely not have to rely on insulin injections. The family cannot afford to pay for the diet on their weekly allowance. Insulin on the other hand is fully covered by the State (via insurance). They request the reception organization to provide an additional allowance for the costs of the diet, which is denied. The family is referred to a (non-state funded) food bank.

The final instance court decides that the weekly allowance is designed to cover all necessary costs of living, including dietary needs. This means no additional allowance needs to be awarded on the basis of national or international law. PCI argues that the diet is a special circumstance that is not calculated in the regular amount of allowance, and that the food bank does not consider dietary needs when awarding food to families.

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