

D2.1

Report on the ITFLOWS International and European Legal Frameworks on Migrants And Refugees and ITFLOWS Ethical Framework

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January/2021



"This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement N° 882986".

Deliverable Factsheet	
Title and number	<i>Report on the ITFLOWS Legal and Ethical Framework (D2.1)</i>
Work Package	WP2
Submission date	29/01/2021
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Dissemination level	PU (Public)
Deliverable type	R (Report)

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Version Log			
Issue Date	Version	Author	Change
22/12/2020	v0.1	Alexandra Xanthaki et al.	First version sent for review.
09/01/2021	v0.2	Asli Okyay (IAI) & Tobias Heidland (IfW)	First version including changes and suggestions made by reviewers
20/01/2021	v0.3	Alexandra Xanthaki et al.	Updated version sent to the Coordinator for review.
26/01/2021	v0.4	Cristina Blasi (UAB) & Santi Villar (UAB)	Updated version including changes and suggestions made by Coordinator
28/01/2021	v1.0	Alexandra Xanthaki et al	Final version ready to submit to the EC
30/06/2022	v2.0	Alexandra Xanthaki et al	Final version after EC review

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Executive Summary

This report sets the International and EU legal and ethical basis upon which the ITFLOWS research, activities and recommendations will be based. The ITFLOWS project develops tools that will allow carefully selected entities to predict migration flows and will support them to prepare in advance the reception and integration of asylum seekers, refugees and migrants in a coordinated, efficient and effective manner. It will also be used as the basis of ITFLOWS work, all the requirements that the partners will have to fulfil for any action relating to the project. It ensures that the EUMigraTool and all other deliverables will be in line with all International and EU law norms relevant to migration and refugee legislation. It also is the basis for any research and activity facilitating integration. Special focus is paid on the General Data Protection as well as the potential ethical implications that need to be taken into consideration during the ITFLOWS research.

The report is a unique, up-to-date collection of all relevant legal instruments pertaining to migrant, asylum seekers and refugee rights. With the caveat that it focuses on irregular migration, as the project requires, it brings together migration and asylum legislation and guidelines, both at the International and the European level, and highlights their most important sections for this project.

Section 1 of the report offers **definitions of the core concepts** as used throughout the report and developed within the framework of European and International legislation (e.g. *asylum seeker, refugee and migrant and victim of torture, etc*). This section also discusses the principles that must be satisfied when the rights of migrants, asylum seekers and refugees are restricted. It directs ITFLOWS partners to the understanding of integration in line with current standards of human rights; and highlights the need to recognize the complex and intersectional positionalities of migrants which shape their experiences in their country of origin, during transit, and in the country of arrival.

Section 2 and 3 of the report outline the **existing European and International Legal Instruments** for migrants, asylum seekers and refugees. Some of the International and European instruments included in this section are *general*, recognised to all individuals, such as the UN Human Rights Treaties, the European Convention on Human Rights and the Charter of Fundamental Rights in the European Union. The report follows the work of international and European judicial

and semi-judicial bodies in applying the general human rights standards on refugees, migrants and asylum seekers. Then, the report discusses the *specific* instruments, International and European, on asylum seekers, refugees and/or migrants, including the 1951 Refugee Convention, the EU legislation on border control, Schengen Borders Code as well as Directives on Return and Reception. Finally, the report turns to instruments that focus on particular aspects of refugee or migrant rights. Relevant case-law of the Court of Justice of the EU and the European Court of Human Rights will be used to contextualise the rights of migrants, asylum seekers and refugees.

These sections combine both **an instruments-led and a rights-led approach**. Among other, the report maps the gradual expansion of the right to non-refoulement both in beneficiaries and in scope; emphasises the need for applying the existing standards of non-discrimination and effective equality for refugees, asylum seekers and migrants in all aspects of their lives; points at the higher standard needed for the detention of these individuals in International legal order than in the EU legal order as both need to be satisfied; and clarifies State obligations in socio-economic rights. Importantly, Annex A of the report includes a **chart summarising and tabulating some of the key rights** concerning refugees, asylum seekers and migrants and their sources. The chart aims at providing an easy tool for partners and other stakeholders to locate the rights to be considered and protected at each stage of the project.

Section 4 focuses on the **legal framework for the processing of (personal) data** in the ITFLOWS project. The report adopts a top-to-bottom approach: First, it offers a brief description of the Right to Privacy in the (overarching) international context to foster the general understanding of risks when processing personal data. Following this, the report describes the primary EU law and then introduces specific European privacy concepts. It then describes the secondary EU law and its specific legal requirements within the project to show how the European approach to privacy and data protection is actually implemented. Specific recommendations to all ITFLOWS partners are made.

Section 5 presents the **ethical framework** that governs all ITFLOWS research activities. In this context, special emphasis is placed on ensuring and promoting ethical and legal compliance of the qualitative research activities. In particular,

ethical guidelines, procedures and measures are specifically designed for the ITFLOWS qualitative research activity that entails the most challenging ethical risks, that is, the interviews with migrants, refugees and asylum seekers. In this regard, the following ethical concerns are addressed: i) the particular vulnerability of the participants; ii) the recruitment plan for the interviewing team and the research participants; iii) the protection of personal data; iv) the need to ensure voluntary participation; v) and, the incidental findings policy.

Developments in this area are on-going. This forms solely a very comprehensive basis on which the ITFLOWS will be built. The development of the project will highlight further need for clarification and implementation of the existing standards.

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Abbreviations

AFSJ: Area of Freedom, Security and Justice

BUL: Brunel University London

CAMM: Common Agenda for Migration and Mobility.

CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Committee against Torture

CEAS: Common European Asylum System

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW (also): Committee on the Elimination of All Forms of Discrimination Against Women

CEPS: Centre for European Policy Studies

CERD: International Convention on the Elimination of All Forms of Racial Discrimination

CERD (also): Committee on the Elimination of Racial Discrimination

CERTH: Ethniko Kentro Erevnas kai Technologikis Anaptyxis

CESCR: Committee on Economic, Social and Cultural Rights

CFR: Charter of Fundamental Rights of the European Union (also EU Charter)

CIT: Cork Institute of Technology

CJEU: Court of Justice of the European Union

CRC: Convention on the Rights of the Child and Committee on the Rights of the Child

CRI: Associazione della Croce Rossa Italiana Policy in the EU

CoE: Council of Europe

CSD: Centre for the Study of Democracy

DG: EU Directorate General

DMP: Data Management Plan

DP-LED: Directive EU 2016/680, Data Protection Law Enforcement Directive

DPA: Data Protection Advisor

DPO: Data Protection Officer

DTM: Displacement Tracking Matrix

EASO: European Asylum Support Office

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EC: European Commission
EDPB: European Data Protection Board
EDPS: European Data Protection Supervisor
ELP: Ethical Lead Partner
EMT: EUMigraTool
EP: European Parliament
EPSR: European Pillar of Social Rights
EU: European Union
EUI: European University Institute
FCNM: Framework Convention for the Protection of National Minorities of the Council of Europe
FIZ Karlsruhe: FIZ Karlsruhe–Leibniz-Institute für Informationsinfrastruktur GMBH
FRA: Fundamental Rights Agency
FRONTEX: European Border and Coast Guard Agency
GA: Grant Agreement
GAMM: Global Approach to Migration and Mobility
GIP: Guidelines on International Protection
GCM: Global Compact for Safe, Orderly and Regular Migration
GCR: Global Compact for Refugees
GDPR: General Data Protection Regulation (EU) 2016/679
HRC: UN Human Rights Committee
IAI: Istituto Affari Internazionali
ICCPR: International Covenant on Civil and Political Rights
ICESCR: International Covenant on Economic, Social and Cultural Rights
ICF: Informed Consent Form
ICRMW: International Convention on the Rights of Migrant Workers and their Families
IEB: Independent Ethics Board
IFP: Incidental Findings Procedure
IFW: Institut Für Weltwirtschaft
IGC: Independent Gender Committee
ILO: International Labour Organisation
IOM: International Organisation for Migration

LGBTQI+: Lesbian, gay, bisexual, transgender, queer, intersexed and ally community

NGO: Non-Governmental Organisation

MP: Mobility Partnerships

MS: Member States

New York Declaration: New York Declaration for Refugees and Migrants

OAU: Organisation of African Unity

OCC: Associació Open Cultural Centre

OHCHR: Office of the High Commissioner of Human Rights

OP-CAT: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

OP-CEDAW: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

OP-CRC-AC: Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

OP-CRC-SC: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

OP-CRC-IC: Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure

OP-ICESCR: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

OP-ICCPR: Optional Protocol to the International Covenant on Civil and Political Rights

OSCE: Organisation for Security and Cooperation in Europe

OXFAM: OXFAM Italia

PSEA: Protection from Sexual Exploitation and Abuse

RD: Directive 2008/115/EC - Return Directive

RRI: Responsible Research and Innovation

SDGs: Sustainable Development Goals

SIS: Schengen Information System

Smuggling Protocol: Protocol against the Smuggling of Migrants by Land, Sea & Air

TEU: Treaty on the European Union

TFEU: Treaty on the Functioning of the European Union

TRC: Terracom AE

Trafficking Protocol: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

UAB: Universidad Aut3noma de Barcelona

UAM: Unaccompanied Minors

UB: User Board

UBPFR: Users Board Participatory Feedback Report

UNDESA: United Nations Department of Economic and Social Affairs

UNDP: United Nations Development Programme

UNHCR: Office of the United Nations High Commissioner for Refugees

UNICEF: United Nations Children's Fund

UNODC: United Nations Office on Drugs and Crime

UNTOC: United Nations Convention against Transnational Organised Crime

WP: Work Package

INTRODUCTION

This Report is an overview of the current European and International legal frameworks applicable to migrants, asylum seekers and refugees as well as the ethical framework for research in this field. It is not produced *in abstracto* but specifically focuses on the legal and ethical frameworks that are applicable to ITFLOWS with an emphasis on the rights of third country migrants, asylum seekers and refugees within EU Member States. Its aim is to assist the project partners of ITFLOWS with complying with the legal and ethical requirements concerning migrants and refugees in research design, implementation, analysis and dissemination.

This report will a) identify the relevant asylum and migration legal instruments at the European and international level; b) discuss how the provisions of the aforementioned instruments should be interpreted and implemented; c) extract and map out the main rights of migrants and refugees that partners should keep in mind during their involvement with the ITFLOWS project; d) focus on data protection and privacy laws; e) map out project partners' standards for research ethics and responsible research and innovation following the Commission's guidelines. For this purpose, it sets forth the main principles in regard to research ethics and includes an in-depth discussion of the EU legal framework on privacy and data protection. The Gender Action Plan should be read in conjunction with this document. ITFLOWS considers the full compliance of all partners with legal requirements in all project activities of utmost importance. The ITFLOWS team will work closely with the technical partners to ensure that the required standards are not compromised by the technical innovations of the project.

The report will provide a point of reference for project partners and researchers for the development and formulation of human rights-based and sustainable policy solutions that are in line with the '[t]he Union's action on the international scene guided by the principles which have inspired its own creation'.¹ This includes 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and

¹ EP Res (2018/2642(RSP)), para. 24. See also EP Res (2015/2342(INI)), paras K-L and 40.

solidarity, and respect for the principles of the United Nations Charter and international law' (Article 21(1) Treaty on European Union (TEU)). For this purpose, this report adopts a rather doctrinal approach to law and justice, discussing the legal frameworks and legislations in relation to the individuals. Therefore, this report is people-centred rather than State-centred. It is not concerned with issues of States' compliance, which is the focus of WP4 (see D4.1). While it mainly focuses on the practical dimensions of International and EU law and legislations, it also provides theoretical insights relevant to the ITFLOWS project.

This report is based on extensive desk research and includes the analysis of international law treaties as interpreted by their monitoring bodies and scholarship; EU relevant legislation and the relevant judgments from the CJEU and ECtHR, policy documents from international organisations including the UNHCR and the IOM, NGOs and think-tanks, as well as EU official declarations and implementation reports. A content exploration of the key legislation pieces at the international and European Union level is undertaken in **Section 1**. It presents the definitions, which are really important for ITFLOWS work, and sets out the main foundations of migration and asylum law at the international and European Union level. These foundational principles will act as determinants in the cases where the application of legal standards is not clear, there is a gap in law, or competing principles also apply. **Sections 2-4** pursue a legal-doctrinal approach for the discussion of the instruments, the rights of the individuals concerned as well as a section specifically on the right to privacy. **Section 2** provides an overview of the main international law instruments relating to migrants and refugees as interpreted by international quasi-judicial bodies, the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU). The choice of which instruments are covered was made with the specific project in mind. **Section 3** maps the European and EU Law instruments on migration and asylum, focusing on the ones that are relevant to the work of our partners. The report also contains a chart of the main human rights of migrants, refugees and asylum seekers, which aim to be an easy tool for our partners and stakeholders in understanding the human rights standards of each phase.

Section 4 highlights the data protection legal requirements all our partners are expected to comply with. This was deemed necessary in view of the importance the right to privacy has in this project. Finally, **Section 5** is based on a hands-on approach and discusses the ethical framework within the remit of ITFLOWS.

The report compliments the work of our partners in several WPs. For example, it does not offer detailed conclusions on the application of relevant legal instruments in practice, as this is a task fulfilled by WP4 which looks at the asylum and migration law at the domestic level. European law and policy on migration and asylum is undergoing tremendous transition at the time of writing this report with the political and policy discussions around the new EU Pact on Migration and Asylum being well underway. In this report, we sought to set out the most recent policy and legislative changes to the best of our ability. The WP2 team will check for legislative developments according to the European Commission published **Roadmap to implement the New Pact on Migration and Asylum**,² and inform the partners through workshops, as well as informally, on these developments.

The writing and reviewing of this report was conducted by a team consisting of (in alphabetical order) Thilo Gottschalk, Andrea Guillén, Kenneth Brant Hansen, Claudia Jiménez Cortés, Mario Macías, Madalina Moraru, Sonia Güell Peris, Montserrat Pi Llorens, Mengia Tschalaer, Emma Teodoro, Alexandra Xanthaki and Ermioni Xanthopoulou. The production of the report faced some challenges because of the current COVID-19 pandemic, but all involved partners have been fully committed to work towards the compliance standards as set forth in this document.

The report does not cover regular migration as it falls outside the remit of ITFLOWS. It adopts the term ‘irregular migration’ in accordance with the Grant Agreement of the Report, although it recognizes the current controversy around this term.

2 Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020, https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en.

As this is a fast-developing area of law and in view of the current proposal for a new EU Migration Pact, this report will need reviewing and updating during the life of ITFLOWS.

The report takes into account developments until 1st of January 2021.

SECTION 1 - FOUNDATIONS

1.1 Definitional Issues

The purpose of ITFLOWS is to provide accurate predictions and adequate management solutions of migration flows in the European Union in the phases of reception, relocation, settlement, and integration, according to a wide range of human factors and using multiple sources of information. In order to do so, the definition of beneficiaries of each legal provision must be clear. There is quite a lot of confusion about who fall within each category, so it is important to clarify this. In what follows, the terms ‘migrant’, ‘refugee’, ‘asylum seeker’, ‘victims of trafficking’ and ‘minority’ will be clarified and their relevance for the ITFLOWS project outlined.

Each category of third country nationals enjoys a separate and specific set of rights under International and EU law. For this reason, it is important to correctly establish the legal status of a migrant third-country national to ensure that they benefit of the rights conferred by international and EU law. The state can define a third country national in varying ways. However, EU law has harmonised the concept by defining a third country national as ‘any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code’.³ International law insists that it is not the role of the state to decide who is a refugee or a migrant; a state only recognises such categories.⁴ Also, the CJEU has provided various operational guidelines on how to ensure the protection of the right to asylum and prohibition of non-refoulement which should be respected irrespective of the domestic asylum and immigration procedure.⁵

Migrants

A migrant is anyone who moves from their country to another, whatever the reasons. At the international level, there is no universally accepted definition of a ‘migrant’. Article 4 of the International Convention on the Protection of the Rights of

³ Art. 3(1) of Directive 2008/115/EC (Return Directive).

⁴ See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva, February 2019), p. 17.

⁵ C-181/16 Ghandi ECLI:EU: C:2018:465 and C-269/118 C and J and S ECLI:EU:C:2018:544.

Migrant Workers and Members of their Families (Convention on Migrants) defines the ‘migrant worker’ as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’. The emphasis is on working migrants, so it is of limited applicability. Indeed, according to the data of the EU Fundamental Rights Agency, there are, under EU law, ‘some 25 different categories of third-country nationals, each with different rights that vary according to the links they have with EU Member States or that result from their need for special protection’.⁶ On the basis of both international and EU law, the term ‘migrant’ is thus a generic socio-legal term that includes, among others, the following categories:

- a. *‘regular’ migrants* are those who have legal permission, usually either a visa or a resident permit within the EU. Asylum seekers and irregularly staying third country nationals do not form part of this category. Parts of ITFLOWS concern regular migration.⁷
- b. *‘irregular’ or ‘undocumented’ migrants*. The term ‘illegal migrant’ is never to be used. Judicially and ethically, an act can be legal or illegal, but a person cannot. And most importantly, a person asking for asylum is indeed justified not to have all their papers with them.
- c. in its widest scope and for some authors, the term ‘migrant’ also includes *asylum seekers and refugees*, although these latter categories are regulated by additional instruments and are given specific guarantees in international and European law. In countries with individualized procedures, an asylum seeker is ‘someone whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum seeker will ultimately be recognized as a refugee, but every recognized refugee is initially an asylum seeker.’⁸

⁶ FRA, Handbook on European law relating to asylum, borders and immigration, (Dec, 2020), p.14.

⁷ ITFLOWS Grant Agreement, Technical Annex, page 10.

⁸ United Nations High Commissioner for Refugees, *Master Glossary of Terms* (Geneva, 2006).

For the various categories of migrants under EU law and clarification on which ones are covered by the ITFLOWS Project, please see Table 1 at the end of this section as well as the Grant Agreement.⁹

Refugees

Refugees are individuals recognised as such under the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol. According to Article 1.A(2) of the Refugee Convention, a refugee is a person who:

owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The temporary and geographical restrictions have been lifted by the 1967 Protocol.

This definition has been reproduced in the subsequent Qualification Directive (2011/95/EU), Article 2(d). The refugee definition is universally binding on all the signatory States to the Convention. All the EU Member States have signed the Convention. Any person who meets its criteria has to be recognised as a refugee unless they meet the exclusion criteria under the Qualification Directive (Art. 12 and 17) and the 1951 Geneva Convention (Art. 1D). Also, since 2007, the refugee population also includes people in refugee-like situations.

The UN High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status by the stipulates that ‘a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is normally determined. Recognition of his refugee status does not

⁹ ITFLOWS Grant Agreement, Technical Annex, page 16.

therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognised because he is a refugee'. Also, Recital 21 of the Qualification Directive states that 'the recognition of refugee status is a **declaratory act**'. It means that a person is a refugee within the meaning of the 1951 Geneva Convention as soon as they fulfil the criteria contained in the definition. Recognition of the person's refugee status does not therefore make them a refugee; it is merely a declaratory act. (UNHCR Handbook paragraph 28). Nevertheless, discretion left in the definition for states to determine status makes recognition, despite its declaratory nature, an important element in the legal regime of refugees.

Therefore, the elements of a refugee are:

- a. *To be outside the country of origin*, which is the country of their nationality or in the case of stateless persons outside of habitual residence;
- b. *To have a well-founded fear of persecution*: This requirement contains both a subjective and objective element. According to the UNHCR, their personal and family background should be taken into account, as well as their interpretation of the situation and their personal experience.¹⁰ From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.¹¹ The EU Qualification Directive defines persecution as acts which must '(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights'; or '(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).'¹² There must be sufficient facts to justify the conclusion that the applicant for refugee

¹⁰ UNHCR, Handbook on Procedures and Criteria..., op. cit., p. 19.

¹¹ Ibid. p. 21

¹² Article 9 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337.

status would face a serious possibility of being subjected to persecution upon return to the country of origin.¹³

Although, as just noted, the refugee determination must be evaluated in light of individual circumstances, the displacement of entire groups may take place, making it difficult in practice to proceed with individual examinations on a case-by-case basis. These are also situations in which assistance is often extremely urgent. In such situations, so-called 'group determination' of refugee status can be implemented, which implies that each member of the group is a refugee *prima facie*;¹⁴

- c. *The motivation of the persecution was race, religion, nationality, membership of a particular social group or political opinion.* The scope of these grounds has been clarified by international guidance and state practice.¹⁵ With regard to belonging to a social group, it is defined as a 'group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society'. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.¹⁶ Gender and sexual orientation fall within this category according to state practice (See also Gender Action Plan p. 37);
- d. *Inability or unwillingness to return.* The Refugee Convention does not require that threatened persons exhaust all options within their own country. Thus, in cases of civil war or serious disturbances, it is not required of the person to have sought protection in other parts of the country, beyond what is

13 UNHCR, Handbook on Procedures and Criteria..., op. cit., p. 20. Also, J Godwin-Gill, 'Transnational Legal Problems of Refugees', (Michigan Yearbook of International Legal Studies, 1982), p. 299.

14 UNHCR, Conclusion No.22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx, 1981

15 UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/12/09 of 23 October 2012.

16 UNHCR, Guidance on International Protection No. 2: "Membership of a Particular Social group" within the context of 1A (2) of the 1951 Convention and/or its 1967 Protocol, 7 May 2002, HCR/GIP/02/02, paragraph 11.

reasonable. The practice in some receiving states of denying refugee status based on the possibility of internal relocation in one's country of origin (the so-called 'internal flight or relocation alternative')¹⁷ is only acceptable if personal circumstances, the country conditions and future expectations have been adequately evaluated.

The refugee status is not exclusive of other legal conditions. This is the case, for example, with victims of torture or human trafficking, whose material circumstances often also meet the characteristics of refugee status, thus creating a confluence of double protection, as has already been indicated. Also, this is a definition of minimum thresholds that does not exclude the application of more protective regulatory instruments, such as those envisioned in some regional areas.

Once a person's refugee status has been determined, they retain it unless it falls within the circumstances of one of the cessation clauses. These may be for example because the refugee returns voluntarily to their country of origin, or re-establish themselves in that country or acquire the nationality of that country.¹⁸

In addition to the above, the state can recognise *complementary or subsidiary protection*, in a form preferred by them, the level of which may not be equivalent to that of the Refugee Convention. Of course, general human rights standards apply. The EU Qualification Directive (460/2011) extends protection to subsidiary protection (art. 18), also called humanitarian asylum, in 3 situations: (a) the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; (c) serious and individual threat to a civilian's life or person.

17 UNHCR, Guidelines on International Protection No. 4: The "Internal Flight or Relocation Alternative" within the context of Article 1A (2) of the 1951 Convention and/or its Protocol relating to the Status of Refugees, 23 July 2003, HCR/GIP/03/04

18 UNHCR, Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), 10 February 2003, HCR/GIP/03/03.

Asylum seekers

According to the UNHCR definition, asylum-seekers are individuals who have sought international protection and whose claim for refugee status has not yet been determined.¹⁹

Asylum seekers are those third country nationals whose claims for international protection (refugee, complementary protection, also known as subsidiary protection under EU law) are waiting for a final decision. The definition of 'final decision' varies between the signatory States to the Refugee Convention, since asylum procedures are not harmonised by the Convention. Within the EU, the Asylum Procedure Directive (2013/32/EU) provides for a common asylum procedure and according to Art 46(5), a third country national continues to be an asylum seeker until a final judgment has been delivered by a court on his or her appeal against the administrative rejection of his asylum claim, or until the expiry of the right to appeal.²⁰

In view of the declaratory nature of the refugee title, the UNHCR has noted that 'every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined.'²¹ Therefore, asylum seekers are in principle considered refugees and enjoy many similar rights recognised in international law to refugees, certainly non-discrimination, non-penalisation and non-refoulement.²²

Victims of trafficking

One of the possible causes that can lead to the asylum application is being or having been a victim of human trafficking. Trafficking of individuals is:

¹⁹ See Art. 9 of the Asylum Procedure Directive (2013/32/EU).

²⁰ Exceptions exist in relation to those whose asylum claim has been rejected within an accelerated procedure, see more in C-269/18 C and others ECLI:EU:C:2018:544.

²¹ UNCHR 'Note on International Protection: Submitted by the High Commissioner' (31 August 1993) UN Doc A/AC.96/815, 5.

²² UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.3 (2011) ("Handbook"), at [28].

'[the] recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.²³

In order for victims of trafficking to get the refugee status, there must be a transnational element, but also coercion for economic benefit through the exploitation of human beings. Both refugees and victims of trafficking are vulnerable individuals in need of protection; and both share the need to have the principle of non-refoulement recognised. Victims of trafficking may also qualify for asylum, if the conditions are satisfied.²⁴

Minorities

Asylum seekers, migrants and refugees often belong to minority groups established in the countries for some time. In this respect, these individuals also enjoy the rights of minorities as recognised in international human rights law. The Human Rights Committee (HRC) has noted in its General Comment 23 that 'Just as they need not be nationals or citizens, [members of minorities] need not be permanent residents. Thus, migrant workers or even visitors in the State party constituting such minorities are entitled not to be denied the exercise of [minority] rights.'²⁵

23 Art 3.(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, which complements the United Nations Convention against Transnational Organized Crime, adopted on the 15th November 2000, para 1.

24 UNHCR, Guidelines on the application of Article 1A (2) of the 1951 Convention or the 1967 Protocol relating to the Status of Refugees in relation to victims of trafficking in persons and persons at risk of being victims of trafficking, UNHCR HCR / GIP Guidelines / 06/07 April 7, 2006.

25 UN Human Rights Committee, General Comment No. 23 on 'The Rights of Minorities (Art 27)', UN Doc. CCPR/C/21/Rev.1/Add.5 para. 5.2.

1.2 Scope of application of ITFLOWS

The table below outlines the categories of persons on the move within the EU. The table is divided into the different legal statuses of migrants staying in the EU and indicates the categories covered by the project. Table 1: ITFLOWS Scope of Personal Application

Persons with rights derived from EU free movement provisions	Family members of citizens of EU Member States <i>NOT covered by ITFLOWS project</i>
Persons with rights derived from international agreements	Family members of citizens of the European Economic Area (EEA) and Switzerland <i>NOT covered by ITFLOWS project</i>
	Turkish nationals and their family members <i>Not Covered by the ITFLOWS project</i>
	Nationals of third countries that have concluded bilateral or multilateral agreements with the EU (over 100 countries) including, nationals of the United Kingdom from 1 st of January 2021 <i>Covered by the ITFLOWS project</i>
Short- and long-term immigrants <i>These are not covered by the ITFLOWS project, as they are regular migrants</i>	Family members of third-country national sponsors
	Long-term residents in the EU
	Blue Card holders and their family members
	Posted workers
	Researchers
	Intra-corporate transferees
	Students
	Au pairs
Short-term visitors <i>If short term, not covered by ITFLOWS</i>	Seasonal workers
	Local border traffic permit holders
	Long-stay visa holders
	Visa-free third-country nationals
Persons in need of protection <i>These are covered by the ITFLOWS project</i>	Visa-bound third-country nationals
	Asylum seekers
	Beneficiaries of subsidiary protection
	Beneficiaries of temporary protection
Migrants in an irregular situation	Refugees
	Victims of human trafficking
	Irregularly staying third-country nationals

These are covered by the ITFLOWS project

Illegally staying third-country nationals whose removal has been postponed

1.3 Sources

This section introduces the structure and main sources of the International and EU Law frameworks on Migration and Asylum. In so doing, this section provides an overview of the legal frameworks relevant to ITFLOWS' research design, implementation, analysis and methodology which need to be taken into account by ITFLOWS project partners and researchers. It also discusses the main underlying principles that have to be kept in mind in discussing and applying the legal frameworks.

International Law Sources

At the International Law level, human rights guarantees are based on the international treaties, as signed and ratified by the states. Non-nationals enjoy all of the unalienable rights applicable in International Law to all human beings. Hence, asylum seekers, refugees and migrants all have the rights aimed at everyone as recognised in the **generic human rights instruments**. The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture (CAT), and the Convention on the Rights of the Child (CRC); are all such legally binding instruments to the extent that States have signed and ratified them. Some of their provisions are also customary International Law, which means that they bind the states irrespective of whether they have signed them and ratified them or not. All provisions are clarified and interpreted by the work of their monitoring bodies.

In addition to the generic human rights instruments, the international legal framework also consists of **instruments specifically aimed at the protection of migrants and refugees**. Many provisions of the Convention Regarding the Status of

Refugees are considered customary international law, so these are binding to all states. In contrast, the Convention on the Rights of All Migrant Workers and Members of their Families has only been ratified by 55 States, without major European destination country of international migrants within its States Parties. Thus, its usefulness for this project is limited. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Protocol against the Smuggling of Migrants by Land, Sea and Air and the United Nations Convention against Transnational Organized Crime may also be of use. These legally binding instruments are complimented by soft (non-legally binding) law, including the New York Declaration and the Global Compacts on Migration and Refugees.

In addition, as mentioned above, asylum seekers, migrants and refugees are often members of long-established minorities and as such they also enjoy the protection of **minority instruments**²⁶, including the UN Declaration on the Rights of Minorities and the Council of Europe Framework Convention on National Minorities.

In addition, all Member States have signed and ratified the **European Convention of Human Rights**, binding to all Member States and all subject to the European Court of Human Rights. The Court's case-law acts as an important guide in clarifying issues relating to migration and asylum.

EU Law Sources

The European Law framework in this report stands upon Article 6 of the TEU:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (...) which shall have the same legal value as the Treaties (...)
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. (...)

²⁶ A Xanthaki 'Against integration, for human rights' (2016) 20 *The International Journal of Human Rights* 815-838.

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

Therefore, three are the sources of rights for the EU: **the EU Charter of Fundamental Rights; the European Convention on Human Rights (ECHR); and the general principles of EU law**, as informed by national constitutional traditions and the ECHR.

The **Charter of Fundamental Rights of the European Union** is the Bill of Rights of the EU. It has the same status as the EU Treaties, and therefore, it ranks at the top of EU law sources as EU primary source. It encompasses a broad range of civil, political, social and economic rights, together with rights specific to EU citizens. EU bodies and institutions are bound by the Charter in all aspects of their work. Member states are bound by the EU Charter when acting 'within the scope of EU law', in 'the implementation of EU law' and in 'situations governed by EU law'.²⁷ Remote connection with EU law is sufficient to revoke the Charter and even though national rules fall outside the scope of the Charter, the individual should not be deprived of the protection afforded by the Charter.²⁸ As asylum law is an area of EU competence, national asylum legislation should be considered as implementing Union law. Certainly, the Charter applies to Member States in the application or execution of a regulation,²⁹ the transposition of a directive, and/or the application of a directive through an executive act.³⁰ Specifically on Dublin III Regulation, the Court has held that the discretion included in the so-called 'sovereignty clause' of Article 3(2) of the Dublin II Regulation should be interpreted as implementation of EU law.³¹ Hence, the Charter binds Member States on Dublin III, but the need to ensure the

27 Case C-617/10 Åkerberg Fransson, EU:C:2013:105; Filippo Fontanelli 'Implementation of EU law through Domestic Measures after Fransson: The Court of Justice Buys Time and 'Non-Preclusion' Troubles Loom Large' (2014) ELR 682. Spaventa, 'The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures, Study for the PETI Committee, EP, DG for Internal Policies, PE 556.930 (2016),

28 Case C-400/10 PPU McB, ECLI:EU:C:2010:582.

29 Joined Cases 201/85 and 202/85 Klensch and Others ECLI:EU:C:1986:439.

30 Case C-28/05 Dokter [2006] ECR I-5431.

31 N.S. and M.E., paras 65-69.

effectiveness of the Dublin system renders the Charter applicable only in exceptional cases.³²

Finally, it should be mentioned that the ECHR belongs to the international regional instruments and will be discussed there, but is also part of the EU sources. The EU Charter provides that the EU will accede to the ECHR, although it is unknown when this will take place and to what extent this can fill in the gaps created by the limited and territorial application of the Charter.

These are the main primary sources to look for answers regarding the legal protection of the affected individuals from our work in ITFLOWS. The next sections will go in depth in the content of these sources.

1.4 Overarching principles

Hierarchies and Rights

Human rights are universal, fundamental, and inalienable. A few **human rights are absolute and no restrictions can be imposed.** Prohibition of torture, prohibition of slavery and prohibition from genocide, freedom of thought and opinion cannot be restricted. All other human rights can be restricted to accommodate other rights or interests. However, the rights of migrants and refugees have in principle priority over other rights and interests, because these are vulnerable sections of the population that require additional protection by the state.

The conditions that must always be applied to restrict human rights have been set in the **International Covenant on Civil and Political Rights** and its jurisprudence, the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Siracusa Principles)³³, the

32 E. Spaventa, The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures, Study for the PETI Committee, EP, DG for Internal Policies, PE 556.930 (2016), p 19

33 American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Geneva, 1985)

European Convention on Human Rights³⁴, the EU Charter of Fundamental Rights (EU Charter) and EU case law. These conditions are:

- *Legality*: any limitation to human rights must be provided by the law (Article 52(1) of the EU Charter, Siracusa principles);
- *Legitimacy*: any limitation must only take place because of the specific aims that are explicitly specified in the law. International provisions recognising specific rights set out the specific aims for which restrictions may take place, usually for'. The EU Charter's restrictions on rights are allowed only if they are necessary and actually meet the objectives of general interests. According to Article 52(1) of the EU Charter, these objectives 'recognised of the Union or the need to protect the rights and freedoms of others';
- *Proportionality*: any limitation has to be put only if and to the extent absolutely necessary to satisfy the specific legitimate aim (ECHR). In EU law, Article 52(1) of the EU Charter states that limitations on the exercise of rights must be subject to the principle of proportionality. Restrictions on rights are allowed only if they are necessary and actually meet the objectives of general interests, recognised by the Union, or the need to protect the rights and freedoms of others;
- The limitation must respond to a *pressing public or social need* in a democratic society (Article 18 ECHR, Siracusa principles);
- The '*essence of fundamental rights*' has to be maintained according to EU law. In International Law, we refer to it as 'the core of the right' that has to be maintained.³⁵

Integration and Migration

ITFLOWS further examines the manner in which migrants, asylum seekers and refugees experience integration measures and policy. Integration is not found as

³⁴ See for example Articles 8, 9, 11 ECHR.

³⁵ Case C-216/18 PPU Minister for Justice and Equality v LM ECLI:EU:C:2018:586, para 60; Case C-426/11, Alemo-Herron ECLI:EU:C:2013:521, para 34; Case C-362/14, Schrems ECLI:EU:C:2015:650, para 94.

such in any human rights binding instrument. The European Commission has provided a definition of ‘integration’ as follows:

Integration should be understood as a two-way process based on mutual rights and corresponding obligations of legally resident third country nationals and the host society which provides for full participation of the immigrant. This implies on the one hand that it is the responsibility of the state to ensure that the formal rights of immigrants are in place in such a way that the individual has the possibility of participating in economic, social, cultural and civic life and on the other, that immigrants respect the fundamental norms and values of the host society and participate actively, in the integration process, without having to relinquish their own identity.³⁶

This definition is quite helpful and similar to the definition given by the OSCE in the *Ljubljana Guidelines on Integration of Diverse Societies*:

To support the integration process, States should adopt policies that aim to create a society in which diversity is respected and everyone, including all members of ethnic, linguistic, cultural or religious groups, contributes to building and maintaining a common and inclusive civic identity. This is achieved by securing equal opportunities for all to contribute to and benefit from the polity. It requires that the State ensures that the rights of all are respected and creates the conditions for all members of society to take on their share of the responsibilities. Society as a whole benefits from such a policy.

The Common Basic Principles for Immigrant Integration Policy in the EU 2016 Action Plan provided for several policy areas where Member States could invest in improving the integration of migrants. This included to set up pre-departure and pre-arrival measures that prepare the migrants for the host society prior to arrival, including information about the host country, their rights and obligations and to provide basic language training. The Action Plan also set out concrete measures

³⁶ European Commission, Communication on Immigration, Integration and Employment, COM (2003)336, Brussels, 3 June 2003.

regarding access to language training, access to the labour market and vocational training.³⁷ It also focused on migrants' active participation in the host society.

ITFLOWS project partners and researchers recognise that a primary precondition of the integration outcome is equality and respect for diversity. Hence, in order to achieve integration, there need to be:

- Measures to end discrimination, prejudice and racism towards migrants and refugees;
- Positive measures to protect their identities;
- Measures to implement their socio-economic rights;
- Ways to satisfy their rights to effective participation in programmes that affect them.

The draft of the New Pact on Migration and Asylum, published in September 2020 includes a new Action Plan on Integration and Inclusion that will cover the period 2021-2024. It draws on all relevant policies and tools in key areas such as social inclusion, employment, education, health, equality, culture and sport and promises to ensure that migrants fully benefit from the European Pillar of Social Rights. A more explicit reference to equality and cultural diversity as well as positive measures would be more consistent with the concept as put forward by the Commission and international bodies.

Intersectionality and migration

In addition to enjoying the protection as migrants, asylum seekers and refugees, individuals have other characteristics that also require additional protection. ITFLOWS recognises that the positionality of persons on the move is not solely determined by their legal status as migrants, asylum seekers and/or refugees. Instead, race, gender, sexuality, class, ethnicity and religion substantially contribute to an individual's ability to access the law and thus legal protection in their country of origin, during transit, and in the context of integration. ITFLOWS thus stresses the importance of an intersectionality lens in assessing and analysing legal protection

³⁷ European Commission, Communication on Action plan on Integration and Inclusion 2021-2027, COM(2020) 758, p.8

measures within the EU (see also Part 2 of the Gender Action Plan for a more in-depth discussion on Intersectionality and migration/asylum).

Originally developed by the writings and organising of U.S. black feminists³⁸, is a way of understanding that people do not lead singular lives; rather, their experiences are simultaneously shaped by their multiple positionalities in terms of gender, race, sexual orientation, gender identity, class, ethnicity, ableism, and religion etc. Using intersectionality as an analytical tool allows to dismantle the interrelationship between power relations and the production of inequalities and marginalities. The analytical and theoretical concept of intersectionality facilitates an understanding of the manner in which hierarchies and power dynamics are created in social life and how such dynamics are legitimized by structural racism, sexism, classism, queer- and transphobia. In essence, intersectionality allows for the disentanglement of the simultaneity of oppression created at the intersection of multiple identities.³⁹

ITFLOWS partner organisations and researchers acknowledge that an intersectional lens is crucial to grasp the different experiences of migrants in their country of origin, during transit and in the country of arrival. Moreover, intersectionality is necessary to comprehend the manner in which EU migration and integration policy and law – as most recently outlined in the New Pact on Migration and Asylum – impact people on the move in different ways. This is in terms of access to legal pathways, refugee protection, employment, education, and health care, etc.

For instance, migration scholars criticise the New Pact's border management geared towards accelerating the asylum procedure and requiring the *a priori* return of people from so-called *safe countries*. To lump sum migrants into groups based on their country of origin neglects the different ways in which people's vulnerabilities and oppressions are constituted. For example, to send LGBTQI+ persons seeking asylum back to 'safe countries' that do not fully respect LGBTQI+ rights mean to overlook the ways in which nationality intersects with sexual orientation and/or gender identity, and gender (see also Part 3(c) of the Gender Action Plan). Moreover, the Pact's 'preliminary vulnerability checks' as part of the screening procedure are

³⁸ Crenshaw K., *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, (1989), *U. Chi. Legal F.*, 139.

³⁹ Collins, P.H. and Bilge, S., *Intersectionality*, (John Wiley & Sons, 2020).

likely to fail to identify particularly vulnerable groups including survivors of trafficking and/or gender-based violence as well as LGBTQI+ individuals because these cases need more time to be assessed due to trauma, stigma, and shame – subjecting these persons to unlawful refoulment and to persecution, torture and even death.⁴⁰ An intersectional lens is thus vital for the ITFLOWS project in order to capture how EU migration and asylum regimes produce privileges and marginalization at the intersection of multiple identities and positionalities.

40 Joannon, B., Pope, S. and Welanders, M.(2020). New Pact on Migration: An Exacerbation of Past Failures in Shiny New Packaging. Available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/09/new-pact> [20 Jan. 2020]

SECTION 2 – INTERNATIONAL LAW INSTRUMENTS

This Section provides an in-depth overview of the legal instruments – binding and non-binding – relating to migration and asylum in International, both universal and regional, Law. This section offers - where applicable - recommendations to project partners on how to ensure that any migration policy or action is compliant with the provisions included in the generic human rights frameworks.

2.1 General International Human Rights Law

Although the EU is not a party to the international human rights conventions as such, its expressed commitments to human rights, democracy and the rule of law necessitate the respect of these standards. Equally, EU Member States are indeed State Parties and hence, any application of ITFLOWS must not affect such legal obligations undertaken by the states. The human rights treaties that are at the core of the rights of migrants, asylum seekers and refugees are the following:

The International Covenant on Civil and Political Rights (ICCPR)

Ratified by 173 states, it recognises important rights that the ITFLOWS partners must keep in mind. Such rights are important in the intersection of security and migration: Prohibition of discrimination; the right to life, liberty and security; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest, detention or exile; are all guaranteed in the Covenant.

The UN Human Rights Committee, the monitoring and interpretative body of the ICCPR, has recently commented that some measures taken to address the influx of migrants may infringe the rights protected under the Covenant⁴¹ and has been concerned about specific practices of the EU states that violate the standards of the Covenant. It is important that the ITFLOWS does not result in facilitating such

⁴¹ UN HRC, Concluding Observations on Portugal, UN Doc. CCPR/C/PRT/CO/5 of 28 April 2020, para. 34.

questionable practices. The UN Human Rights Committee has recently asked EU states in its concluding observations to their reports to ensure that:

- Applications for international protection at the border and in reception and detention facilities are promptly received, registered and referred to the asylum authorities;
- Determination of asylum applications are individualised;⁴²
- The quality of refugee status determination procedures is not compromised and the low recognition rates, when existing, are investigated;⁴³
- The non-refoulement principle is respected;⁴⁴
- No pushbacks must take place and the right of persons to apply for asylum must be upheld in all situations;⁴⁵
- An effective mechanism for vulnerable persons is established;⁴⁶
- The detention of migrants and asylum seekers must be 'reasonable, necessary and proportionate', in accordance with the Committee's general comment No. 35 (2014) on liberty and security of person, and alternatives are favoured;⁴⁷
- Living conditions and treatment in immigration centres are good;
- That alternatives to detention are found in practice;⁴⁸
- Staff dealing with migrants and refugees are trained on the human rights standards;⁴⁹
- That the state takes measures against hate speech, intolerance, stereotypes, prejudice and discrimination towards these vulnerable individuals;⁵⁰

42 UN HRC, Concluding Observations on Bulgaria, UN Doc. CCPR/C/BGR/CO/4 of 15 November 2018, para 30

43 UN HRC, Concluding Observations on Czechia, UN Doc. CCPR/C/CZE/CO/4 of 6 December 2019, para 45.

44 UN HRC, Concluding Observations on Norway, UN Doc. CCPR/C/NOR/CO/7 of 25 April 2011, para. 33; UN HRC, Concluding Observations on Czechia, UN Doc. CCPR/C/CZE/CO/4 of 6 December 2019, para 45. UN HRC, Concluding Observations on Belgium, UN Doc. CCPR/C/BEL/CO/6 of 6 December 2019, para 32; also see Portugal para 34.

45 UN HRC, Concluding Observations on Bulgaria, UN Doc. CCPR/C/BGR/CO/4 of 15 November 2018, para 45.

46 UN HRC, Concluding Observations on Portugal, UN Doc. CCPR/C/PRT/CO/5 of 28 April 2020, para. 34; UN HRC, Concluding Observations on Bulgaria, UN Doc. CCPR/C/BGR/CO/4 of 15 November 2018, para 30.

47 UN HRC, Concluding Observations on the Netherlands, UN Doc. CCPR/C/NLD/CO/5 of 22 August 2019, para 19; also see Portugal para 34; and Czechia para 16.

48 Portugal, para. 34.

49 UN HRC, Concluding Observations on Bulgaria, UN Doc. CCPR/C/BGR/CO/4 of 15 November 2018, para 30. Also, Portugal, para 34.

50 UN HRC, Concluding Observations on Czechia, UN Doc. CCPR/C/CZE/CO/4 of 6 December 2019, para 16.

- Excessive use of force and cruel, inhuman and degrading treatment is prohibited;⁵¹
- Trafficking of persons is investigated and victims of trafficking have access to asylum procedures;⁵²
- Unaccompanied minors are not detained except as a measure of last resort;⁵³

The UN Human Rights Committee also affirmed the positive obligation of states to ensure that everyone has access to the essential healthcare necessary to prevent foreseeable risks to life, regardless of migration status.

ITFLOWS partners will ensure that the work of the project as well as the potential effects of the project do not contract such state obligations under international law. Importantly, ITFLOWS partners are concerned to ensure that the prediction of migration flows (WP6) will not lead to or encourage national and local authorities as well as enforcement agencies to restrict the rights to asylum of all or some inflows and will not lead to distinguishing among migrants within the predicted inflows. Pushbacks is a real concern currently and it is imperative that the ITFLOWS WP6 (EUMigraTool), focusing on ‘management solutions related to reception, asylum, and integration systems within the EU’, is particularly relevant to reducing hostility, discrimination and prejudice towards migrants. It is important in this respect that the design and development of the EUMigraTool urges partners to carefully assess hostile attitudes towards migrants and refugees and in doing so, reduces the discrimination and prejudice that exists. It is important that such data is not used by national and local authorities to fuel more hostility or to justify violations of migrants’ rights on the basis of ‘public’s attitudes’.

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

ICESCR guarantees socio-economic rights that are important to ITFLOWS research and policy activities on integration. The Covenant has been ratified by 171 States. Its monitoring body, the Committee on Economic, Social and Cultural Rights, has been repeatedly concerned that states do not respect the socio-economic rights of

51 Portugal, para 34; Bulgaria, para 30.

52 UN HRC, Concluding Observations on Czechia, UN Doc. CCPR/C/CZE/CO/4 of 6 December 2019, para 16; and See eg. UN HRC, Concluding Observations on Portugal, UN Doc. CCPR/C/PRT/CO/5 of 28 April 2020, para 34.

53 See eg. UN HRC, Concluding Observations on Portugal, UN Doc. CCPR/C/PRT/CO/5 of 28 Apr 2020

refugees, asylum seekers and migrants;⁵⁴ and/or have regressed in their protection of the socio-economic rights of these individuals.⁵⁵ The Committee has specified that the states cannot put forward excuses for not taking any measures to implement socio-economic rights, irrespective of the internal financial or other issues.⁵⁶ They still have to ‘take steps, individually and through international assistance and co-operation, 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’.⁵⁷

In actual truth, the Committee on Economic, Social and Cultural Rights has specifically shown its concern about EU States’ policies and practices. They have asked EU States to ensure that they:

- Adopt ‘specific measures to promote the social integration of migrants, asylum seekers and refugees, in order to ensure their enjoyment of their economic, social and cultural rights in particular access to employment, education, housing and health’;⁵⁸
- Reverse retrogressive measures that do not meet the criteria of ‘necessity, proportionality, temporariness and non-discrimination’;⁵⁹
- Address and sanction intolerance, hostility and hate speech towards migrants, asylum seekers and refugees;⁶⁰
- ‘Ensure the effectiveness of law to combat discrimination’ in the workplace, housing and education. Violations of migrants’ labour rights have repeatedly been identified. The Committee has specified that discrimination can be

54 UN CESCR, Concluding Observations on Belgium, UN Doc E/C.12/ESP/CO6 of 25 April 2018, para.

55 UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 13.

56 UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 12.

57 Ibid.

58 For example, UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 40.

59 UN CESCR, Concluding Observations on Denmark, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 13. UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 14.

60 For example, UN CESCR, Concluding Observations on Slovakia, UN Doc E/C.12/SVK/CO/3 of 19 November 2019, para. 56.

direct, indirect and multiple (adopting the intersectional approach).⁶¹ By effective measures the Committee expects positive measures specifically for these persons;

- Ensure permanent housing for refugees. The Committee has specifically criticised Denmark for introducing in legislation the categorisation of ‘ghettos’, defined by the proportion of residents from ‘non-Western’ countries and has asked the removal of direct and indirect discrimination deriving from this concept. The state party must instead, the Committee has noted, adopt a human-rights approach to address residential segregation and enhance social cohesion;⁶²
- Guarantee these persons a ‘decent standard of living’.⁶³ The Committee has identified that poverty is more widespread among migrants and refugees and states must take measures to mitigate against it;⁶⁴
- Ensure that migrants, asylum seekers and refugees have ‘equal access to preventive, curative and palliative health services, regardless of their legal status and identity documents. No restrictions must be placed to free health care for children and women in irregular situations’;⁶⁵
- Ensure that subsidiary protection and reunification measures do not restrict socio-economic rights indirectly;⁶⁶

Any EU provision on socio-economic rights must be interpreted in the light of these standards. All ITFOWS partner organisations will ensure that their research, tools, policy activities and dissemination are consistent with these standards. Any ITFOWS action and effect must ensure that such standards are not diluted in the

61 UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 18.

62 UN CESCR, Concluding Observations on Denmark, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 52.

63 UN CESCR, Concluding Observations on Belgium, UN Doc E/C.12/BEL/CO/5 of 26 March 2020, para. 23.

64 UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 34.

65 CESCR, General Comment No. 14 (2000) on the right to the highest attainable standard of health, UN Doc E/C.12/2017/1. Also UN CESCR, Concluding Observations on Ukraine, UN Doc E/C.12/UKP/CO/7 of 2 April 2020, para. 39. UN CESCR, Concluding Observations on Denmark, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 63. UN CESCR, Concluding Observations on Germany UN Doc E/C.12/DEU/CO/6 of 27 November 2018, para 59.

66 UN CESCR, Concluding Observations on Germany UN Doc E/C.12/DEU/CO/6 of 27 November 2018, para 29.

name of security, wrongly understood integration or any other principle. Integration policies that endorse rather than limit the socio-economic rights of migrants and refugees are of particular relevance for policy-making activities in WP8 (i.e. Policy brief 3) and for WP4 which examines labour market implications of different flows of movement of refugees within the EU (especially family reunification and secondary movement of refugees) as well as the economic situation of state parties and how this affects asylum seekers and refugees.⁶⁷

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

The provisions of this Convention is of particular importance for ITFLOWS as they go to the core of the experiences of migrants, asylum seekers and refugees. The Convention, ratified by 182 States, explicitly prohibits *both direct and indirect discrimination, both discrimination in law and in practice*. It also prohibits policies, practices and speech of racial superiority or hatred as well as segregation. Article 4 CERD imposes an obligation on States to take ‘immediate and positive measures’; paragraph (a) goes on to require that it should be an offence to ‘disseminate ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin’. The Committee on the Elimination of All Forms of Racial Discrimination has been very vocal on violations committed against migrants, asylum seekers and refugees. Recently, the Committee has noted that EU Member States must ensure that:

- Positive protection is provided to migrants, refugees and asylum seekers, when need be;
- Focus on non-discrimination in practice not merely in law;⁶⁸

⁶⁷ Grant Agreement, Annex A, page 37.

⁶⁸ UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 Jan 2020, p 13

- Address intersectional discrimination.⁶⁹ the committee has referred among other to gender-based violence of migrant women of irregular status;⁷⁰
- Address hate speech against these individuals effectively;⁷¹
- Address the inadequate integration measures by the state;⁷²
- Ensure the participation of migrants in all levels of political and public life and in public services;⁷³
- Address discrimination in labour;⁷⁴
- Refrain from detaining children in guarded prison-like centres;⁷⁵
- Refrain from detaining asylum seekers and use detention only as a measure of last resort and for as short a time as possible;⁷⁶
- Refrain from preventing asylum seekers from entering the state;⁷⁷
- Take measures to combat trafficking of migrants;⁷⁸
- Take measures to ensure non-discrimination of migrants, asylum seekers and refugees in health care;⁷⁹

All ITFOWS partner organisations will ensure that all activities, policy recommendations and tools are consistent with the standards of CERD. Specifically,

69 Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 23. UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 39.

70 UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 39. UN CERD, Concluding Observations on Iceland, UN Doc CERD/C/ISL/CO/21-23 of 18 September 2018, para. 21.

71 UN CERD, General Recommendation No. 15 (1993) on article 4 of the Convention and No. 35 (2013) on combating racist hate speech. See UN CERD, Concluding Observations on Iceland, UN Doc CERD/C/ISL/CO/21-23 of 18 September 2018, para. 14. Concluding Observations on the Czech Republic, UN Doc CERD/C/CZE/CO/12-13 of 19 September 2019, para. 11. UN CERD, Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 15. UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 Jan. 2020, para. 19.

72 Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 23(c).

73 UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 25.

74 UN CERD, Concluding Observations on Iceland, UN Doc CERD/C/ISL/CO/21-23 of 18 September 2018, para. 20.

75 Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 Sept 2019, para. 23.

76 Concluding Observations on the Czech Republic, UN Doc CERD/C/CZE/CO/12-13 of 19 September 2019, para. 21.

77 Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 Sept. 2019, para. 23.

78 Concluding Observations on the Czech Republic, UN Doc CERD/C/CZE/CO/12-13 of 19 September 2019, para. 29.

79 CERD, Concluding Observations on the Czech Republic, UN Doc CERD/C/CZE/CO/12-13 of 19 September 2019, para. 23.

the predictions of migration made in WP6 should be carefully assessed so as to make sure that they do not lead to direct nor indirect discrimination of people on the move in the EU. The prediction of inflows cannot lead to decisions on who to accept and who not to. It is also important that the EUMigraTool is committed both in its design and purpose to reducing hostile attitudes towards migrants and refugees and, in doing so, reduce existing racial discrimination and prejudice. Data and conclusions on attitudes cannot lead to further hostile public speech by politicians to attract popular support.

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

The Convention against Torture is of primary importance for ITFLOWS too, including on the possibility of facilitating push backs, violations of non-refoulement, practices in reception and living conditions. Signed by 171 countries, the Convention includes a prohibition of torture, which is binding irrespective of whether states have ratified it, but also prohibition of inhuman and degrading treatment. Indeed, the prohibition of torture has attained status as a *jus cogens*⁸⁰ or peremptory norm of general international law, also giving rise to the obligation *erga omnes* (owed to and by all States) to take action against those who torture. The prohibition is not subject to derogation, even in times of war or emergency.

Torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person in order to get information or confession, intimidate or coerce them for any reason that is discriminatory. State Parties have undertaken the obligation to take effective measures to prevent torture. Torture cannot be justified under any circumstances. Article 3 obliges State Parties not to expel, return or extradite a person to another State where there are ‘substantial grounds’ for believing that the person would be at risk of being subjected to torture. Any action relating to ITFLOWS must not lead to the dilution of this principle.

⁸⁰ *Jus cogens* are international norms considered so fundamental that no derogation from them is permitted, even through the application of other international norms.

International law also prohibits mistreatment that does not meet the definition of torture, either because less severe physical or mental pain is inflicted, or because the necessary purpose of the ill treatment is not present. It affirms the right of every person not to be subjected to cruel, inhuman or degrading treatment. In essence, any form of physical treatment used to intimidate, coerce or 'break' a person during an interrogation constitutes prohibited ill-treatment. If these practices are intense enough, prolonged in duration, or combined with other measures that result in severe pain or suffering, they can qualify as torture.

This convention must be taken into account when evaluating the possible effects of the project. Notifying EU bodies and/ or State bodies on potential inflows must not lead to policies or practices that dilute the obligations deriving from this Convention. ITFLOWS partner organisations and researchers must recognise the principle of non-refoulement as an important tool to state violence against migrants and refugees and try to the extent possible reduce the possibilities that states allow practices that are inconsistent with these guarantees. Also, our work on integration must emphasise the legal obligation that states have under this convention regarding minimum standards of living.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. Ratified by 189 states, it includes a number of provisions applicable to migrant women, including but not limited to the elimination of sex role stereotyping (Article 5), suppression of traffic in women and exploitation of prostitutes (Article 6), and an end of discrimination in the field of employment and citizenship (Articles 3, 9 and 11). The Convention is often used by EU Member States and endorsed by them.

Its Optional Protocol of 1999 allows for submitting complaints regarding violations of CEDAW to the UN Human Rights Committee, which in turn can request that states remedy any violations that have occurred.⁸¹

Specifically, on migrant, asylum seeking and refugee women, the Committee has recently commented on the need of EU states:

- To revise immigration policies to ensure that laws on deportation of foreign women are not applied in a discriminatory way;⁸²
- To take special temporary measures to accelerate substantive equality between migrant and asylum-seeking women and men;
- To minimize gender-based violence against them without an effect on their immigration status;⁸³
- To recognise trafficked women as vulnerable and not to return them as irregular migrant women. Also, not to penalise trafficked women;⁸⁴
- To take measures for the social and economic integration of migrant, refugee and asylum-seeking women;⁸⁵
- To minimise the difficulties for undocumented migrant women to acquire medical care;⁸⁶
- To improve their education and to ensure that the ban of 'ideologically or religiously influenced clothing' does not have a discriminatory effect on the education of migrant girls.⁸⁷

⁸¹ <https://www.un.org/womenwatch/daw/cedaw/protocol/why.htm>

⁸² CEDAW, Concluding Observations on Austria, UN Doc CEDAW/C/BUL/CO/8 of 30 July 2019, para 25

⁸³ CEDAW, Concluding Observations on the United Kingdom, UN Doc CEDAW/C/BGR/CO/8 of 14 March 2019, paras 27 and 29.

⁸⁴ CEDAW, Concluding Observations on Austria, UN Doc CEDAW/C/AUT/CO/9 of 30 July 2019, para 25. CEDAW, Concluding Observations on Norway, UN Doc CEDAW/C/NOR/CO/9 of 22 November 2017, para 27.

⁸⁵ CEDAW, Concluding Observations on Austria, UN Doc CEDAW/C/AUT/CO/9 of 30 July 2019, para 42.

⁸⁶ CEDAW, Concluding Observations on Austria, UN Doc CEDAW/C/AUT/CO/9 of 30 July 2019, para 34. CEDAW, Concluding Observations on Latvia, UN Doc CEDAW/C/LVA/CO/4-7 of 10 March 2020, para 37. CEDAW, Concluding Observations on the United Kingdom, UN Doc CEDAW/C/BGR/CO/8 of 14 March 2019, para 50.

⁸⁷ CEDAW, Concluding Observations on Austria, UN Doc CEDAW/C/AUT/CO/9 of 30 July 2019, para 30

- To address migrant women's disparities in labour rights and integrate them better into the labour force.⁸⁸
- To address migrant women's effective access to justice.⁸⁹

In line with the recommendations made in the Gender Action Plan, this Report stresses the commitment of ITFLOWS partner organisations and researchers to acknowledge that;

'[...] all migration flows are gendered and sexualized. In so doing, ITFLOWS considers gender and sexuality as central to any discussion and research on the drivers, trajectories, and integration of those who leave their countries of origin voluntarily, forced or somewhere in between. ITFLOWS is thus committed to consider gender and sexuality as a major priority in project design, methodology, analysis, and dissemination of outputs. ITFLOWS is further committed to consider gender as an integral part of research team management and monitoring.' (See Introduction in the Gender Action Plan).

ITFLOWS partner organisations and researchers are thus obliged to consider gender and sexuality in research management, design, implementation, monitoring and policy-making.

The Convention on the Rights of the Child (CRC)

Ratified by 196 states, Article 1 of the Convention on the Rights of Children (CRC) recognizes that children and young people have the same general human rights as adults and also specific rights that recognize their special needs. The Convention requires States to treat the children neither the property of their parents nor are they helpless objects of charity, but as human beings and the subjects of their own rights. It also recognises the fundamental human dignity of all children and the urgency of ensuring their well-being and development. It makes clear the idea that

88 CEDAW, Concluding Observations on Austria, UN Doc CEDAW/C/AUT/CO/9 of 30 July 2019, par. 32

89 CEDAW, Concluding Observations on Latvia, UN Doc CEDAW/C/LVA/CO/4-7 of 10 Mar. 2020 par 14

a basic quality of life should be the right of all children, rather than a privilege enjoyed by a few.

Children's rights include the right to health, education, family life, play and recreation, an adequate standard of living and to be protected from abuse and harm. Children's rights cover their developmental and age-appropriate needs that change over time as a child grows up. There are four general principles that underpin all children's rights:

- *Article 2 on non-discrimination*: all children have the same right to develop their potential in all situations and at all times. For example, every child should have equal access to education regardless of the child's gender, race, ethnicity, nationality, religion, disability, parentage, sexual orientation or other status;
- *Article 3 on best interest*: The *best interests of the child* must be 'a primary consideration' in all actions and decisions concerning a child, and must be used to resolve conflicts between different rights. For example, when making national budgetary decisions affecting children, governments must consider how cuts will impact these;
- *Article 6 on survival and development*: The *right to survival and development* underscores the vital importance of ensuring access to basic services and to equality of opportunity for children to achieve their full development. For example, a child with a disability should have effective access to education and health care to achieve their full potential;
- *Article 12 on the ability to form views*: The *views of the child* must be heard and respected in all matters concerning their rights. For example, those in power should consult with children before making decisions that will affect them.

The UN General Assembly adopted in 2000 two Optional Protocols to the Convention to increase the protection of children from involvement in armed

conflicts⁹⁰, and from sale, prostitution and pornography.⁹¹ These are important instruments for migrant, asylum seeking and refugee children. In 2014, a third Optional Protocol was adopted, allowing children to bring complaints directly to the Committee on the Rights of the Child.⁹²

The international legal framework for the protection of children applies irrespective of the migration status of the child or his/her parents or family members. Indeed, EU Schengen Catalogue on external borders recommends adoption of Convention and protocols.⁹³ The convention includes several articles essential in protecting migrant children, including Article 11 on trafficking of children under 18 years old and Article 19 requiring States to protect children from violence, abuse, neglect, exploitation and sexual abuse.

Recently, the Committee on the Rights of the Child established in *D.D v Spain* (4/2016) that removing an unaccompanied minor from Spain to Morocco without assessing the best interests of the child violated the Convention.⁹⁴

The Committee on the Rights of the Child has also recently urged EU Member States states to ensure that measures are taken to:

- Combat stereotyping, prejudice and discrimination against asylum seeking, refugee and migrant children;⁹⁵

⁹⁰ <https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx>; the Optional protocol on the involvement of children in armed conflict entered into force on 12th February 2002, aims to protect children from recruitment and use in hostilities, and has been ratified by 170 countries.

⁹¹ <https://www.ohchr.org/en/professionalinterest/pages/opscrc.aspx>; the Optional Protocol on the sale of children, child prostitution and child pornography entered into force on 18th January 2002, and provides States with detailed requirements to end the sexual exploitation and abuse of children. It also protects children from being sold for non-sexual purposes such as forced labour, illegal adoption and organ donation. It has been ratified by 176 countries.

⁹² <https://www.ohchr.org/en/professionalinterest/pages/opicrc.aspx>; this Optional Protocol recognizes that children have the right to appeal to an international mechanism specific to them, when national mechanisms fail to address violations effectively, therefore allowing for more accountability of states. It has been ratified by 52 states.

⁹³ Council of the European Union, 'EU Schengen Catalogue: External Borders Control, Removal and Readmission; Recommendations and Best Practices' (February, 2022), available at < [catalogue-en.pdf](#)>, p.49

⁹⁴ UN CRC, Communications No. 16/2017 A.L. v. Spain; 17/2017 M.T. v. Spain; 22/2017 J.A.B. v. Spain; 24/2017 M.A.B. v. Spain and 27/2017 R.K. v. Spain.

⁹⁵ CRC, Concluding Observations on Hungary, UN Doc. CRC/C/HUN/CO/6 of 3 March 2020, para. 16. CRC, Concluding Observations on Austria, UN Doc. CRC/C/AUT/CO/5-6 of 6 March 2020, para. 17.

- Combat violence against these children,⁹⁶ especially by police;⁹⁷
- Take special measures to provide accommodation for these children;
- Measures to stop the expulsion of children without the chance to apply for refugee status;⁹⁸
- Measures to stop the arbitrary detention of the children, their inadequate nutrition and education in transit zones;⁹⁹
- Provide these children 'safe, accessible, inclusive and smoke-free spaces for play and socialization and public transport to access such spaces';¹⁰⁰
- Take measures to identify and protect trafficked and exploited refugee and migrant children.¹⁰¹

It is essential that these measures of implementing the Convention are not hindered by ITFLOWS tools.

The European Convention of Human Rights (ECHR)

In a manner similar to the monitoring bodies of the universal international treaties, the European Court of Human Rights has applied the ECHR to migrants, asylum seekers and refugees in ways that clarifies and expands on their rights. Migration and asylum issues have generated a vast body of case-law from the ECtHR. This report will focus on the issues that relate in principle to the work of ITFLOWS. Further analysis on other rights may be necessary as the project unfolds.

- *Non-refoulement*: The Convention does not recognise the right to asylum as such. However, turning away an individual, whether at the border or elsewhere within a state's jurisdiction, and thereby putting the individual at risk of torture or inhuman or degrading treatment or punishment, is prohibited by Article 3 of the ECHR.¹⁰² **Article 3 ECHR provides** that no one

96 CRC, Concluding Observations on Hungary, UN Doc. CRC/C/HUN/CO/6 of 3 March 2020, para. 24.

97 Ibid, para. 39.

98 Ibid.

99 Ibid.

100 CRC, Concluding Observations on Austria, UN Doc. CRC/C/AUT/CO/5-6 of 6 March 2020, pa. 37.

101 CRC, Concluding Observations on Austria, UN Doc. CRC/C/AUT/CO/5-6 of 6 March 2020, pa. 42.

102 ECtHR, Kebe and Others v. Ukraine, No. 12552/12, 12 January 2017. ECtHR, M.A. and Others v. Lithuania, No. 59793/17, 11 December 2018. See also ECtHR, M.K. and Others v. Poland, Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020.

shall be subjected to torture or to inhuman or degrading treatment or punishment.

The Court has extended both the beneficiaries and the scope of protection of this right. As for the beneficiaries, the Court has expanded the right to all migrants beyond refugees. As for the scope of protection, the Court has prohibited the return of anyone within the Convention's jurisdiction to a place where they face a 'real and substantiated risk of ill-treatment' irrespective of their status regarding cruel acts committed by either the state and by non-state actors with the caveat of the state not being able to protect the individual. 'Real and substantiated risk of ill-treatment' means violations of the right to life and the prohibition from torture,¹⁰³ which goes much further than the risk of persecution on one of the grounds set out in the 1951 Geneva Convention (to be analysed in the next subsection). It has even included the most extreme cases of violations of socio-economic rights.¹⁰⁴ In its case-law the court has repeated that non-refoulement is absolute¹⁰⁵ and has not referred to the exceptions of the 1951 Refugee Convention. Collective expulsion is prohibited.¹⁰⁶ Also, asylum seekers cannot be prevented from lodging an asylum application. In addition, in cases of threatened expulsion, the ECtHR has insisted on **procedural guarantees** on the basis of arts. 3 and 14 of the Convention that are not lower than the ones established by **Articles 6 and 7 ECHR**.

Specifically, on prohibition of pushbacks at sea, in *Hirsi Jamaa*,¹⁰⁷ the Court held that the fact that the applicants had not asked for asylum or described the risks they faced as a result of the lack of asylum system in Libya did not exempt the respondent State from complying with its obligations under Article 3 of the Convention. Therefore, non-refoulement applies also to asylum seekers who have not yet applied for asylum;

¹⁰³ *Ahmed v Austria*, App. No 25964/94 (1996); *HLR v France*, App No 24573/94 (1997); *D v the United Kingdom*, App. No 30240/96 (1997).

¹⁰⁴ *D v the United Kingdom*, App. No 30240/96 (1997).

¹⁰⁵ *Saadi v Italy*, App. No 37201/06, (2008) at para 37.

¹⁰⁶ Article 4 of Protocol 4; and the minimum standards for expulsion in Article 1 Protoc. 7. Page 189.

¹⁰⁷ ECtHR, *Hirsi Jamaa and Others v Italy*, No 7765/09 (2012).

- *Police brutality*: In accordance with Article 3 ECHR has on several occasions states liable for police violence against migrants and has held them liable for their failing to enquire into racially motivated assaults. Recently, in *Chowdury and Others v Greece*,¹⁰⁸ the Court concluded that Greece had violated the right of irregular migrants who had been subjected to forced labour and human trafficking to fulfil its positive obligation under Article 4, to protect them against these abuses, to conduct effective investigation and to punish the perpetrators. *O.S.A and others v Greece* – violation of the right of detailed applicants' right to challenge the lawfulness of their detention since remedies were practically inaccessible. In this respect, the ECHR is supplemented by the (1987) **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment**.¹⁰⁹ This Convention was ground-breaking, as it was the first instrument capable of enforcing compliance with the obligations it created. It also established the Committee for the Prevention of Torture that can visit any place within the jurisdiction of the states' parties where people are deprived of their liberty, such as prisons, police stations, psychiatric institutions and detention centres;
- *Arbitrary detention*: Article 5 § 1(f) of the Convention allows States to control the liberty of aliens in an immigration context in two different situations: the provision permits the detention of an asylum-seeker or other immigrant prior to the State's grant of authorisation to enter. In respect of adults with no particular vulnerabilities, detention under Article 5 § 1(f) is not required to be reasonably necessary. However, it must not be arbitrary. The place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued.¹¹⁰ If the place and conditions of detention are not appropriate, this may also breach Article 3 of the Convention.¹¹¹

108 *Chowdury and Others v Greece*, App. No.21884/15 (2017).

109 <https://rm.coe.int/16806dbaa3>.

110 ECtHR, *Saadi v. the United Kingdom*, No 13229/03, 29 January 2008, para 74.

111 For example, ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011

Detention of vulnerable individuals has to satisfy additional safeguards. In *Sh.D and others v Greece, Austria, Croatia, Hungary, Northern Macedonia and Slovenia*, the ECtHR held that the detention conditions in Greek police stations and living conditions in Idomeni camp in northern Greece for 5 unaccompanied children were in breach of Article 5 regarding protective custody of unaccompanied children in police stations.¹¹² In *H.A. and others v Greece*,¹¹³ the Court also found that the detention conditions to which the applicants had been subjected in the police stations represented degrading treatment and could have caused them to feel isolated from the outside world, with potentially negative consequences for their physical and moral well-being. The Court also found that the applicants' placement in 'protective custody' was an unlawful measure of detention under Article 5 (1) f;

- *Living conditions*: In *M.S.S. v. Belgium and Greece*,¹¹⁴ the ECtHR held that the applicant's living and detention conditions in Greece had breached Article 3 of the ECHR. Belgian authorities were therefore found liable under Article 3 for a Dublin transfer to Greece because, based on available evidence, they knew, or ought to have known, of the risk to asylum seekers in Greece of being subject to degrading treatment at that time. If asylum-seekers, including persons intending to apply for asylum, are not provided with accommodation and are forced to live on the streets for months, with no resources or access to sanitary facilities, without any means of providing for their essential needs, in fear of assault from third parties and of expulsion, it raises concerns under article 3 of the Convention. Children's well-being and living conditions have of course a lower threshold in triggering the Convention;
- *Socio-economic rights*: The Court has recognised that migrants must not be discriminated against based on their nationality in general and in specific regarding socio-economic rights. The Court has held that the State may have legitimate reasons for curtailing the use of public services, including welfare programmes, public benefits and health care, by short-term and illegal

112 ECtHR, *Sh.D. and others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia* (no. 141165/16), 13 June 2019.

113 ECtHR, *HA and Others v Greece*, No 199951/16, 28 February 2019.

114 ECtHR, *M.S.S v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011

immigrants, who, as a rule, do not contribute to their funding.¹¹⁵ The Court has also agreed that in certain cases, the States may justifiably differentiate between different categories of aliens residing in its territory. Withholding social security benefits of migrants is discriminatory.¹¹⁶ Denial of child benefits to legal long-term migrants is discriminatory.¹¹⁷ In *Anakomba Yula* the Belgian government argued that irregular status of a migrant is an objective ground for discrimination in the context of judicial assistance in paternity proceedings.¹¹⁸ The Court rejected this argument and stated that ‘only ‘very weighty reasons could justify a difference of treatment between the applicant who did not have a residence permit and people who did have such a permit’.¹¹⁹ In reaching this conclusion, however, the Court used fact-specific arguments that the applicant was a ‘quasi-regular migrant’; thus it fell shy of developing a normative stance that tied equality claims with the time spent by the migrant in the country and not the legal status of the migrant;

- *Privacy*: Article 8 ECHR regarding private life of family matters is another important provision for the migration context. In *Botta v Italy*,¹²⁰ the ECtHR stated that private life constitutes both physical as well as psychological integrity. In *Maslov v Austria*,¹²¹ the ECtHR confirmed such judgment in the case of *settled migrants* saying that ‘the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of private life within the meaning of Art. 8’. In several human rights issues, the Court has maintained a clear distinction between ‘settled migrants’ that have a formal legal status in the country and migrants whose legal status is pending.¹²² Settled migrants had had their right to family life recognised and any interference was seen under the strict lens of necessity and

115 ECtHR, *Slivenko v Latvia*, App no 48321/99, 9 October 2003. B Çalı, ‘All You Need Is Time? Discrepancies between the European Court of Human Rights Case Law and Liberal Normative Theory on Long-Term Migrants’ (2017) 50 3 *Israel Law Review* 447-497.

116 *Ponomaryovi v Bulgaria*, Application no 5335/05 (2011).

117 ECtHR, *Niedzwiecki v Germany*, App no 58453/00, 25 October 2005; ECtHR, *Okpiz v Germany*, App no 59140/00, 25 October 2005.

118 ECtHR, *Anakomba Yula v Belgium*, App no 45413/07, 10 March 2009, para 29.

119 *Ibid*, para 37.

120 *Botta v Italy* (Application no. 21439/93 (1998).

121 ECtHR, *Maslov v Austria*, No. 1638/03 (2008)

122 ECtHR, *Jeuness v The Netherlands*, App no 12738/10, 3 October 2014; also *Üner v The Netherlands*, App no 46410/99, 18 October 2006.

proportionality.¹²³ In contrast, migrants not legally settled, even if long-term inhabitants in the host state, have not been the recipients of the same strict test; the Court has rather been favouring competing interests.¹²⁴

2.2 International Migration Law

The International Convention of All Migrant Workers and Members of their Family

In addition to the generic human rights treaties that address migrant rights, the United Nations also has a convention specifically for the rights of migrants: The International Convention of All Migrant Workers on Members of their Family (MWC), signed by 63 and ratified by 55 states, focuses on labour law and migrant workers, regular or irregular. The Convention requires the development of sound, equitable, humane and lawful conditions for migration, not just with regards to pay but also to the social, economic, cultural and other needs of migrant workers and members of their families involved.

As mentioned earlier, the Convention has not been signed, nor ratified by any EU state and is thus of limited applicability to this project.

Other Migration Law Instruments

In addition to the above, there are a number of conventions sponsored by the International Labour Organisation (ILO) specifically protecting the rights of migrants. The **Convention concerning Migration for Employment (Revised)**, 1949 (No. 97), the **Migrant Workers Convention** (No. 143) concerning migrants in abusive conditions, the **Convention concerning Forced or Compulsory Labour** (No. 29), the **Convention Concerning Abolition of Forced Labour** (No. 105), the

123 ECtHR, *Boultif v Switzerland*, App no 54273/00, 2 August 2001; Üner(n 23); ECtHR, *Savasci v Germany*, App no 45971/08, 19 March 2013; ECtHR, *Maslov v Austria*, App no 1638/03, 23 June 2008; ECtHR, *Udeh v Switzerland*, App no 12020/09, 16 April 2013; ECtHR, *Omojudi v United Kingdom*, App. no 1820/08, 24 February 2010.

124 ECtHR, *Slivenko v Latvia*, App no 48321/99, 9 October 2003. B Çalı, 'All You Need Is Time? Discrepancies between the European Court of Human Rights Case Law and Liberal Normative Theory on Long-Term Migrants' (2017) 50 3 Israel Law Review 447-497.

Equal Remuneration Convention (No. 100), the **Discrimination (Employment and Occupation) Convention** (No. 111), the **Convention on the Maintenance of Migrants' Pension Rights** (No. 48); all compliment the international legal framework related to migration.

In addition, the UN (2000) **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children** and the **(2000) Protocol against the Smuggling of Migrants by Land, Sea and Air** emphasise the need for co-operation to prevent smuggling and trafficking. The (2000) Smuggling Protocol requires States to adopt measures to criminalize smuggling and to prevent smuggling (Article 7, 8, 11, 15), requires States to preserve and protect the rights of migrants who have been smuggled (Article 16) and requires States to facilitate the return of migrants (Article 18). These instruments require international cooperation in combating smuggling and trafficking.

The adoption of separate protocols on trafficking and smuggling reflects the need to clearly distinguish these two activities. Whilst in smuggling undocumented migrants willingly accept to pay and take risks to be transported across borders, trafficked persons are coerced into moving.¹²⁵ Trafficking is defined in the Trafficking Protocol as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'. States must adopt measures to criminalize trafficking (Article 5), to provide assistance and protection to victims of trafficking (Article 6), to provide repatriation assistance to victims of trafficking (Article 8), and to prevent and combat trafficking (Article 9). Yet, the sometimes overlapping nature of trafficking in humans, labour migration into exploitative situations, and debt bondage to pay off smuggling fees calls for a careful use of these terms. Although interlinked, they are two distinct crimes. The criminal offence of smuggling always includes border

¹²⁵Global Initiative against Transnational Organised Crime, *Smuggling in the Time of COVID-19*, by Lucia Bird (April 2020), pp 5-6.

crossing, that renders it a transnational crime.¹²⁶ On the other hand, the offence of trafficking of humans does not necessarily do so.¹²⁷ Persons might volunteer to migrate but then find themselves subject to violence, coercion and exploitation after leaving their home communities.

New York Declaration for Refugees and Migrants

In addition to the general human rights treaties, the United Nations states have also adopted specific instruments that are non-binding but are important in clarifying and contextualising the binding norms.

The New York Declaration for Refugees and Migrants was adopted by UN Member States in 2016 to address the large movement of refugees and migrants with 193 unanimous State signatories. It is a political document. The document affirms the States' commitment to fully protect the human rights of all refugees and migrants.¹²⁸ It also recognises that migrants and refugees may face many common challenges and similar vulnerabilities: 'Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms.'¹²⁹ The Declaration recognised the need for greater cooperation between states to manage migration effectively, and therefore includes a set of commitments for refugees and migrants, and elements towards the achievement of a *Global Compact on Refugees* and a *Global Compact for Safe, Orderly and Regular Migration*.

126 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

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

128 <https://www.ohchr.org/EN/Issues/Migration/Pages/NewYorkDeclaration.aspx>

129 New York Declaration for Refugees and Migrants

Global Compact for Safe, Orderly and Regular Migration (GCM)

The Global Compact for Migration is the first-ever inter-governmentally negotiated UN agreement on a common approach to international migration, approved by 164 states on 10th December 2018, and endorsed by 152 countries in the UN General Assembly on 19th December 2018.¹³⁰ It is non-binding and is grounded in values of state sovereignty, responsibility-sharing, non-discrimination, and human rights, and recognizes that a cooperative approach is needed. The Compact has five thematic issues: Promoting fact-based and data driven migration discourse, policy and planning; Protecting safety and well-being of migrants, including through addressing the drivers and mitigating situations of vulnerability in migration; Addressing irregular migration, including by managing borders and combating transnational crime; Facilitating regular migration and decent work and enhancing the positive development effects of human mobility; Improving the social inclusion and integration of migrants.

The Network on Migration, comprised of ILO, IOM, OHCHR, the United Nations Development Programme, UNHCR, UNICEF, UNODC and the Department of Economic and Social Affairs of the Secretariat and co-ordinated by the IOM supports the implementation, follow-up and review of the GCM and ensure effective, timely and coordinated system-wide support to Member States. In carrying out its mandate, the Network prioritises the rights and well-being of migrants and their communities of destination, origin, and transit. It places emphasis on issues where a common UN system approach would add value and from which results and impact can be readily gauged.

Other Relevant Instruments

The Framework Convention on National Minorities

As mentioned earlier, most of the migrants living in EU states belong to long-established national minority groups entitled to the protection and rights set out in

¹³⁰ The United States, Hungary, Israel, Czech Republic and Poland voted against it, while 12 countries abstained. The European states that abstained were Austria, Bulgaria, Italy, Latvia, Liechtenstein, Romania and Switzerland.

the Council of Europe Framework Convention on Minorities. To the extent that migrants are also members of minorities, EU Member States have to respect:

- The free enjoyment of their ethnic, cultural, linguistic and religious identities, including specific measures for the preservation of their cultures, religions and languages;
- The prohibition of non-discrimination and the promotion of effective equality through specific measures;
- Freedom of assembly, association, expression, thought, conscience and religion;
- Promoting intercultural education and knowledge and education accessible to all;
- Using minority languages in contact with the authorities in areas inhabited traditionally or in substantial numbers by national minorities;
- Their effective participation in matters that affect them and in the cultural, social and public life of the state.

2030 Agenda for Sustainable Development

The Sustainable Development Goals are a collection of 17 interlinked goals designed to be a 'blueprint to achieve a better and more sustainable future for all'. They form non-binding goals but are important because they have been agreed and measured against specific indicators.

The 2030 Agenda recognises migrants as 'agents for change' and 'enablers for development in countries of origin, transit and destination'. The needs of refugees, internally displaced persons and migrants are explicitly recognised and migration is included in the 2030 Sustainable Development Goals (SDGs) under target 10.7, which prescribes the facilitation of 'orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well- managed migration policies'. The SDG Declaration recognizes the positive contribution of migrants to inclusive growth and development and asks for the empowerment of refugees, internally displaced persons and migrants; highlights the impact of humanitarian crises and forced displacement of people on development; calls for

access by all to lifelong learning opportunities for these individuals; and is committed to the eradication of forced labour and trafficking in human beings.¹³¹

2.2. International Refugee Law

The Refugee Convention

There is no right to asylum; only the right to seek asylum and to enjoy it once declared.

The (1951) United Nations *Convention relating to the Status of Refugees* entered into force in 1954. It is currently complied by 145 state parties. Its (1967) *Protocol*, put into force in 1967 expanded the scope of the Convention by eliminating the temporal and geographical restrictions established in it, linked to the problem of refugees caused by the Second World War. It currently has 146 state parties. Also, in 1951 the *Office of the United Nations High Commissioner for Refugees* (UNHCR) was created with the objective of providing international protection to persons within the sphere of its competences and co-operate with the states to face refugee issues.¹³²

Article 1.A.2) of the 1951 Convention defines a refugee, as seen in the first section.

Rights of Refugees

The rights of refugees in the Refugee Convention are minimum standards. Refugees must have the rights of non-discrimination, non-penalisation and non-refoulement respected. These are extremely important principles.

¹³¹ IOM, Migration in the 2030 Agenda, edited by G Appave and N Sinha (Geneva: IOM, 2017).

¹³² These people can receive UNHCR protection regardless of whether the country where they are located has ratified the 1951 Convention or the 1967 Protocol and whether or not they have been recognized as a refugee. They are called “mandate refugees”. The competences of UNHCR’s *ratione personae* have been gradually expanded by the Executive Committee with the support of the General Assembly, leading to a more broader definition of refugee than the one in the 1951 Convention, to encompass all “persons who are found outside their countries and who need international protection as a consequence of a serious threat to their life, liberty or personal security in their country of origin, as a result of persecution or armed conflict, or due to serious public disorder”, UNHCR, Note on International Protection, A/AC.96/ 830 of Sept. 7th, 1994, par. 32

Non-refoulement

According to Article 33(1) of the Refugee Convention, ‘no Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. This principle is the cornerstone of international refugee law and applies both to refugees and asylum seekers.

The extensive scope of this duty of non-refoulement is qualified by two exceptions found in Article 33(2) of the Refugee Convention. The principle of non-refoulement cannot be claimed by a refugee or an asylum-seeker ‘whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country’. However, this has to be interpreted very restrictively as all restrictions to human rights.

Non- penalisation

The Refugee Convention prevents the penalisation of a refugee for their unlawful presence *within* a state’s territory. This provision is found under Article 31(1) of the Refugee Convention (Non-Penalisation Clause), which states:

The Contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ...enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Asylum claimants within the jurisdiction of the host state are not to be penalised for illegal entry. Despite this provision, asylum seekers are often placed in detention, including detention at border points or in airport transit areas. In several states, they are also detained at the ‘pre-admission’ phase, because of false documents or lack of proper documentation, or be held in anticipation of deportation.

Other Rights of Refugees in the Refugee Convention

For refugees to live in dignity and to be agents of their own fate, the rights under articles 2 to 34 of the Refugee Convention are important. The Convention has a staged set of rights that become more expanded following the status of the individual falling under the Convention's scope. As the refugees' status is declaratory, hence they can be refugees before and after status determination, asylum seekers are also entitled to some rights recognised by the Convention. The UNHCR has noted that 'the graduations of treatment allowed by the Convention... serve as a useful yardstick in the context of defining reception standards for asylum seekers.'¹³³

Refugees have the right to acquisition of moveable and immovable property (Art. 13), free access to domestic courts (Art. 16(1)), rationing (Art. 20), primary education (Art. 22(1)), and fiscal equality (Art. 29). If they are physically resident, refugees are entitled to the same treatment recognised to nationals regarding freedom of religion (Art. 4), the delivery of identity papers (Art. 27), and the prohibition of penalties on account of illegal entry (Art. 31(1)). If they have a lawful presence, they benefit from the most favourable treatment accorded to nationals of a foreign country in the same circumstances regarding their right to association (Art. 15) and wage-earning employment (Art. 17) and to engage in self-employment (Art. 18), to move freely within the host territory (Art. 26) and to be protected against expulsion (Art. 32). And refugees have treatment not less favourable than that accorded to aliens generally in the same circumstances regarding liberal professions (Art. 19), housing (Art. 21), education other than elementary (Art. 22(2)), and freedom of movement (Art. 26).

Especially on reunification, neither the 1951 Convention nor any other international instrument, other than the CRC (Arts. 9(1) and 10(1)), mentions the right to family unity. Yet, it is considered an essential right for refugees. It has been widely agreed that the object and purpose of the 1951 Convention implies that its rights are in principle extended to the family members of the refugees; similar mention has been made in the UNHCR Guidelines on Reunification of Refugee Families (1983). It can

¹³³ UNHCR 'Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems' (4 September 2001) UN Doc EC/GC/17, para 3.

be strongly argued that ‘refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities of enjoying that right elsewhere’.¹³⁴

All these rights have also to be measured with respect to the general human rights instruments; it is always that the most favourable provision will apply. Indeed, human rights law has become a crucial source of rights for the refugees and asylum seekers, as seen in the previous section.

UNHCR and Rights of Refugees

The *Office of the United Nations High Commissioner for Refugees* (UNHCR) was created in 1950 with the objective of providing international protection to all ‘mandate’ refugees, i.e. refugees recognised or not recognised by States.¹³⁵ The UNHCR promotes several types of solutions to refugees. These are in other words, applications of the rights of refugees.

While emphasising the importance of refugees returning to their home countries once the reasons for the flight disappear, the UNHCR also emphasises the need for durable solutions for those who cannot return. It is essential that all solutions be voluntary as far as possible. The choice of solution should be linked to the original reasons for leaving the country of origin; and they include:

Voluntary repatriation: it must be by free choice; in safety (e.g. physical or material safety); and with dignity (e.g. no mistreatment takes place). If these conditions are not met, UNHCR emphasizes that it constitutes a breach of the principle of non-refoulement.

Local integration: for refugees to settle permanently in the country of asylum. ITFLOWS will look at this. We have discussed the meaning and elements of this solution in Section 1. Certainly integration measures must be focused on voluntary integration, rather than attempts to assimilate the refugees.

¹³⁴ F. Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition*, UNHCR Doc PPLA/2018/01 (Jan 2018), <https://www.unhcr.org/5a8c40ba1.pdf>.

¹³⁵ UNHCR, *Note on International Protection*, A / AC.96 / 830 of September 7th, 1994, par 32.

Resettlement: the refugee may be resettled to a third country as part of the international community's effort to share responsibility.

Unfortunately, statistics are not encouraging: only a small fraction of displaced persons find a durable solution. According to UNHCR, between 2010-2019, only 4 million refugees returned, 1 million were resettled, and around 300,000 were naturalized in the countries of asylum.

Procedural Guarantees

The principle of 'effective implementation' requires States Parties at a minimum to adopt some form of internal procedure through which refugees can be identified. The appropriate form of procedures to determine refugee status falls within the discretion of each individual State keeping with its constitutional and administrative system. Hence, procedures vary widely from country to country. However, the UNHCR has laid down 'certain common basic requirements'.¹³⁶

(i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority;

(ii) The applicant should receive the necessary guidance as to the procedure to be followed;

(iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance;

(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned.

¹³⁶ UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reissued, Geneva, December 2011.

Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR;

(v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status;

(vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system;

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.¹³⁷

Although non-binding, these practical standards aim to ensure the ‘impartiality and objectivity’ of status determination in line with the principle of equality before the law, as discussed earlier in this report. Fairness and efficiency must exist in all asylum procedures. For the purposes of ITFLOWS, it is important to keep in mind that efficiency does not trump fairness in all processes. Both the UN Human Rights Committee and the European Court of Human Rights have agreed that the threshold of the guarantees of the right to a fair trial as included in article 14 ICCPR and article 6 ECHR is not the same in ‘decisions regarding the entry, stay and deportation of aliens’¹³⁸, but the difference is much less pronounced.¹³⁹

137 Official Records of the General Assembly, Thirty-second Session, Supplement No. 12 (A/32/12/Add.1), para. 53 (6) (e).

138 For the UN standards, see M Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, Kehl, N.P. Engel, (2005) pp. 296–300; for the ECHR, see ECtHR, *Maaouia v. France* (Judgment) (2000) Application No. 39652/98, para. 40.

139 D J Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence’ (2015) 34 1 Refugee Survey Quarterly 79-106 at 89-90.

The Global Compact on Refugees

The UN Global Compact for Refugees came through the New York Declaration for refugees and migrants.¹⁴⁰ The Compact for Refugees was approved in an ordinary session of the General Assembly on December 17, 2018 as part of the report presented annually by UNHCR.¹⁴¹ It is a resolution of the General Assembly and contains an explicit reference to its non-binding nature that does not intend to modify neither the definition nor the current universal legal regime of refugee status. It has a particularly strong focus on fairer responsibility-sharing. Its introduction sets out four objectives: to reduce pressures on host countries, promote self-reliance of refugees, expand the availability of solutions in third countries and collaborate with countries of origin to create conditions that allow a safe return of refugees. It includes no new rights, but focuses on managing the states' responsibilities.

140 Approved on September 19th, 2016 through General Assembly resolution 71/1 (A / RES / 71/1, October 3, 2016).

141 Through Resolution 73/151 of December 17th, 2018, A / RES / 73/151, January 10th, 2019. Approved by a majority of 181 votes in favor, two votes against (United States and Hungary) and three abstentions (Dominican Republic, Eritrea and Libya).

SECTION 3 – EU ASYLUM AND MIGRATION LAW¹⁴²

This section summarises the relevant rights of asylum seekers, refugees, regular migrants and immigrants as provided by the EU Treaties, EU Charter of Fundamental Rights, and EU secondary legislation on asylum, migration and immigration as interpreted by the CJEU and ECtHR. This section will first discuss the general legal background within which these rights are set – the Area of Freedom Security and Justice, before analysing the key EU legal instruments concerning migrants', asylum seekers', beneficiaries of international protection rights, and irregularly staying third countries' rights. This section will first assess the key EU law instruments governing international protection (asylum) and will then continue to analyse the key EU legal instruments governing irregular migration and those legal instruments governing regular migration that have recently become relevant also for asylum and irregular migration cases. The various EU legal instruments governing asylum, regular and irregular migration are increasingly inter-linked being all part of a holistic European approach to migration which, overall, governs the immigration status determination of a third country national. For instance, a third country national could enter the territory of the EU on the basis of an asylum claim, and following final rejection of the asylum claim, the third country national would become an irregularly staying third country national subject to a return decision. Nevertheless, the third country national might become a tolerated non-removable third country national in the Member State if the return to the third country of origin would entail a serious risk of grave and irreversible deterioration in his state of health. All these stages of the migration route are governed by distinct EU legal instruments, which are closely inter-linked.

3.1 The legal-political context of migrants, asylum seekers and refugee rights

The EU's overall migration strategy encompasses the legal framework for legal migration, irregular migration as well as asylum and integration, and it forms part

¹⁴² This section will use the term 'Migration' for both regular and irregular migration in accordance with the Grant Agreement of ITFLOWS.

of the Area of Freedom, Security and Justice (hereinafter AFSJ)¹⁴³. As ITFLOWS is not concerned with regular migration, the legal framework on regular migration will not be the focus of this section; only to the extent that it blurs with irregular migration. The AFSJ covers a wide variety of issues, from common policies on border checks, asylum and immigration, judicial cooperation in criminal matters and police cooperation to judicial cooperation in civil matters.¹⁴⁴ The AFSJ developed under the political guidance of the European Council,¹⁴⁵ which has adopted so far three five-year political programmes, namely: Tampere, Hague and Stockholm Programmes. The Tampere programme represents a ground-breaking policy development as it set out the basis for the development of a Common European Asylum System, where asylum seekers would be treated similarly and beneficiaries of international protection would enjoy the same rights regardless of the Member States where they would be located.

Recognising ongoing major issues with the legal framework and its implementation (or lack of it), in September 2020 the Commission presented the New Pact on Migration and Asylum¹⁴⁶ where it proposed ‘a fresh start to address this task’. At the height of the crisis, the framework that has been set up in the previous years proved to be incapable of dealing with the reality of the crisis. This was sought to be addressed in the 2015 European Agenda on Migration¹⁴⁷ that introduced the so-called ‘hotspot approach’ to support front-line Member States like Greece and Italy to manage the migration flows. In this approach EU agencies like EASO and Frontex would support the Member State to register the newly arrived refugees and channel them either towards the asylum procedure or return those who did not warrant international protection. However, this led to congested islands in Greece where asylum seekers were and are living under conditions widely criticised as inhuman and degrading.¹⁴⁸ Hence, the main idea is to create a new European Framework that accounts for the interconnectivity of migration and is built on solidarity among Member States. Together with the Communication, the Commission also presented

143 See Title V in the Treaty on the Functioning of the European Union (TFEU).

144 TFEU, Article 67.

145 TFEU, Article 68.

146 COM (2020) 609 final.

147 COM(2015) 240 final

148 FRA 2020 Fundamental Rights Report, pp.120ff.

five legislative proposals, three recommendations and one guidance.

The 2020 Pact on Migration and Asylum continues the holistic approach to asylum, migration and immigration policies of the 2015 European Agenda on Migration. The Pact proposes to approach various migration procedures as ‘seamless’ and ‘interlinked’, such as: migration and asylum process, and internal and external dimension of migration. Throughout this Report the Pact and its potential consequences are addressed when relevant.

Given the new increased links between asylum and returns, the focus on increasing the number of returns in the EU, and expanded border procedures in the 2020 Pact on Migration and Asylum, closer attention should be given to the protection by EU law of the rights of migrants, asylum seekers and refugees. In addition to the EU Charter and the decisions of the judicial bodies, policies governing the entry and residence of third-country nationals in the EU provide basic rights and offer equal treatment in order to foster integration into the host societies; hence, they are also relevant when assessing policies under the project.

Activities, research outputs, policy guidelines and recommendations developed under ITFLOWS will navigate through the various interests and agendas, always keeping in mind the legal standards for the protection of these individuals as currently recognised in EU law.

3.2 EU Primary Law on Asylum and Migration

The EU primary law sources for Asylum and Migration include: the EU Treaties provisions laid out in Articles 77-80 TFEU and human rights provisions in the TEU; EU Charter of Fundamental Rights, and the general principles of EU law.

EU Treaties

Under EU law there are various legal sources for human rights. According to Article 6 TEU, the primary source of fundamental rights in the EU is the Charter on Fundamental Rights of the EU. In addition, the ECHR and the common constitutional traditions of the Member States are stipulated as sources for general principles of

EU law. Article 6(3) TEU provides for fundamental rights beyond those contained in the Charter, should the need ever arise.¹⁴⁹

The EU Charter of Fundamental Rights

Based on Article 6(1) TEU, the Charter has ‘the same status of the Treaties’; thus, the Charter ranks at the top of EU law sources, as EU primary law. This means that if a provision of the EU legal instruments governing asylum, migration or immigration is contrary to the Charter provisions, then the former are invalid.¹⁵⁰ For instance, so far, two provisions from EU asylum legal instruments have been argued to be contrary to the EU Charter provisions before the CJEU:

- *The validity of asylum detention grounds* set out in Article 8(3)(a), (b), (e) Reception Conditions Directive were argued to be in breach of the right to liberty as enshrined in Article 6 Charter and Article 5(1)(f) and (2)-(5) ECHR. Article 5(1)(f) ECHR provides for two exhaustive grounds for detention: to prevent unauthorised entry into the country or with a view to deportation or extradition. Article 8(3) of the Reception Conditions Directive provides instead for six possible grounds of asylum detention. Ultimately, the CJEU has upheld the conformity of these EU secondary provisions in *J.N.*¹⁵¹ and *K.*¹⁵²
- *The validity of exclusion grounds from refugee status* set out in Article 14(4) and (5) Recast Qualification Directive were argued to be contrary to Article 18 Charter and Article 1F Geneva Convention. However, the CJEU has found them to be in conformity with the Charter and the Refugee Convention.¹⁵³

Several of the Charter provisions are relevant in asylum and irregular migration: *human dignity* (Article 1); *prohibition of torture and ill-treatments* (Article 4); *right to liberty and security* (Article 6); *right to private and family life* (Article 7); *freedom*

149 For instance, the right to good administration and right to be heard during administrative immigration proceedings bind the Member States under the general principles of EU law of rights of defence and not under the right to good administration enshrined in Article 41 EU Charter, see C-166/13 Mukarubega ECLI:EU:C:2014:2336.

150 Invalidity of an EU secondary legislation provision is a matter of exclusive competence of the CJEU, see Article 267(b) TFEU and Foto-Frost doctrine.

151 C-601/15 J.N. ECLI:EU:C:2016:84.

152 C-18/16 K. ECLI:EU:C:2017:680.

153 Joined Cases C-391/16, C-77/17 and C-78/17 M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides ECLI:EU:C:2019:403.

of thought, conscience and religion and right to conscientious objection (Article 10); *right to asylum* (Article 18); *principle of non-refoulement* (Article 19(2)); *right to a fair trial and an effective judicial remedy* (Article 47). In addition, asylum seekers and immigrants have an individual right to be heard before public authorities adopt a decision negatively affecting their rights.¹⁵⁴

Many of these fundamental rights have a corresponding provision in the European Convention of Human Rights (ECHR). Whereas the **right to asylum**, and the right to conscientious objection are specific to the Charter, other fundamental rights are enshrined in the ECHR as well, such as: *prohibition of ill treatment and torture* (Article 4 Charter and Article 3 ECHR); *right to liberty* (Article 6 Charter and Article 5 ECHR); *right to private and family life* (Article 7 Charter and Article 8 ECHR); *freedom of thought, conscience and religion* (Article 10 Charter and Article 9 Convention); *Prohibition of collective expulsion* (Article 19 Charter and Article 4 of Protocol 4 Convention); *right to fair trial and effective remedies* (Article 47 Charter and Article 13 Convention invoked usually in combination with other Convention rights, such as: Article 3, 5 or 4 of Protocol 4¹⁵⁵).

Differences also exist though in the application of corresponding fundamental rights. For instance, the Charter based right to a fair trial and effective remedy provides for the **right to an effective remedy** before a court of tribunal, unlike the Convention based right to effective remedy which guarantees access before an (impartial and independent) authority.¹⁵⁶ Additionally, the right to a fair trial and effective remedy does not apply to asylum and irregular migration cases (Article 13 ECHR has been considered in asylum and migration cases but only in conjunction with other provisions of the Convention, such as Article 3, 5(1)(f), 8, and Article 4 Protocol 4, since the right to fair trial applies only to civil and criminal law cases, excluding public and administrative ones). According to Article 53(2), the Charter shall not offer lesser protection than the ECHR, insofar as corresponding rights are concerned.

154 C-249/13 Boudjlida ECLI:EU:C:2014:2431 ; C-517/17 Addis ECLI:EU:C:2020:579.

155 In particular the requirement that a remedy against a removal measure must have suspensive effect, e.g. Čonka v. Belgium, ECHR (2002), Appl. No. 51564/99, para. 79; Gebremedhin v. France, ECHR, (2007), Appl. No. 25389/05, para. 58.

156 See more on this under the section on Article 47 EU Charter.

The application of Charter rights also has specific requirements which differentiate them from the application of Convention rights. Article 51(1) of the Charter lists the addressees of Charter obligations, stipulating that it **applies to both EU institutions, bodies and agencies, and the Member States when they ‘implement’ EU law provisions**. According to Article 51, the provisions of the EU Charter are applicable only within the scope of EU law, which means, in essence, that the Charter cannot apply in the absence of EU primary or secondary provisions of EU law governing the case.¹⁵⁷ The only threshold requirement, therefore, is whether there is a provision from EU asylum or migration law that applies to the particular circumstances of the case¹⁵⁸ to trigger the application of Charter rights.

Within the current political context of negotiating the reform of the EU asylum and immigration law, it is important to remember that the EU Charter functions as a benchmark for checking the legality of the current legislative proposal and future legislation to be enacted by the EU. Therefore, the rights of asylum seekers and immigrants as set out in the EU secondary legislation have to be in line with the EU Charter based rights, which take precedence.

General Principles of EU Law

Although the EU Charter is the primary source of fundamental rights within the EU, policies developed by the ITFLOWS partners should also take into account the complementary sources of EU human rights, such as the general principles of EU law. In particular, **the right to good administration and be heard by public authorities** are applicable to all migrant third-country nationals on the basis of general principles of EU law of rights of defence and good administration.

3.3 Legal framework on EU asylum law

Introduction

This section provides an overview of the five legislative instruments, which are considered as the ‘building blocks’ of the EU asylum policy. These legal instruments form the asylum package: the Reception Conditions, Qualification and Asylum

¹⁵⁷ C-617/10 Fransson ECLI:EU:C:2013:105.

¹⁵⁸ More information on the scope of application of the EU Charter and the triggering factors can be found in the ENACT Booklet on the EU Charter, available at <https://cjc.eui.eu/projects/e-nact/>

Procedures Directives and the Dublin and Eurodac Regulations. In addition to the abovementioned building blocks, another legal instrument, the Temporary Protection Directive was adopted in 2001, but it has never been applied.

The establishment of a common European asylum system was completed by the Tampere Conclusions (1999) of the European Council, which had first introduced the notion of the Common European Asylum System (CEAS). A process of harmonisation began, whereby minimum common standards were adopted as a first step towards building the CEAS. In its first phase of legislative harmonisation, the EU adopted a substantial number of EU legal acts: four Directives and two Regulations in less than 5 years. Following the entry into force of the Lisbon Treaty, the second phase of harmonisation of asylum norms continued under a strengthened institutional framework at the EU level. A new *Qualification Directive* was adopted in 2011 and had to be implemented by Member States by December 2013.¹⁵⁹ On 26 of June 2013, revised *Asylum Procedures* and *Reception Conditions* Directives and revised *EURODAC* and *Dublin Regulation* were adopted.¹⁶⁰ These recast Directives repeal the first generation of asylum Directives and Regulations and the recast versions are currently still in force. To ensure compliance with CEAS, the Commission and Member States can bring an action against another Member State before the CJEU if this Member State is believed not to have fulfilled its

159 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20 December 2011 (Recast Qualification Directive).

160 Namely, the Recast Reception Conditions Directive - Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 June 2013; Recast Asylum Procedures Directive- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/160, 29 June 2013; Dublin III Regulation - Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29 June 2013; Recast Eurodac Regulation - Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180/1, 29 June 2013.

obligation under Article 258 of the TFEU. This was the case in the recent judgement, ***Commission V. Hungary***,¹⁶¹ in which the Court found that Hungary had disregarded substantial safeguards in the Procedures, Reception and Return Directives by having restricted access to the international protection procedure to a strip of land at the border, establishing a system of **systematic detention of applicants for international protection**, and removing illegally staying third-country nationals, without observing the guarantees provided for in the Return Directive.

All CEAS instruments have to comply with the Refugee Convention (as detailed in the section 2 above, dedicated to International Refugee Law) and with the EU Charter of Fundamental Rights (as detailed in the section 3.2 on EU Primary Law on Asylum and Migration).

As opposed to individual Member States, the European Union is not a state party to the Refugee Convention and, therefore, the EU itself is not bound by it as a matter of public international law. Nevertheless, according to Article 78(1) TFEU, the **EU asylum acquis must comply with the Refugee Convention** and the 1967 Protocol. Non-compliance with the Refugee Convention constitutes an infringement of Article 78(1) TFEU that can result in the annulment of secondary legislation or at least require its **interpretation in conformity with the Geneva Convention**.¹⁶²

In addition, the implementation of the CEAS instruments at the domestic level has to comply with the relevant fundamental rights of the EU Charter, particularly Article 19 of the Charter which speaks of the **principle of non-refoulement**, and of the **prohibition of collective expulsions**.

A key principle governing the functioning and the effective implementation of the CEAS instruments is the principle of mutual recognition founded on the principle of *mutual trust*. The CJEU defined this principle as meaning that there is a presumption of equivalence in standards of protection granted to asylum seekers with regard to asylum procedures, reception conditions and the protection of fundamental rights

161 Judgment of 17.12.2020, *Commission v. Hungary* C-808/18

162 C-391/16, C-77/17 & C-78/17 M, X and X EU:C:2019:403, paras. 73-75; C-443/14 & C-444/14 Alo & Osso EU:C:2016:127, paras. 28-30; C-175/08, C-176/08, C-178/08 & C-179/08 Abdulla EU:C:2010:105, paras. 51-53.

throughout the EU.¹⁶³ In fact, certain secondary measures, such as the Qualification Directive and the Reception Conditions Directive, constitute ‘trust-building’ or ‘trust ensuring’ instruments.¹⁶⁴

Another central feature of this policy area is the principle of *solidarity*. According to Article 67(2) TFEU, the principle of solidarity is referred to as the cornerstone of EU policies on borders, migration and asylum. According to Article 80 of the TFEU,¹⁶⁵ this principle should govern the application of the EU competence on borders, migration and asylum policies. In this respect, Article 78(3) of the TFEU provides that, in the event that one or more Member States face a sudden inflow of migrants, provisional measures may be adopted for the benefit of the Member State concerned.¹⁶⁶

Reception Conditions Directive

The Reception Conditions Directive establishes minimum common standards for the reception of applicants for international protection.¹⁶⁷ These standards refer to the living conditions of applicants and ensures that applicants will have **access to housing, food, employment and healthcare**. The instrument covers only applicants subject to the asylum procedures and before being granted international protection.¹⁶⁸ The Directive also sets out a special **set of rights and procedural guarantees during the reception and asylum procedures for vulnerable persons**, including victims of torture are entitled to. Specifically, Article 21 states that Member States shall take into account the **specific situation of vulnerable persons** such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking,

¹⁶³ Court of Justice, opinion 2/13 of 18 December 2014, para. 191.

¹⁶⁴ See Lienenke Slingenberg ‘Asylum Seekers’ Access to Employment: Tensions with Human Rights Obligations in the Recast of the Directive on Reception Conditions for Asylum Seekers’; Robert K. Visser, ‘Two Realities: Striking the Balance’ in Claudio Matera and Amanda Taylor (eds), *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies* (Asser Institute, CLEER 2014).

¹⁶⁵ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47.

¹⁶⁶ It is the Council which may adopt the measures, following a proposal by the Commission and a consultation with the European Parliament.

¹⁶⁷ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

¹⁶⁸ While the rights of those having been granted international protection is covered by Article 78(2)(a), (b) TFEU.

persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

The Directive also defines rights regarding conditions governing **access to the labour market, education or social assistance**.¹⁶⁹ In this respect, the rights and principles enshrined in the **chapter on 'solidarity' of the Charter of Fundamental Rights** can influence the interpretation of EU secondary law provisions, such as those included in the Directive. The Directive also governs the conditions regulating **asylum detention**, specifying that 'When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively'.¹⁷⁰ The latter is an exception to the main rule prohibiting states from holding 'a person in detention for the sole reason that he or she is an applicant'. Article 8(3) provides for an exhaustive list of detention grounds, meaning that Member State is precluded from detaining on other grounds than the grounds listed under this Article.

Dublin System

The Dublin Regulation establishes the criteria for determining which Member State is responsible for examining an application for international protection. The objective is to ensure that every application is examined by one Member State and also to prevent abuse of the system by the submission of several applications by one person in different countries. The Eurodac Regulation constitutes the legal basis for an EU database for comparing fingerprints to ensure the effective implementation of the Dublin system.¹⁷¹

¹⁶⁹ Directive 2013/33/EU, Articles 15 and 16.

¹⁷⁰ Ibid, Article 8(2).

¹⁷¹ The Dublin system is supported by a measure on the establishment of an expansive database of fingerprints, EURODAC. See Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) 1077/2011 Establishing A European agency for the operational management of large-scale it systems in the area of freedom, security and justice (Recast) [2013] OJ L 180/1–30 (herein Dublin III Regulation).

The Dublin III Regulation comprises of eight chapters.¹⁷² The law operates on the premise that all Member States are considered safe countries and that they all respect the **principle of non-refoulement**.¹⁷³

Chapter III introduces a hierarchy of eight criteria for deciding which Member State is responsible: for processing asylum applications, these are related to: family unity,¹⁷⁴ age, and residence, or if the claimant previously held an immigration document;¹⁷⁵ and the rest of the criteria are linked to the immigration control of a Member State through which an applicant entered the EU and managed to obtain a visa or residence permit.¹⁷⁶ There are special **responsibility rules for unaccompanied minors** under Article 8(4). It should be noted that the mandatory tone of the law contradicts the Preamble where the voluntary nature of the transfer is highlighted.¹⁷⁷ Humanitarian and compassionate criteria may allow derogations from the rules on responsibility so that Member States can reunite family members.¹⁷⁸

The main controversy about the responsibility-solidarity issue also revolves around the application of these criteria; i.e., the widespread use of the first country of irregular entry criterion in determining responsibility – and the fact that the other criteria, i.e., family unity, having a visa/residence permit are not sufficiently considered in establishing the responsibility. This has led to a dysfunctional Dublin system.

In the event of the absence of standard criteria for the determination of the

172 Chapter I contains definitions and the subject matter of the Regulation. Chapter II includes general principles and safeguards. Chapter III lists the criteria for determining the Member States responsible. Chapter IV contains provisions in relation to dependent person and lists discretionary clauses. Chapter V provides for the obligations of the Member State responsible. Chapter VI elaborates on the procedures for taking charge and taking back the asylum seeker. Chapter V provides rules for the detention of applicants when needed. Chapter VI regulates the actual transfers of the applicants with regard to time limits and modalities, the cost of the transfers, the exchange of relevant data before the transfer between the competent authorities and a mechanism of early preparedness and crisis management. Finally, the last three chapters regulate the administrative cooperation between the relevant authorities, provide rules on conciliation and final and transitional provisions are set out.

173 Ibid, Preamble, recital 3.

174 The importance of this guarantee is highlighted by UNHCR Standing Committee, 'Family Protection Issues', UN Doc EC/49/Sc/Cpr.14, 4 June 1999.

175 Dublin III, Articles 7-15.

176 Agnès Hurwitz, 'The Dublin Convention: A Comprehensive Assessment' (1999) 11IJRL 646, 648.

177 See Ibid, Preamble, recital 24: The transfers to the responsible state should be carried out on a voluntary basis. The character of the state's contributory role to the transfers should be supervisory.

178 Ibid, recital 17.

responsible Member State, and in the event of an irregular entrance into the EU, responsibility is with the Member State of first entrance of the applicant.¹⁷⁹ Article 13 of the Dublin III Regulation states that ‘where it is established [...] that an applicant has irregularly crossed the border into a Member State [...] the Member State thus entered shall be responsible for examining the application for international protection’.

Two discretionary flexible clauses were also established, allowing Member States to accept responsibility even in cases where they are not primarily responsible. The sovereignty clause is of particular interest. Article 3(2) of the Dublin II Regulation (now amended by the Dublin III Regulation) state that ‘By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation’. The sovereignty clause is now enshrined by Article 17(1) of the Dublin III Regulation, which repeats the same provision. A second discretionary clause concerns humanitarian and cultural reasons based on when a Member State, even if not primarily responsible, may decide to examine applications.¹⁸⁰

Moreover, an applicant has the **right to know** and competent authorities have the obligation to inform an applicant on the objectives and operation of the Dublin III Regulation, the criteria for determining the responsible Member State, the provision of a personal interview according to Article 5 of the Regulation, the possibility of challenging a decision on responsibility and requesting the suspension of a transfer, and the consequences of moving from one Member State to another while an application is pending.¹⁸¹

Effective relocation policies must not compromise the rights of migrants and refugees, especially the prohibition from torture, degrading or inhumane treatment. The CJEU requires both a systemic deficiencies and individual violation test to be performed by national authorities in cases of Dublin transfers, if there are substantial grounds for believing that a violation of Article 4 EU Charter on

¹⁷⁹ Dublin III, Article 13(1).

¹⁸⁰ Dublin III, Preamble, recital 17.

¹⁸¹ Dublin III, Article 4.

prohibition of torture, inhumane and degrading treatment would occur if the asylum seeker is transferred to another Member State. The CJEU also set the thresholds when medical cases might entail a violation of Article 4 Charter within the framework of Dublin transfers (see Case C-578/16 PPU C.K. and others).

Also, the Court of Justice has insisted that **fundamental rights prevail over secondary legislation when in conflict**. When assessing the effect of Article 4 Charter on Dublin transfers, the Court of Justice has consistently held, that ‘Member States must [...] make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law’ (*NS & ME*, para. 77). This is in line with the place reserved to fundamental rights within the hierarchy of legal sources, as founding values of the Union (Article 2 TEU) and as standards of validity/legality of EU acts (Articles 6 TEU and 263 TFEU).

According to the explanations in Article 1 of the Charter, ‘the **dignity of the human person** is not only a fundamental right in itself but constitutes the real basis of fundamental rights’. The key judgments of the CJEU, where Article 1 of EU Charter was invoked, are: *Cimade* (C-179/11) and *N.S. and others* (C-411/10). The CJEU held in *Cimade* that a Member State has to provide the **minimum reception rights to asylum seekers** regardless of whether they are or not subject to a Dublin procedure, until they are actually transferred in the responsible Member State.

The proposed New Pact on Migration and Asylum also contains new initiatives in the area of **solidarity and responsibility sharing**. The proposed Asylum and Migration Management Regulation¹⁸² will set out a solidarity mechanism that will oblige the Member States to participate in the management of migration flows, either by offering relocation or by sponsoring return. The Member States can choose between the two or do both. Member States can also support other Member States facing more challenges due to their geographical position. The regulation will contain a responsibility sharing mechanism that builds on the principles of the

182 Proposal for a Regulation on asylum and migration management, COM (2020) 610 of 23 September 2020.

current Dublin regulation.¹⁸³ The current criteria for assuming responsibility to examine the asylum application will remain the same but new rules will be adapted to put more obligations on the applicant and to encourage them to stay in the first country of entry through quicker procedures and by obtaining long-term residence faster (3 years instead of the current 5).

The negotiations of these new instruments are on-going and expected to be concluded in the end of 2021 and are likely to have an impact on the ITFLOWS Project.

Qualification Directive

Article 18 of the Charter states that ‘the **right to asylum** shall be guaranteed with due respect for the rules of the Geneva Convention...’. **The Qualification Directive¹⁸⁴ is the main EU instrument focusing on the rights of refugees and beneficiaries of international protection.**

Indeed, the Qualification Directive lays out the conditions for the qualification and status of third-country nationals or stateless persons as refugees or as beneficiaries of subsidiary protection. It also establishes the **rights for its beneficiaries (residence permits, travel documents, access to employment and education, social welfare and healthcare)**. It ensures that states have common criteria on the identification of refugees and beneficiaries of subsidiary protection.

Qualification Directive does not only **transpose the Geneva Convention into EU legislation**, but supplements it by providing some concrete definitions and concepts. This is done for instance by taking over elements from the UNHCR eligibility criteria complementing the Geneva Convention (e.g.: internal protection, actors of persecution).

In line with International Refugee Law, Article 2(e) of the Qualification Directive provides that ‘refugee status means the recognition by a Member State of a third-country national or a stateless person as a refugee’. Article 2(d) of the same instrument provides that a ‘refugee’ is ‘a third-country national who, owing to a

¹⁸³ Regulation (EU) No. 604/2013

¹⁸⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted OJ L 337, 20.12.2011, p. 9–26.

well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it. Recognition of a person as a refugee does not make that person a refugee, but formally affirms them as one.’ This definition is based on that provided in Article 1A (2) of the Geneva Refugee Convention.¹⁸⁵ It is worth noting that the definition provided in the Qualification Directive refers to third-country nationals, thus **excluding citizens of the EU Member States from the scope of protection** of the Directive.

In evaluating the applicant’s subjective fear, Article 4 of the Qualification Directive clarifies that the assessment should take into account relevant elements of the application, including the applicant’s statements and all the documentation at his or her disposal regarding, among other things, his or her age, background, including that of relevant relatives, identity and nationality(ies). Article 4(3)(c) of the Qualification Directive establishes that the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: ‘the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm’.

Chapter 7 of the Qualification Directive sets out the **rights and benefits enjoyed by beneficiaries of refugee and subsidiary protection** status, respectively, including: residence permits, access to education, health, measures in respect of unaccompanied minors, access to accommodation, freedom of movement within the Member State, access to integration facilities and repatriation assistance.

Member States have the obligation to **maintain the family unity** of beneficiaries of international protection (Article 23(1)). The duty to maintain family unity relates to members of the family in so far as the family already existed in the country of origin

¹⁸⁵ Convention relating to the status of refugees (1951).

and who are present in the same Member State in relation to the application for international protection. It is limited to the spouse or unmarried partner in a stable relationship, their minor children (under 18 years-old) if unmarried and the father, mother or other adult responsible for the beneficiary of international protection if the latter is a minor and unmarried (Article 2(j)). However, Member States may decide to apply Article 23 to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time (Article 23(5)). If they do not individually qualify for international protection, these family members are entitled to a set of benefits laid down in Chapter VII of the Directive (Article 23(2)). However, Member States are not required to grant the family member the same protection status as the beneficiary of international protection, but they must ensure that the family member is entitled to claim the benefits set out in Articles 24 to 35, which include the issuance of a residence permit (Article 24).

The Qualification Directive expands on the European international protection scope beyond Convention refugees, also to third country nationals who feel a real threat against his life or person but who do not have a fear of persecution on any of the five listed grounds for refugee protection. The Qualification Directive establishes an additional obligation on Member States to adopt a protection scheme which is meant to supplement, not substitute refugee protection under the 1951 Geneva Convention. This type of international protection is referred to as **subsidiary protection** which aims rightfully at protecting the persons at risk even if there is no nexus with any of the grounds listed in Article 1(A)(2) of the 1951 Geneva Convention

According to Article 2(f) of the Qualification Directive, **a person qualifies for subsidiary protection if there are substantial grounds for believing that he or she, if returned to his/her country of origin, would face a real risk of suffering serious harm as defined in Article 15**. Article 15 outlines 'serious harm' as death penalty or execution, torture, inhuman or degrading treatment or punishment or a serious and individual threat to a civilian's life due to generalized violence in situations of international or internal armed conflict. A person who is eligible for subsidiary protection in accordance with these criteria is given a protection status fully in line with respect of the **non-refoulement principle**. The delimitation

between refugee and subsidiary protection status is often difficult in practice, and Member States diverge in the status recognition. Recently the CJEU has found that the German practice of recognising Syrians who fled to avoid military service could be recognised refugee protection instead of subsidiary protection, which was the practice in Germany up until this judgment.¹⁸⁶

Although the Qualification Directive 2011/95 has approximated the rights enjoyed by refugees to those enjoyed by beneficiaries of subsidiary protection, the two groups still enjoy different rights. A person can only be eligible for subsidiary protection if he or she does not qualify as a refugee, as the 1951 Geneva Convention should be first assessed and given full and inclusive interpretation.

The Qualification Directive contains exclusion clauses both in regard to refugees and persons eligible for subsidiary protection status. Accordingly, a war criminal, who cannot be returned to his or her home country due to state obligations under ECHR Article 3 shall, for example, not be granted refugee status or subsidiary status. Furthermore, Article 21 of the Qualification Directive, in light of Article 33(2) of the Geneva Refugee Convention, states that exceptions to the **principle of non-refoulement** are allowed only on the grounds explicitly provided there.

It should be noted that at present, the Asylum Qualification Directive 2011/95/EU **does not comprise an obligation of mutual recognition of positive asylum decisions**. On the other hand, in addition to the forms of protection provided by the Qualification Directive, some Member States recognise nationally based humanitarian protection status. In spite of the Qualification Directive objective to ensure coherence in asylum decisions, there is a variety of recognition rates (even for the same countries of origin) between Member States – which is among the structural weaknesses of CEAS. To address structural weaknesses of the CEAS the Commission submitted in July 2016 a draft proposal for a new Qualification Regulation. The proposal codifies the latest case law of the CJEU and further harmonises common criteria for qualifying for international protection, thus ensuring convergence of asylum decisions. Further provisions aim at ensuring that protection is granted only for as long as the grounds for persecution or serious harm persist. The proposal also addressed **secondary movements of beneficiaries of**

186 C-238/19 EG ECLI:EU:C:2020:945.

international protection, and further harmonises the rights of beneficiaries of international protection. Discussions on the individual proposals both in the Council and in the Parliament are currently ongoing and follow a comprehensive approach on both reform packages.

Asylum Procedures Directive

The Asylum Procedures Directive introduces a common legal framework to reduce the disparities between national asylum procedures and to safeguard the quality and efficiency of decision-making.¹⁸⁷ These rules are essential in supporting the identification of those in need of international protection. The instrument's aim was both to harmonise the asylum procedures in the European Union and to safeguard applicants' rights. **Various aspects of the asylum procedure and guarantees for judicial protection** can be found in the Asylum Procedures Directive.

According to the Directive, asylum seekers are **entitled to a personal interview** (Article 14). During the interview, they can present the circumstances under which they left their country of origin.¹⁸⁸ They also have the right to object to decisions made by asylum authorities. As the Charter is legally binding, EU legislation and national administrative practices have to be interpreted in light of the procedural guarantees in the Charter.

In the New Pact on Migration and Asylum, the Commission has put forward a proposal for a **new regulation on the Asylum Procedure**¹⁸⁹ amending the 2016 proposal for a common procedure for international protection in the Union.¹⁹⁰ The main aim of this new regulation is to merge the asylum and border procedures into one legal instrument and allow for a more flexible and effective use of border procedures. In the border procedure the asylum application is fast-tracked through the use of concepts such as safe third country and safe country of origin as well as being applicable for asylum seekers from countries of origin with a low recognition rate.

187 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

188 Directive 2013/32/EU, Article 25.

189 Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM (2020) 612 of 23 September 2020.

190 The proposal COM (2016) 467 final for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU

Temporary Protection Directive

The Temporary Protection Directive provides for a specific **emergency mechanism to cope with a sudden and mass influx of applicants** at EU level, in a spirit of solidarity. However, this mechanism has never been put into practice so far.¹⁹¹ This was the first legally binding instrument agreed by the EU institutions on asylum that made use of the specific legal basis of Article 78(2)(c) TFEU. The instrument allows states to rely on abstract criteria in the event of mass influx rather than apply an individual analysis for each application to determine the need for international protection. This measure could be applied to various cases of **forced migration and potentially to climate-induced migration** as the Article 78(2)(c) TFEU refers to 'displaced persons' due to various hazards in the countries of origin. Considering recent case law on international protection for climate migrants, it is argued here that the CEAS should embrace a broad reading of the law which should be confirmed in the reform packages under the New Pact on Asylum and Migration.

In concluding this part, it should be emphasised that when developing ITFLOWS research and future policy recommendations within WP8, compliance with the EU Charter of Fundamental Rights should be ensured throughout the stages of the asylum route. Important attention should be given to Article 24 of the EU Charter which provides that the **best interest of the child** should always be the main principle applied in decision-making and the child has a right to be heard before the adoption of any decision by public authorities.

The Future of the Common European Framework for Migration and Asylum Management under the 2020 Pact on Asylum and Migration

In an attempt to deal with the problems by the lack of solidarity among the EU Member States and to address the shortcomings of the 2015 European Agenda for Migration, the Pact introduces a common European framework and better governance of migration and asylum management, as well as a new solidarity

¹⁹¹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

mechanism. It also aims to make procedures at the border more consistent and more efficient, as well as ensuring a consistent standard of reception conditions.

Some of the important features of the Pact are:

a. New screening, Border and Asylum procedure

The Pact introduces a mandatory **streamlined border procedure** which is based on two pillars: pre-entry screening procedure and a two-phased border procedure. The **pre-entry screening procedure** is applied to both asylum seekers (who request international protection at border crossing points without fulfilling entry conditions) and irregularly entering third-country nationals (i.e. apprehended in connection with unauthorised crossing of external borders, disembarked following search and rescue operations). This pre-entry screening procedure has the aim to allow national authorities to channel irregular third country nationals at external borders to the appropriate procedures (i.e. asylum or return procedures)¹⁹². The Pact introduces an amended border procedure for carrying out returns (see Article 41a of the Asylum Procedure Regulation proposal), which replaces the model included in the 2018 proposal for a recast Return Directive. There are two main changes introduced by the Pact to the 2018 model of return border procedure. The Pact introduces an amended border procedure for carrying out returns (see Article 41a of the Asylum Procedure Regulation proposal), which replaces the model included in the 2018 proposal for a recast Return Directive. There are two main changes introduced by the Pact to the 2018 model of return border procedure.

The overall goal of the Pact is to achieve faster procedures, where asylum seekers in need of international protection will have their cases handled swiftly and effectively, while other third country nationals who do not qualify for protection will be returned.

b. A Common Framework for Solidarity and Responsibility sharing

The second important feature of the Pact is a **new framework for responsibility sharing** that will replace the Dublin Regulation. The proposed Asylum and

¹⁹² See: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2020\)659346](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)659346)

Migration Management Regulation¹⁹³ will set out a solidarity mechanism that will oblige Member States to participate in the management of migration flows, either by offering relocation or by sponsoring return. See above Section 2.4, European Asylum Law.

c. A Common EU Return System

As part of the Pact, the Commission aims to progress the 2018 proposal for a recast of the Return Directive¹⁹⁴ to address and improve the low rate of effective return (currently at 1/3) of third country nationals.

d. Upgrading of the Eurodac database to facilitate relocation

It is suggested that the Eurodac database will be updated so as to track individuals rather than only applications as it has been the case until now. The Commission's proposal suggests that this new system would assist better in the proposed relocation process. ITFLOWS will assess this matter and provide recommendations within WP8

e. Set up a preparedness and management system in cases of force majeure and future migration crises.¹⁹⁵

To prevent a new migration crisis the Pact proposes to establish a Migration Preparedness and Crisis Blueprint to ensure that the EU response is that of preparedness rather than be reactive to new events as it was the case in 2015-2016. It also tables a proposal for a regulation¹⁹⁶ that will give the Member States the opportunity to provide subsidiary protection to large groups of people deemed in need of protection due to indiscriminate violence due to armed conflicts (as in the case of Syrians during the 2015-2016 refugee crisis). It will also make mechanisms of compulsory relocation if a few Member States experience an increased amount of asylum applications. In Article 1 (2) a of the proposed Regulation it is stated that the

193 Proposal for a Regulation on asylum and migration management, COM (2020) 610 of 23 September 2020.

194 COM (2018) 634 final.

195 Commission Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint), C(2020) 6469 of 23 Sept 2020.

196 COM (2020) 613 final, Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum.

Commission must establish that a Member State is confronted with a crisis situation due to an ‘exceptional situation of mass influx of third country nationals or stateless persons arriving irregularly, being of such a scale and nature that it renders the Member State’s asylum, reception or return system non-functional and which can have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in the proposed Regulation on Asylum and Migration Management, or an imminent risk of such a situation’.

In addition to the above areas of intervention, the Commission also makes a range of initiatives to improve the Integrated Border Management and Schengen, mainly using the already existing rules to create more synergies and effectiveness in the control of the external borders and finding better ways of controlling unauthorised movements within the Schengen area without having to resort to controls of the internal borders.

As in previous policy initiatives, the Commission will make a new EU Action Plan against Migrant Smuggling, that will replace the previous five-year action plan and focus on combatting the criminal networks facilitating human smuggling and disregarding the safety of migrants in the process, through increased law enforcement cooperation among the national and EU law enforcement agencies and by strengthening the effectiveness of the Employers Sanctions Directive,¹⁹⁷ to eliminate one of the main drivers of migrant smuggling.

The EU will also continue to work with its international partners to foster partnership with sending/origin countries and transit countries as well as supporting refugee hosting countries and address root causes of migration, mainly through development assistance. Under the New Pact for Migration and Asylum the EU commits to step up its engagement with partner countries and incorporate migration in policy issues such as development cooperation, security, visa, trade, agriculture, investment and employment, energy, environment and climate change, and education. The EU will continue to support refugees settled in the vicinity of the countries from where they have fled (e.g. Syria and Libya), address root causes of migration through development assistance and assist with partner countries to fight

¹⁹⁷ Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

irregular migration. The cooperation will also further step up the bilateral relations with partner countries to facilitate readmission and re-integration of migrants returned from the EU. The above discussed Visa Code is also envisaged as an instrument to curb irregular migration and allow for legal pathways to enter the EU together with instruments such as resettlement schemes and talent partnerships to attract qualified workforce to Europe.¹⁹⁸

The Commission contends that more legal pathways for migrants to come to EU should also be sought out through better resettlement schemes and by matching prospective labour migrants from third countries with labour market needs in the EU. One of the keys in this area is to reform the Blue Card directive to attract highly skilled talent.

Finally, the Commission will prepare a new Action Plan on Integration and Inclusion for 2021-2024. The Action Plan will provide strategic guidance and set out concrete actions to foster inclusion of migrants and social cohesion, bringing together relevant stakeholders and recognising that regional and local actors have a key part to play.

3.4 European Legal Framework for Migration

The Legal Basis

Since the 1999 Tampere Conclusions, the EU aimed to ensure that ‘the legal status of third-country nationals is approximated to that of Member States’ nationals. Following the entry into force of the Lisbon Treaty,¹⁹⁹ these objectives are reflected in Article 79 TFEU. In addition, Article 80 TFEU requires that the implementation of the EU policies on border checks, asylum and immigration be governed by the principle of solidary and fair sharing of responsibility.

In the following part, the key rights of migrant third-country nationals under the directives and regulation on irregular migration are summarised. ITF*flows* does not focus on regular migration, so this section will focus on irregular/ undocumented migration. According to the current Return Directive 2008/115/EC, a third-country

¹⁹⁸ https://ec.europa.eu/info/sites/info/files/1_en_act_p Article1_v7_1.pdf, p.1

¹⁹⁹ Treaty of Lisbon [2007] OL C306/01.

national is to be considered as **‘illegally staying’**, in one of the following situations: irregular border crossing; or breaching the conditions of stay (such as overstaying the visa or violating restrictions with regard to employment).²⁰⁰

Unauthorised Migration: Border Management and Unauthorised Entry

Combating unauthorised migration to Europe has been one of the main priorities of European policy makers, especially since the 2015 rising migration influx, when over a million third-country nationals entered the European Union, and of which many have tragically lost their lives in the attempt to reach Europe.²⁰¹

In recent years, the control of the external borders of the EU has been a central part in the overall migration strategy and received community funding to efficiently combat irregular migration. As confirmed by the New Pact on Asylum and Migration, this trend is likely to continue in the upcoming period.

Surveillance of the EU's Borders

The purpose of border surveillance policy is to prevent unauthorised border crossings, to counter cross-border criminality and to apprehend or take other measures against those persons who have crossed the border in an irregular manner. In performing their duties at sea, the border agency shall ensure safety at sea (Article 3) and ensure the safety of the persons intercepted or rescued.

The Frontex Agency, the agency in charge of border control, was reformed in 2019 under Regulation (EU) 2019/1896 (OFJ L295/1 14.11.2019) leading to increase of staff and tasks.²⁰² The regulation's aim is to manage the crossing of the external borders efficiently and address migratory challenges and potential future threats at the borders. Its role is to support Member States in controlling the external border and assist them with forced returns. However, *it is also committed to act in full respect for fundamental rights and in a manner that safeguards the free movement of persons within the Union*. Regulation 2019/1896 specifically and repeatedly

200 See Article 3(2) of the RD.

201 (2015). "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a European Agenda on Migration, p.9; more recently, Progress report on the Implementation of the European Agenda on Migration – Annex 6. The main elements for developing the European Integrated Border Management Strategy, 14 March 2018.

202 Council Regulation (EC) 2007/2004 and Regulation (EU) 2016/1624.

specifies the commitment of the agency to respect the **principle of non-refoulement** (e.g. Chapter IV, Article 80, para 2) as well as ‘**respect for human dignity, the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of trafficking in human beings, the right to liberty and security, the right to the protection of personal data, the right of access to documents, the right to asylum and to protection against removal and expulsion, non-refoulement, non-discrimination and the rights of the child**’ (Reg 2019/1896, para 103). In general, the Regulation is clear that FRONTEX must respect and contribute to the application of the Union *acquis* on fundamental rights and in particular both the Refugee Convention and the EU Charter (Chapter IV, Article 80).

Partners in ITFLOWS are aware that respecting fundamental rights at the EU’s external borders has remained a top challenge for both the EU and the Member States. The EU’s Fundamental Rights Agency reported use of violence, informal push-backs, chain refoulement and deaths at sea.²⁰³ The accountability mechanisms for violations of fundamental rights at the Member States borders have been found to be **lacking fair trial and effective remedies**.²⁰⁴ There are several pending cases lodged against the EU due to the Frontex activities falling short of fundamental rights, which will have to be closely monitored by the partners and researchers as regards their outcome on the EU/Frontex legal responsibility.²⁰⁵ As regards migration flows at the EU’s external borders, the ITFLOWS policy outputs should ensure close observance of the principle of non-refoulement and the right to asylum, fair procedures and effective remedies.

Schengen Borders Code

As regards border control, the EU Schengen Borders Code (Regulation (EU) 2016/399)²⁰⁶ lays down rules governing the control of people crossing the EU’s external borders. It contains fundamental rights protection clauses that emphasise the obligation of Member States to comply with fundamental rights when

²⁰³ 2020 FRA Annual Report, p. 133.

²⁰⁴ M Stefan and S Carrera (eds), *Justicing Europe’s Frontiers: Effective Access to Justice in Bordering and Expulsion Policies* (Routledge 2019).

²⁰⁵ See the Human Rights Watch Report.

²⁰⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0399&from=EN>

controlling the external border of the EU, where these rights are most frequently under pressure.

The regulation applies to any person crossing the internal or external borders of Member States, without prejudice to a) the rights of persons enjoying the **right of free movement under Union law**; b) the **rights of refugees and persons requesting international protection**, in particular as regards **non-refoulement**. It has several guarantees for the rights of affected persons: it explicitly refers to the need for the regulation to comply with the 'relevant Union law, including the EU Charter and the Refugee Convention, obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights (Article 4). It also requires border guards to have **full respect for human dignity when performing checks**; in particular in cases involving vulnerable persons' (Article 7.1) These legislations regarding full respect and human dignity are mandatory for all EU Member States of the Schengen Area. For example, Schengen Borders Code provides in recital (7) that border checks should be carried out in such a way as to fully respect human dignity. In addition, Schengen Borders Code Article 7- Conduct of border checks states in paragraph (1) that border guards shall, in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons. Schengen Borders Code dedicates Annex VI (a) to international protection by making it clear that a third country national who has passed exit control by third-country border guards and subsequently asks Member State border guards present in the third country for international protection, shall be given access to relevant Member State procedures in accordance with Union asylum acquis. Third-country authorities shall accept the transfer of the person concerned into Member State territory. Article 14 of Schengen Borders Code addresses Refusal of entry. The provision states that ' A third-country national who does not fulfil all the entry conditions laid down in Article 6(1) and does not belong to the categories of persons referred to in Article 6(5) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.'

Finally, the Pact introduces new possibilities for Member States to provide

assistance to each other in carrying out returns, which could be promising in terms of cooperation.

Frontex has an EU Center for Returns Division through which it coordinates and conducts return operations and return interventions. Article 1 of the Frontex Regulation (Regulation EU 2019/1896) explains the obligations of Frontex in managing EU external borders efficiently in full compliance with fundamental rights and foresees the need to increase the efficiency of the Union return policy. Article 48 of the same regulation provides thorough overview about the action by the Agency in the area of return. In addition, Fundamental Rights and Return are subjects of Schengen Evaluation. Moreover, Frontex has a Vulnerability Assessment Unit that is responsible for monitoring and assessing the capacities and readiness of the Member States to face current and upcoming challenges at their external borders. The Vulnerability Assessment Unit serves as the point of contact for the Schengen Evaluation Mechanism matters within Frontex. EU law seems to be well-equipped in relation to the protection of human dignity. However, there seems to be an implementation gap which is well-observed.²⁰⁷ However, recent research shows that the vulnerability assessment undertaken by Frontex are highly gendered and racialized and geared toward ‘protecting’ what is perceived as European values that benefit predominantly white European citizens. To this end, the assessment of vulnerability as carried out by Frontex remains a politically sensitive issue, which is often detrimental to the right to respect and human dignity of migrants seeking to enter the EU (see also Part 2(c) of the ITFLOWS Gender Action Plan).²⁰⁸

As part of the New Pact on Migration and Asylum²⁰⁹ presented by the European Commission in September 2020, a proposal was put forward for a pre-entry screening procedure of third country nationals at the external border²¹⁰ to complement the Schengen Borders Code to prevent unauthorised entry. The

207 E Tsourdi ‘Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?’ (2021) 17 (3) European Constitutional Law Review 471-497.

208 See: Stachowitsch, S., & Sachseder, J. (2019). The gendered and racialized politics of risk analysis. The case of Frontex. *Critical studies on security*, 7(2), 107-123. also Fjørtoft, T. N. (2022). More power, more control: The legitimizing role of expertise in Frontex after the refugee crisis. *Regulation & Governance*, 16(2), 557-571.

209 https://ec.europa.eu/info/sites/info/files/1_en_act_p Article1_v7_1.pdf

210 COM 2020 612 final.

proposal introduces uniform rules concerning the procedures and the length of the process to be followed at the pre-entry stage of assessing the individual needs of third country nationals. The main deviation from the Schengen Borders Code is that it does not make a distinction between persons requesting international protection, but submits all third-country nationals to the same screening procedure, which will consist of:

- (a) A preliminary health and vulnerability check;
- (b) An identity check against information in European databases;
- (c) Registration of biometric data (i.e., fingerprint data and facial image data) in the appropriate databases, to the extent it has not occurred yet; and
- (d) A security check through a query of relevant national and Union databases, in particular the Schengen Information System (SIS), to verify that the person does not constitute a threat to internal security.

After the check has been performed the individual will then be channelled to the appropriate procedure: either a regular asylum procedure; or a border asylum procedure; or return procedure. The screening procedure will be complemented by the obligation of each Member State to establish an independent monitoring mechanism for fundamental rights (Article 7). The Fundamental Rights Agency is tasked with issuing general guidance for Member States on the setting up of such mechanisms and the Member States may request the Agency to support them in developing their national monitoring mechanism, including the safeguards for independence of such mechanisms.

ITFLOWS policy suggestions and research activities must ensure that the following principles set out by the Fundamental Rights Agency issued in 2019²¹¹ be respected by the Border guards in the implementation of the Schengen Borders Code:

- Treat everyone with dignity; Identify and refer vulnerable people;²¹²
- Respect the legality, necessity and proportionality when using force;

211 <https://fra.europa.eu/en/publication/2020/border-controls-and-fundamental-rights-external-land-borders?fbclid=IwAR2X0SrcA4PSQeIY-zHa1880Z09YsJTupJklwUBY0WuqtAfcXhkg08056Ds>

212 As also prescribed by existing EU law. See, for example Schengen Borders Code, Preamble, Recital 7; Art. 7(1); This obligation is also reiterated in Article 14 addressing refusal, where it is stated that '1. A third-country national who does not fulfil all the entry conditions laid down in Art. 6(1) and does not belong to the categories of persons referred to in Art. 6(5) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.'

- Apply safeguards when holding people at borders;
- Respect procedural safeguards and protecting personal data.

It also stresses the need to report violations systematically, to investigate effectively all allegations, and to give effective and dissuasive sanctions when violations occur.

EU Return Policy

The return of third country nationals not authorised to stay in the EU is one of the key areas of the EU's migration and asylum policy. In the context of the ITFLOWS project, return is, on the one hand, less relevant since it deals with a situation that arises when no grounds have been found to allow a legal stay. On the other hand, the EU's return policy is relevant for the ITFLOWS Project for three main reasons. First, return policies are inter-linked with asylum law, as asylum seekers cannot be considered as third country national with an illegal stay or entry (e.g. when does a third country national stop being an asylum seeker and becomes a returnee is more and more blurred). Secondly, some of the returnees cannot be returned due to risks of being subjected to refoulement, in which case, their stay must be legally tolerated in the EU until the risks of refoulement no longer exist. Third, the 2020 EU Pact on Asylum and Migration renewed emphasis on: making return a continuation of asylum procedure (particularly, in border procedures); making visa facilitation/restriction measures dependent on readmission. All these interlinks between asylum, visas and readmission agreements and return policies show that return policies should be part of the ITFLOWS research scope.

The main principles of the EU return policy are outlined in the following paragraphs. Directive 2008/115,²¹³ also known as the Return Directive (RD), sets out the procedure to be followed by Member States when returning illegally staying third country nationals.²¹⁴ This Directive is now subject to legislative amendments. First, the European Commission issued a proposal for the Recast of the Return Directive

213 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, OJ L 348/98, 24.12.2008.

214 For a detailed commentary of the Directive's provisions, see F. Lutz and S. Mananashvili, 'Commentary of the Return Directive' in K. Hailbronner, D. Thym (eds), EU Immigration and Asylum Law A Commentary, 2nd edition 2016 BECK.

in 2018,²¹⁵ which is now subject to negotiations between the European Parliament and the Council.²¹⁶ Subsequent amendments have been put forward by the Commission on 23 September 2020 as part of the Pact on Asylum and Migration.²¹⁷ Compared to the 2018 Proposal, the Pact enlarges the scope of application of return border procedure and increases the links between asylum and return policies.

The term ‘Illegally staying’ in the Return Directive refers to a third country national after irregular border crossing or breaching the conditions of stay.²¹⁸ Once the return decision is issued, the Return Directive (hereinafter, RD) establishes other four main stages within the return proceeding, ranging from the least restrictive to the third-country national’s freedom (voluntary departure), followed by physical enforcement of the return (removal)²¹⁹, issue of entry ban,²²⁰ and up to the last resort return measure, which is also the most coercive - pre-removal detention.²²¹ This mandatory order in following the return stages and measure has been confirmed by the CJEU on the basis of the EU law **principle of proportionality**, which governs the entire return procedure.²²²

Article 7 of the RD obliges national authorities to **prioritise voluntary return** of irregularly staying third-country nationals. Accordingly, the individual would independently organise his departure from the territory, and voluntary return to his country of origin.²²³

Although voluntary return should remain the preferred option, when the third country national does not comply with his obligation(s), or when ‘no period for voluntary departure has been granted’, Article 8 RD requires the national authorities to take all necessary measures to enforce the obligation to return. Article

215 See, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) Brussels, 12.9.2018 COM(2018) 634 final 2018/0329 (COD) (‘ the Proposal’).

216 According to the information published by the European Parliament, see <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-proposal-for-a-recast-of-the-return-directive>.

217 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum COM/2020/609 final.

218 See Article 3(2) of the RD.

219 Article 8 RD.

220 Article 11 RD.

221 See, in particular, Article 15 RD.

222 See, C-61/11 El Dridi ECLI:EU:C:2011:268, para. 41.

223 The voluntary departure period is usually provided within the return decision by the Member States, see P. De Bruycker, M. Moraru, G. Renaudiere, ReDial Research Report 2016/01, 8.

8 RD establishes the principles and general steps that should be followed by Member States in the enforcement of the obligation to return, namely physical transportation out of the Member State.

Jointly with **removal orders**, Member States are required to issue an **entry ban**,²²⁴ which prohibits the third country national's entry into all Member States for a period of time of up to five years or exceptionally to longer than five years.²²⁵ Member states retain the freedom to issue an entry ban also when the individual departs voluntarily.²²⁶

The last resort measure that can be adopted for securing an effective return of the irregular third-country national is the so-called **pre-removal detention**.²²⁷ This measure should be distinguished from criminal law-based detention. A pre-removal detention entails deprivation of liberty and therefore it is designed to be a measure of last resort only.²²⁸ According to Article 2(2)(b) RD, Member States may decide not to apply the Return Directive to third- country nationals who are subject to a criminal law sanction or to an extradition. For the derogation to be valid, the Member States have to provide for this expressly in the national implementing legislation.

According to Article 15(1) of the RD, **detention is allowed only for the purposes of removal and only if other sufficient but less coercive measures cannot be applied effectively in a specific case**. A third country national cannot be detained merely for being found as illegally staying.²²⁹ Most importantly, any detention shall be for as short a period as possible and 'only maintained as long as removal arrangements are in progress and executed with due diligence'.²³⁰

The Return Directive and the EU Charter as interpreted by the CJEU have recognised the following rights of 'illegally staying' third country nationals:

224 The circumstances which require the issue of an entry ban are similar to those of issuing a removal order, namely: a) if no period for voluntary departure has been granted (see Article 7(4) RD) or b) the obligation to return has not been complied with within the voluntary departure period (see Article 11(1) RD).

225 See Article 11 RD.

226 In addition to the Member States' power to issue entry bans under the Return Directive, they have retained power to adopt entry bans under other legal frameworks, for instance in cases of serious criminal offences. See Article. 24(2) SIS II Regulation.

227 See Article 15 RD in Chapter IV – pre-removal detention.

228 See the CJEU judgment in in El Dridi, para. 42 and G. and R.

229 El Dridi *ibid*.

230 El Dridi, para. 40.

- The **best interest of the child, family life**,²³¹ the **state of health of the third country national**,²³² and **respect of the principle of non-refoulement**, all have to be examined before issuing any of the return related decisions, since they can act as legal bars to removal. They also take precedence over other provisions of the RD.²³³
- A third-country national who is subject to a return or removal order cannot be removed, where there are substantial grounds for believing that he or she will be exposed to a **real risk of ill treatment** contrary to Article 4 of the EU Charter. The CJEU has held that Article 19(2) of the EU Charter cannot be limited, under whatever circumstances, even when third country nationals have been excluded from refugee or subsidiary protection or have committed a crime.²³⁴ To these third-country nationals who are un-removable, the CJEU obliges the Member States to ensure as far as possible, that **family unity is maintained, emergency health care and essential treatment of illness are provided, access to basic education is granted to minors and the special needs of vulnerable people** are taken into consideration.²³⁵
- In *K.A. and Others*, the CJEU stated that Article 5 RD ‘precludes a Member State from adopting a return decision without **taking into account the relevant details of the family life** of the third-country national concerned’.²³⁶ Member States have a duty to observe the obligations imposed by Article 5 of the Directive and hear the person concerned on that subject, even when that third country national has previously been the subject of a return decision, accompanied by an entry ban.²³⁷ It follows that an individual assessment needs to be undertaken in order to take due account of family life

231 This is most notably the case when irregular third-country nationals have children with an EU citizen or a third country national holding a residence permit. See, for example, ECtHR, *Omojudi v. the United Kingdom*, Appl. No. 1820/08, [2009]; *Rodrigues Da Silva and Hoogkamer v The Netherlands*, Appl. No. 50435/99 [2006]; *Nunez v Norway*, Appl. No. 55597/09 [2011]; *Antwi and Others v Norway*, Appl. No. 26940/10 [2012].

232 ECtHR (Grand Chamber), *N. v. the United Kingdom*, Appl. No. 26565/05, [2008].

233 According to the CJEU, national authorities ‘must necessarily observe the obligations imposed by Article 5 RD [when issuing return decisions]’ (see *Boudjlida*, C-249/13, para 49).

234 C-391/16, C-77/17 and C-78/17 *M and others* ECLI:EU:C:2019:403.

235 See C-562/13, *Abdida*, EU:C:2014:2453. *Paposhvili v Belgium* [GC], ECHR, Appl. No. 41738/10.

236 C-82/16, *KA and Others*, EU:C:2018:308, para 104.

237 *Ibid*, para. 104.

and the best interests of the child, in conformity with Article 7 and 24(2) of the Charter.²³⁸

- Article 14 RD requires the Member States to secure, as far as possible, that family unity is maintained, **emergency health care and essential treatment of illness** are provided, access to specific procedural safeguards are provided for unaccompanied minors (UAM),²³⁹ since they are considered as ‘vulnerable persons’, whose special needs have to be taken into account during all main stages of the return proceedings.²⁴⁰

Currently, there are ongoing negotiations between the European and the Council on the recast of the Return Directive. On 17th of December 2020 the European Parliament adopted its Report with amendments opening up the negotiation with the Council. According to the Commission Roadmap on the New Pact on Migration and Asylum the Recast should be adopted in 2021.²⁴¹ A new return border procedure might be introduced, whose precise content is unclear, that is whether it will take the form of the Commission’s 2018 Proposal to Recast the Return Directive or the amended Asylum Procedure Regulation form proposed in the 2020 Pact on Asylum and Migration. Should the amended Asylum Procedure Regulation be adopted in its current form from the 2020 Pact, it should be observed that the Pact extends the scope of application of return border procedures to the following categories of third country nationals: apprehended at the external border and disembarked after the search and rescue operations; relocated from another Member State. Second, the Pact’s amended return border procedure comes with guarantees for a fairer procedure compared to the Recast Return Directive proposal

238 Ibid, para. 71. The CJEU previously acknowledged that Article 7 of the Charter, which states that everyone has the right to respect for his or her private and family life, must ‘be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights’ (C-400/10 PPU, J McB, EU:C:2010:582, para 53). On the best interest of children in return proceedings, see more in C Grütters, ‘The Return of Children’ in M Moraru, G Cornelisse and P de Brucyker (eds) *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (Hart 2020), Chapter 18.

239 See notably Article 3(9) RD. The Return Directive does not define the term of unaccompanied minor. The Return Handbook invites to apply the definition provided by Article 2(e) of the recast Reception Conditions Directive 2013/33/EU. Any third country national who is under eighteen is a ‘minor’ within the meaning of the RD.

240 Art. 10 – removal; 14 (1)(c)(d)- general safeguards pending return; 17 – pre-removal detention.

241 On 17th of December 2020, the European Parliament voted the Report including the reply to the European Commission proposed amendments.

of the European Commission. For instance, voluntary return will be mandatory (Article 41a Asylum Procedure Regulation proposal).

Finally, the Pact introduces new possibilities for Member States to provide assistance to each other in carrying out returns, in the form of return sponsorship. The Pact complements the possibilities for solidarity through relocation of asylum seekers by including 'return sponsorship' schemes, under which a Member State commits to support returns from another one (Article 45(1)(b) of the proposal for a Regulation on Asylum and Migration Management).

For the moment, the issue of regularisation of those third country nationals who cannot be removed is left to the discretion of the Member States as the subject has not been the object of an EU legislative act.

The Visa Code Regulation²⁴²

This regulation has been used by some asylum seekers and also migrants to access the EU territory. Also, though rejected by the CJEU, several Member States have accepted this use for some categories. For example, the Belgium granted humanitarian visas under the visa code to Syrians up until 2016.²⁴³ In Italy, some of domestic courts have established a right to humanitarian visas for unaccompanied minors to access asylum procedure.²⁴⁴ As for irregular migration, the Visa Code is relevant for those third country nationals whose visa prolongation has been rejected. For example, in *El Hassani* the Court required the Member States to ensure access to court for these third country nationals to challenge the administrative decision rejection visas.²⁴⁵

The main elements of the Visa Code included the reduction of the deadline for processing a visa application and making a decision, making it possible to lodge visa applications in other EU countries consulates if the Member State competent for processing the visa application is neither present nor represented in the respective country as well as facilitating the process for frequent visitors who have shown that they can be trusted, including the mandatory issuing of multiple entry visas valid for

242 Regulation (EU) 2019/1155 of the European Parliament and of the Council 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code).

243 S Bodart, C Fransen, C Dubois, 'EU Charter and the dialog of the judges in asylum and immigration cases', EUI RSCAS Working Paper 2020/10, Centre for Judicial Cooperation

244 Tribunal of Rome, judgment of 21 February 2019.

245 C-403/16 *El Hassani* ECLI:EU:C:2017:960.

three years.

The CJEU has enhanced the protection of the **right to a fair trial by requiring Member States to ensure access to courts to those third country nationals' whose visa application was rejected** by consular or other public authorities. Accordingly, Article 32 (3) of the Visa Code on **legal remedies** must be interpreted as meaning that it requires EU Member States to provide for an **appeal procedure** against decisions refusing visas before courts, even if this right is not provided under domestic procedural law of the Member State.²⁴⁶

In the New Pact for Migration and Asylum, short-term mobility as part of the amended Visa Code is mentioned as one of the legal pathways to Europe once its full application has been incorporated in national policies and practices in their overseas representations. Nevertheless, the New Pact also presents the amended Visa Code as including legal pathways that can improve cooperation with third countries (e.g., on irregular migration).

The Global Approach to Migration and Mobility (GAMM)

The GAMM's, initially created in 2005 and updated in 2011, aims to develop a 'coherent and comprehensive migration policy for the EU,' taking into account the Union's short-term and long-term needs.²⁴⁷ It is organised around four thematic priorities: (1) legal migration and mobility; (2) the fight against irregular migration; (3) asylum; and (4) the migration-development nexus²⁴⁸ (GAMM, p. 6). Yet, the key focus is the fight against irregular migration, on the premise that, 'without well-functioning border controls, lower levels of irregular migration and an effective return policy, it will not be possible for the EU to offer more opportunities for legal migration.'²⁴⁹ No special consideration for providing international protection to the forcibly displaced on the EU territory and, in the absence of legal pathways, resort to unauthorised channels to reach the EU.²⁵⁰

²⁴⁶ C-403/16 El Hassani ECLI:EU:C:2017:960.

²⁴⁷ GAMM, p.2

²⁴⁸ GAMM, p.6

²⁴⁹ GAMM p.5

²⁵⁰ Available statistics show that up to 90% of those subsequently recognised as qualifying for international protection entered the EU irregularly. See European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), para. E.

3.5 Main Rights of Refugees, Asylum Seekers and Irregular Migrants

The instruments analysed above contain plenty of references to the rights for refugees, asylum seekers and irregular migrants. Also, the EU Charter has specific rights that apply to everyone, so to irregular migrants too. This section will add to the rights already discussed in the various EU instruments.

Right to Asylum

Of particular significance for EU asylum and irregular migration is the right to asylum. According to Article 18 of the EU Charter, '[t]he right to asylum shall be guaranteed with due respect for the rules of the [Refugee Convention] in accordance with the [TEU] and the [TFEU] [...]'. This was the first time in the EU that a legally binding supranational instrument to which EU member States are parties recognised the right to asylum. The right to asylum embodied in Article 18 of the Charter is given expression, in particular, in Article 6 (access to the procedure), Article 9 (right to remain in the Member State pending the examination of the application) and recital (27) of the Asylum Procedure Directive, as well as in the Qualification Directive.

In the EU, the concept of international protection is also applicable. This can refer either to refugee status or subsidiary protection status. The status of subsidiary protection can be granted to people who fall outside the criteria of the 1951 Convention's definition of refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm.²⁵¹ It is worth noting that the ITFLOWS project covers the study of migrants under this status, especially in the case of Venezuelan asylum seekers arriving in Spain.

²⁵¹ The delimitation between refugee and subsidiary protection under EU law can be a complex procedure; however guidelines have been provided by the CJEU, the most recent referring to the qualification of Syrians who have fled to avoid military service, see C-238/19 EG ECLI:EU:C:2020:945.

Non-Refoulement

The ITFLOWS project recognises the need to enforce the right to non-refoulement within the European Union. As discussed in the individual instruments, non-refoulement is one of the most primary rights in asylum and migration law. Article 19(2) Charter provides that no one may be removed, expelled or extradited to a State where they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. According to the explanations on the Charter, Article 19(2) Charter incorporates the standards developed by the ECtHR under Article 3 ECHR.

The protection against *refoulement* envisaged in the Charter covers every individual, regardless of his/her regular or irregular status in the EU, without exception (unlike Article 33 of the Refugee Convention), and its territorial reach depends only on fulfilling the conditions set out by Article 51 of the Charter.²⁵² While the Refugee Convention permits states to derogate from the principle of non-refoulement in cases in which a refugee has committed a serious crime and presents a threat to the nation, or if the refugee presents a serious threat to society, **the CJEU held that Article 19 requires absolute protection, which means that there cannot be any derogations or limitations to its application.** While the refugee status can be revoked or refused, the third country nationals cannot be returned to a State if there are substantial grounds for believing that he/she will face a genuine risk, in the country of destination, of being subjected to treatment prohibited by Article 19(2) of the Charter.²⁵³

In the case of irregularly staying third-country nationals whose return to their country of origin might expose them to treatment contrary to the principle of non-refoulement, Art 19(2) and 47 of the Charter require the Member States' authorities to:²⁵⁴

1. Refuse enforcement of return related decisions entailing the removal of a third-country national suffering from a serious illness to a country in which

²⁵² In *X and X* (C-638/16 PPU ECLI:EU:C:2017:173), the CJEU held that the EU Charter does not apply to third country nationals located in a third country who have applied for a visa at one of the MS embassies or consulates for the purpose of accessing the asylum procedure in the EU territory.

²⁵³ Joined Cases C-391/16, C-77/17 and C-78/17 M, X, X ECLI:EU:C:2019:403.

²⁵⁴ See C-562/13 *Abdida* ECLI:EU:C:2014:2453.

appropriate treatment is not available (*Article 5(c) Return Directive*)²⁵⁵;

2. Recognising a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health directly on the basis of Articles 19(2) and 47 of the EU Charter, even in the absence of a corresponding provision in EU or domestic legislation;

3. Provide the concerned third-country national with emergency health care and essential treatment of illnesses pending the appeal (*Article 14 Return Directive*).

Prohibition of Collective Expulsions

Similarly to the right to non-refoulment, Article 19 of the Charter provides in its first paragraph a prohibition of collective expulsion. An equivalent prohibition is contained in Article 4 of Protocol 4 of the ECHR. Collective expulsions is defined by the ECtHR as ‘any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.’²⁵⁶

The ECtHR has so far developed precise standards that States have to follow in order to avoid violations of this provision.²⁵⁷ The relation between Article 19 Charter and Article 4 Protocol 4 is very close, the ECtHR referring to the EU Charter in declaring Italy’s responsibility for failure to fulfil its international refugee law obligation and highlighted that the non-refoulement principle is also enshrined in Article 19 Charter.²⁵⁸ According to Article 52(3) Charter, Article 19(1) Charter should be read in light of Article 4 Protocol 4 as interpreted by the ECtHR.

According to the Fundamental Rights Agency Handbook on European law relating to asylum, borders and immigration and its Annual Report on Asylum and Migration

255 According to Article 5(c) Return Directive, Member States are required, “when implementing this Directive, to take due account of, inter alia: (c) the state of health of the third-country national concerned.” Article 5(c) together with Articles 19(2) and 47 Charter, require according to the CJEU in the *Abdida* case to not return/remove third country national suffering from serious illness where adequate treatment is not available in their country of origin.

256 ECtHR, ‘Collective Expulsions’ Factsheet (February, 2016), https://cjc.eui.eu/wp-content/uploads/2020/05/eNACT_Handbook_asylum-compresso.pdf.

257 The ECtHR landmark cases are ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002; *Sharifi v Italy*, Appl. No. 16643/2009, Judgment of 21.10.2014, and *Hirsi v Italy*, Appl. No. 27765/2009, Judgment of 22.2.2012.

258 See *Hirsi v Italy*, Appl. No. 27765/2009, Judgment of 22.2.2012.

in the EU, any form of expulsion, removal or any interception activity that prevents entry into the territory, including territorial waters of the Member States may result in collective expulsion, if the expulsion, removal or interception is not based on an individual assessment and if effective remedies against the decision are unavailable.²⁵⁹ The ECtHR held that this prohibition also applies on the high seas.²⁶⁰

Arbitrary Detention, Right to a Fair Trial

The right to liberty and security enshrined in Article 6 of the EU Charter is a relative fundamental right, therefore both asylum and immigration detention are possible as long as these measures respect the safeguards required by Article 52(1) Charter, namely: 1) the limitations must be provided by law; 2) respect the essence of the right; 3) genuinely meet the objectives of general interest; 4) necessity; and 5) proportionality. The EU legislator has provided for an exhaustive list of detention grounds of both asylum seekers and irregular migrants, which were aimed at ensuring respect for Article 52(1) Charter requirements. Article 15(1) of the Return Directive (2008/115) provides for two exhaustive grounds for the detention of irregular migrants: 1) risk of absconding; 2) avoiding or hampering the preparation of return or removal.²⁶¹ As for asylum seekers, Article 8(3) of recast Reception Conditions Directive provides for an exhaustive list of six detention grounds of asylum seekers: a) in order to determine or verify his or her identity or nationality; b) risk of absconding; c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory; d) when there are reasonable grounds to believe that an application for international protection is made only in order to delay or frustrate the enforcement of the return decision; (e) when protection of national security or public order so requires or f) during Dublin procedures. Article 28(2) of Dublin III Regulation provides that an asylum seeker subject to Dublin procedures can be detained only if there is a 'significant risk of absconding' from the proceedings.

The Reception Conditions Directive, Dublin III Regulation and the Return Directive

259 FRA, 2020 Handbook on European law relating to asylum, borders and immigration; FRA, 2015 Annual Report on Asylum and Migration in the EU.

260 *Sharifi v Italy*, Appl. No. 16643/2009, Judgment of 21.10.2014, and *Hirsi v Italy*, Appl. No. 27765/2009, Judgment of 22.2.2012.

261 Detailed practice and standards can be found in the REDIAL European Synthesis Report on immigration detention, REDIAL Research Report 2016/05 of the Migration Policy Centre.

all prohibit detention solely on grounds of seeking asylum, being subject to the Dublin procedure, or mere irregular entry or stay.²⁶²

Article 6 EU Charter has a correspondent right in Article 5 ECHR, thus according to Article 52(3) Charter, the standards set by the ECtHR under Article 5 ECHR have to be taken into consideration as a minimum threshold of protection under Article 6 Charter.

As regards *de facto* detention, the main issue is the determination whether the measure is a mere free movement confinement or an actual deprivation of liberty. The identification criteria were clearly set out by the ECtHR in the *Khlaifia v Italy* case²⁶³ and include an individual factual assessment of: the type of the restrictive limitation, its duration, effects and manner of implementation of the restrictive measures in question.

In the *Khlaifia* case, although the applicants were held in a reception centre used for first aid and assistance, this fact did not exclude the applicability of Article 5 ECHR as ‘even measures intended for protection or taken in the interest of the person concerned maybe regarded as deprivation of liberty.’²⁶⁴ The fact that the applicants were involuntarily, under permanent surveillance of the centre, without the possibility to communicate with the outside world and under prolonged confinement, determined the ECtHR to conclude that the applicants were, in effect, deprived of their liberty. Importantly, ‘the classification of the applicants’ confinement in domestic law cannot alter the nature of the constraining measures imposed upon them.’²⁶⁵

Non-Discrimination

The principle of non-discrimination is a foundational principle of the EU legal order and the ECHR and applies to everyone, migrant, asylum seeker or refugee. Non-discrimination operates both in the EU and in the ECHR on the basis of an exhaustive list of grounds, but the two systems guarantee the enjoyment of different set of

262 The CJEU has repeatedly held that public authorities have to carry out an individual assessment of the circumstances and cannot base their decisions on general or abstract facts, as well as prohibiting immigration detention on the basis of mere illegal entry or stay (C-16/11 *El Dridi* ECLI:EU:C:2011:268; C-329/11, *Achughbabian* ECLI:EU:C:2011:807; C-357/09 *Kadzoev* ECLI:EU:C:2009:741).

263 ECtHR, *Khlaifia and others v. Italy*, Appl. No 16483/12.

264 ECtHR, *Khlaifia v. Italy*, para. 71.

265 Ibid.

treatments. In view of the paramount importance that non-discrimination has on the ITFLOWS project, the following paragraphs provide a brief description of the relevant legal regimes governing the principle of non-discrimination in Europe that complement our discussion on the international framework on non-discrimination. Much stronger is the prohibition of discrimination at the EU level than in the ECHR. Prohibition of non-discrimination is included in Article 14 ECHR which is the central provision laying down the principle of equality. The Article does not have an autonomous application, as it ensures everyone's equal enjoyment of other ECHR rights; Protocol 12 (2000) makes non-discrimination a self-standing right, but only 7 EU Members have ratified it so far.

In EU Law, Article 2 and 3 TEU specify that non-discrimination is a foundational value of the EU legal order. Article 10 TFEU stipulates eight grounds for the principle of non-discrimination: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and reflects the minimum protection against discrimination in EU equal treatment directives). Article 19 TFEU confers upon the Council competence to adopt legislation to fight discrimination on a limited set of grounds (sex, racial or ethnic origin, religion or belief, disability, age of sexual orientation). Article 157 TFEU prohibits discrimination based on sex (equal pay between men and women), which was heralded as a general principle of the EU since *Defrenne II*.²⁶⁶

The EU Charter includes in Article 21 a much longer list of grounds than Article 10 TFEU, including: language, membership in a national minority and property. In total there are 14 prohibited grounds of discrimination. Nevertheless, the Explanations to the Charter clarify that Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Article 20 provides a general guarantee of equality before the law, Article 23 recognises equality between men and women, and Article 26 affirms the principle of non-discrimination on the ground of disability.²⁶⁷

The CJEU has developed a strong case-law on the protection of the principle of non-

266 Case 43/75 Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, ECLI:EU:C:1976:56.

267 T. Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56(5) Common Market Law Review 1201.

discrimination that has gradually gone beyond commercial practices and the exercise of economic freedoms. Over time, it has extended its reach to all citizens and it has developed into a fully-fledged fundamental right, gaining recognition as a general principle of EU law on non-discrimination.²⁶⁸ In the *Dansk Industries* case, the Court clarified that the principle of non-discrimination based on age as enshrined in Article 21 of the EU Charter applies also in a private parties relations at the domestic level, even if EU Directives are still prohibited this horizontal direct effect.²⁶⁹

In terms of secondary legislation, the Racial Equality Directive 2000/43/EC prohibits discrimination 'on the grounds of racial or ethnic origin' applies to employment, social benefits and access to goods and services²⁷⁰ The Employment Equality Framework Directive prohibits discrimination in employment 'on the grounds of religion or belief, disability, age or sexual orientation.²⁷¹ The Gender Equality Directive 2006/54/EC²⁷² and the Gender Goods and Services Directive²⁷³ 2004/113/EC prohibit gender discrimination in employment and access to goods and services²⁷⁴

All aforementioned directives require that judicial and administrative procedures exist for the enforcement of non-discrimination principles. Also, Member States must have a body to provide independent assistance to victims of discrimination in pursuing their complaints; conduct independent surveys concerning discrimination; and publish reports on the implementation of non-discrimination.

Unfortunately, the EU Anti-Discrimination Directive 2000/43/EC that strengthens the equality requirement beyond employment, which is still the case for a few grounds, is currently on hold and is yet to get adopted.²⁷⁵

²⁶⁸ Case C-144/04 Mangold ECLI:EU:C:2005:709; Case C-555/07 Küçükdeveci ECLI:EU:C:2010:21.

²⁶⁹ C-441/14 Dansk Industri ECLI:EU:C:2016:278.

²⁷⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, 22-26.

²⁷¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, 16-22.

²⁷² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L204, 26 July 2006, 23-36.

²⁷³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21 December 2004, 37-43.

²⁷⁴ See Article. 4 of Directive 2004/113/EC.

²⁷⁵ <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive>.

A Note on LGBTIQ+ Rights and Migration

According to the UNHCR²⁷⁶, the number of persons who flee their country due to their sexual orientation and/or gender identity and who qualify for protection as ‘members of a particular social group’ under the 1951 Refugee Convention has significantly increased. To live a life in fear of violence, incarceration, torture, excommunication and isolation is a reality for about 175 million lesbian, gay, trans*, bi, intersex and non-binary persons worldwide.

The Common European Asylum System, which has been subject to recent LGBT reform. For instance, Art. 10 (1d) the EU Directive 2011/95/EU (Recast Qualification Directive)²⁷⁷ established that ‘gender-related aspects, including gender identity and sexual orientation, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group’. In 2013, the European Court of Justice bolstered such directive in the case of X, Y, and Z where the Court ruled that ‘a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it’. ²⁷⁸ In 2014 and 2018 respectively, the European Court of Justice further condemned the use of tests or stereotypes in assessing the requests for asylum. As according to ILGA Europe²⁷⁹, the asylum legislation and policies in some European countries can pose specific problems for LGBTI asylum seekers. Moreover, the authorities’ lack of experience and professionalism in dealing with such refugee status applications can bring additional problems. Problems that LGBTI asylum seekers face are:

- The fact that national asylum legislation provides for **insufficient protection or specific measures protecting LGBTI asylum seekers**,

²⁷⁶UN High Commissioner for Refugees (UNHCR), (2020), LGBTI Persons [online], available at: <https://www.unhcr.org/uk/lgbti-persons.html> [accessed 16 November. 2020].

²⁷⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 Dec. 2011, see above.

²⁷⁸ Preliminary ruling in Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200-12) and Z, Judgment of the fourth Chamber on 7 November 2013.

²⁷⁹ ILGA Europe, Asylum in Europe (online). Retrieved from <https://www.ilga-europe.org/what-we-do/our-advocacy-work/asylum-europe> on January 14, 2021.

despite the European legislation and resolutions that have been adopted over the past years;

- **Insufficient respect for the right to privacy and for the right to human dignity** in assessing the asylum claim. National authorities are allowed to assess the credibility of the statements made by the asylum seeker, but these assessment procedures should not violate the applicant's rights to human dignity and private and family life. Questions about sexual practices and 'tests' to confirm one's sexual orientation have been explicitly forbidden by the Court of Justice of the EU in December 2014;
- Little or **no consideration of taboo or stigmatisation in the countries of origin**, which can lead to asylum seekers not revealing their sexual orientation or gender identity right from the beginning of the asylum procedure. Late disclosure often leads to rejection of the claim, even if the Court of Justice of the EU has ruled that this cannot be a sufficient reason to refuse a refugee status application;
- **Lack of country-of-origin information**. The authorities' information on persecution of people on the bases of sexual orientation and gender identity is often out-dated and incomplete;
- **Lack of sensitivity and training of asylum personnel**, which can lead to a misjudgement of the credibility of the refugee status application;
- LGBTI asylum seekers may face a **high level of discrimination, taboo and violence in reception centres**. For this reason they will often have special reception needs.

For more information on the particular challenges faced by LGBTQI+ asylum claimants and refugees see the ITFLOWS Gender Action Plan.

Socio-Economic Rights

The EU Charter recognises some socio-economic rights for all migrants, asylum seekers and refugees. On socio-economic rights, EU law makes some distinction, as follows:

Refugees

The EU Qualification Directive 2011/95/EU (hereinafter, QD) ensures that refugees and beneficiaries of international protection have the same socio-economic rights and opportunities as nationals of the State, especially on education, labour and healthcare. Access to accommodation is guaranteed under equivalent conditions as other third nationals legally residing in the country, and non-discrimination as well as equal opportunities have to be guaranteed (art. 32 QD). On **social welfare**, migrants have the right to be provided with ‘the necessary social assistance as provided to the nationals’. Limitations may apply but only to the point of guaranteeing the core benefits (art. 29 QD). Indeed, refugees with a residence permit valid for three years are entitled to the same level of **social assistance** as nationals of the same Member State. The CJEU added that those with refugee status are objectively in a more precarious situation than nationals of the host Member State. Treating such individuals unfavourably would not comply with this matter, so therefore domestic legislation that discriminates refugees’ access to social assistance would be contrary to the Qualification Directive.²⁸⁰

Asylum Seekers

Regarding asylum seekers, the **standards for ‘material reception conditions’**²⁸¹ which Member States have to provide to all asylum seekers under the Reception Conditions Directive 2013/33/EU (RCD) apply for as long as applicants are allowed to remain on the territory (Article 3 RCD). The application applies even if there is a decision to transfer the asylum seeker to another Member State, which will be responsible for processing the asylum claim under the Dublin system.²⁸² Therefore until the actual transfer to that second Member State responsible for examining the application, the first host Member State is obliged to grant **dignified reception conditions**. The process for transferring an asylum seeker from one Member State to another will be assessed in WP4 of the ITFLOWS project.

It is worth noting that Articles 17 and 18 of the Reception Conditions Directive do

280 C-713/17 Ayubi ECLI:EU:C:2018:929.

281 According to article 2(g) RCD these mean reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance, according to Article 2(g) RCD.

282 C-179/11 Cimade, ECLI:EU:C:2012:594.

not provide for a fixed amount of social assistance for asylum seekers. However, they provide for necessary material reception conditions and health care at a level comparable to national citizens.

The RCD does not oblige Member States to establish specific types²⁸³ of facilities for applicants, as long as reception standards are respected. The few standards provided by the RCD (Article 18) have been clarified by the CJEU and ECtHR:

- Reception facilities and reception conditions have to be adapted to the age of the children and ensure compliance with the principle that a family should be kept together whenever possible;²⁸⁴
- Reception centres have to ensure that applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies. Furthermore, family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants;²⁸⁵
- Housing rules should be explained in a language the asylum seeker can understand. If necessary, an interpreter can help to explain the house rules. Residents should be given the housing rules in writing in a language they understand;²⁸⁶
- Where a Member State has opted to grant the material reception conditions in the form of financial allowances or vouchers, those allowances should be provided from the moment the application for asylum is issued; and the amount should ensure dignified living and adequate health, and preservation of family life and best interest of children. For instance, the amount of allowances must be sufficient to enable minor children to be housed with their parents, so that the family unity of the asylum seekers is maintained;²⁸⁷

283 See Article 18(1) RCD.

284 Case 29217/12, *Tarakhel v Switzerland* (2014).

285 See Article 18(2) RCD.

286 See the EASO, *Guidance on reception conditions for unaccompanied children: operational standards and indicators*, December 2018.

287 C-79/13 *Saciri* ECLI:EU:C:2014:103.

- If the accommodation facilities for asylum seekers are overloaded, Member States could transfer asylum seekers to public assistance bodies, in order to ensure the minimum standards as regards the asylum seekers²⁸⁸;
- Failing to ensure asylum seekers' accommodation in a type of facility that ensures a dignified living (such as living on the streets or in tents) has been held by the ECtHR to fail the standards of Article 3 ECHR;²⁸⁹

Sanctions, such as reduction of or even withdrawal of material reception conditions, may be possible when an applicant abandons the place of residence without informing the authorities. Examples could be found in migrants who have been reported, have abided the rules of the accommodation centre, or have lodged a subsequent application as defined in Article 2(q) of the RCD. It is worth adding that **reduction of withdrawal decisions have to be taken on an individual, objective and impartial basis, bearing in mind the particular situation at stake, and complying with the principles of proportionality, human dignity and the relevant EU Charter rights.**²⁹⁰ Even in the case of withdrawal of material reception conditions, a dignified standard of living and access to health care for all applicants have to be ensured. In the case of an unaccompanied minor, those sanctions must, in the light, inter alia, of Article 24 of the Charter of Fundamental Rights, be determined by taking particular account of the best interest of the child.²⁹¹

Irregular migrants

On irregularly staying third-country nationals, the Return Directive 2008/115/EC does not require Member States to ensure specific material conditions. The standards are lower than those provided by the RCD. Hence, migrants should look into the Charter or the International Law.

Nevertheless, Member States are required to ensure throughout the return procedure stages the following general principles: (a) the best interest of the child; (b) family life; (c) the state of health of the third-country national concerned, and

²⁸⁸ C-79/13 Saciri ECLI:EU:C:2014:103.

²⁸⁹ ECtHR, M.S.S v Greece and Belgium and Khan v France, Appl. No. 12267/16.

²⁹⁰ C-233/18 Haqbin ECLI:EU:C:2019:956.

²⁹¹ See Haqbin. In this case an Afghan UAM was excluded from the material support in an asylum reception centre for being the instigator of a brawl.

respect the principle of non-refoulement.²⁹² In addition, the special needs of vulnerable persons should be taken into account. Even though there is no general legal obligation under Union Law to make provision for the basic needs of all third-country nationals pending return, the Commission encourages Member States to do so under national law, in order to assure humane and dignified conditions of life for returnees.²⁹³

On Schooling and Education

The Qualification Directive states that *refugees and beneficiaries of international protection* have the right to **education** under the same conditions as nationals (Art. 27).

According to Article 14 of the RCD, minor *asylum seekers*, or minor children of asylum seekers must be granted access to the education system of a Member State under similar conditions to that Member State's own nationals, for as long as an expulsion measure against them or their parents is not enforced. Access has to be ensured no later than three months from the date on which the application for international protection is lodged. In order to facilitate access to and participation in the education system, preparatory classes, including language classes, must be provided where necessary. The fact that a minor has reached the age of majority should not be the only reason for withdrawal of access to secondary education according to Article 14 RCD.

As regards minor children of *irregularly staying third-country nationals*, or irregularly staying minors have the right to access to the basic education system subject to the length of their stay during the preparation of the voluntary departure period, and its prolongation periods and during periods for which removal has been postponed in accordance with Article 9.²⁹⁴

On Healthcare

The EU Qualification Directive 2011/95/EU states that *refugees and beneficiaries of*

292 See Article 5 of the Return Directive.

293 See the 2017 Return Handbook, p. 64.

294 Article 14 of the Return Directive.

international protection have the right to access to **healthcare** under the same rules as for the nations of the Member States (Art. 30 QD).

Irregularly staying third-country nationals have to be ensured emergency health care and essential treatment of illness during voluntary departure and its prolongation periods and during periods for which removal has been postponed in accordance with Article 9.²⁹⁵

On asylum seekers, the law emphasises the importance of health care and a dignified standard of living. Even in the case of withdrawal of material reception conditions, access to health care for all applicants have to be ensured.

On Labour Rights

Refugees have the right to engage in **employed or self-employed activities** without discrimination and immediately after protection is granted (art. 26 QD)

Asylum seekers have a right to access the labour market of the Member State where they lodged the application for international protection. Access should be granted no longer than nine months since the date the application for international protection was lodged, (Article 15 RCD). However, Member States may introduce more favourable provisions and grant access to the labour market earlier than the nine-months period (Article 4 RCD). For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third country nationals.

Applicants may be allowed access to vocational training irrespective of whether they have access to the labour market or not, unless the training is related to an employment contract.

Also, applicants may move freely within the territory of the host Member State or within an area assigned to them; the assigned area must respect the unalienable sphere of private life (Article 7 of the Charter), and allow access to all reception benefits to be guaranteed.

²⁹⁵ See Article 14 of the Return Directive and Case C-562/13 *Abdida*.

The Directive on Seasonal Workers applies to all categories of *migrants*²⁹⁶ and it is especially relevant to cases of smuggling. The Directive provides that migrant seasonal workers are allowed to stay legally and temporarily in the EU for a maximum period of between five and nine months (depending on the Member State) to carry out an activity dependent on the passing of seasons, while retaining their principal place of residence in a third country. The Directive also clarifies the **set of rights to which such migrant workers** are entitled.

Right to access to judicial remedies

According to the UN HRC Concluding Observations on Bulgaria of 2011, the applicant must have access to their file.²⁹⁷ The time from applying for asylum to getting the final decision has to be 'reasonable'.²⁹⁸ Failure to submit an asylum request within a certain time limit, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration.²⁹⁹ Applications for asylum must be assessed on an individual basis.³⁰⁰ According to the case ECtHR, *MSS v. Belgium & Greece*, the following procedural issues could also be a problem:

*[...] no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively deprives the asylum-seekers of legal counsel, and excessively lengthy delays in receiving a decision.*³⁰¹

Poor decision-making such as unreasoned cut-and-paste first-instance repeatedly negative decisions violates the rights of asylum seekers.³⁰² A second level

296 Directive 2014/36/EU; Conditions of entry and residence of third-country nationals for the purpose of employment as seasonal workers.

297 UN HRC, Concluding Observations on Bulgaria, UN Doc.CCPR/C/BGR/CO/3, 19 Aug. 2011, pa. 16

298 ECtHR, *MSS v. Belgium and Greece*. Also, UN HRC, Concluding Observations on Bulgaria, UN Doc. CCPR/C/BGR/CO/3, 19 Aug. 2011, para. 16.

299 UN HCR EXCOM, Conclusion of Refugees without an Asylum Country, Conclusion No. 15 (XXX), 1979, para. i.

300 UN HRC, Concluding Observations on Estonia, UN Doc. CCPR/CO/77/EST, 31 Mar. 2003, pa. 13.

301 ECtHR, *MSS v. Belgium & Greece*, para. 301; see also ECtHR, *Hirsi Jamaa & Others v. Italy*, par. 202

302 ECtHR, *MSS v. Belgium and Greece*, para. 302.

independent look at the rejected asylum applications is strongly encouraged.³⁰³ The appeal procedure must always have automatic suspensive effect vis-à-vis expulsion.³⁰⁴ The procedure must be accessible and swift in practice,³⁰⁵ and the resulting decision must be binding for relevant national authorities.³⁰⁶ The European Court of Human Rights has also condemned efforts by police authorities to deport asylum seekers prior to any decision on the merits of their claim.³⁰⁷

Right to Family Reunification³⁰⁸

Work Package 4 of the ITFLOWS project will study family reunification given its key role in migration flows and integration. WP4partners will create estimates of expected numbers of arrivals to be used for family reunification programmes and assess future potential magnitudes of family migration inflows.

Although the Directive to Family Reunification precedes the Charter of Fundamental Rights, the CJEU in subsequent rulings has clearly indicated that the implementation of the Family Reunification Directive 2003/86/EC in national legislation has to be held up against Article 7 (the **right to family life**) and Article 24 (**best interest of the child**) of the EU Charter.³⁰⁹ Thus, Member States should ensure that family reunification rights under national legislation comply with the standards provided by the Charter.

The purpose of the Family Reunification Directive is to determine the conditions under which third-country nationals residing lawfully on the territory of the Member States may exercise the right to family reunification. The objective is to protect the family unity and to facilitate the integration of nationals of non-member

303 G Goodwin-Gill & J McAdam, *The Refugee in International Law*, 3d edition (Oxford: OUP, 2007), p. 537. Hathaway, *The Rights of Refugees*, 645–646; see also B. Elberling, “Article 16 (Access to Courts/Droit d’Ester en Justice”, in A. Zimmermann (ed.), *The 1951 Convention Relating [sic] to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011) pp. 931–947, at 938–940 and 944–947. Also, UN HRC, Concluding Observations on Latvia, UN Doc. CCPR/CO/79/LVA, 1 Dec. 2003, para. 9, and Concluding Observations on Lithuania, UN Doc. CCPR/CO/80/LTU, 4 May 2004, para. 7. But see contra UNHCR EXCOM Conclusion No. 8, para. Vi, that is not clear.

304 ECtHR, *Jabari v. Turkey*, para. 49.

305 ECtHR, *MSS v. Belgium and Greece*, paras. 318–320; see ECtHR, *K.R.S. v. United Kingdom*, where the Court criticised the “automatic and mechanical application” of procedural requirements in appeals (p 15).

306 ECtHR, *Chahal v. United Kingdom* (Judgment) (1996) Application No. 22414/93, para. 154.

307 ECtHR, *MSS v. Belgium and Greece*, para. 315.

308 Directive 2003/86/EC on the right to family reunification OJ L (hereinafter Family Reunification Directive).

309 See C-356/11 and 357/11 *Maahanmuuttovirasto* ECLI:EU:C:2012:776.

countries. Article 4 the Directive defines that the family members who can benefit from family reunification are only the spouse and minor children. However, Member States can extend the right to other family members (e.g., grandchildren and adult unmarried children) who are dependent on the third-country national; as well as first-degree relatives in the direct ascending line of the sponsor or his or her spouse, if they are dependent on them and do not enjoy proper family support in their country of origin. According to Article 7(1), the sponsor has to fulfil certain requirements in order to benefit from the Directive's right to family reunification. Notably, the sponsor must have adequate accommodation, sickness insurance and stable resources to maintain the family without access to the social systems of the host Member State. Member States are free to establish the criteria on how to assess whether the resources are adequate, as long as these conditions are in line with the standards developed by the CJEU. For instance, in the *Khachab* case,³¹⁰ the CJEU held that Member States can make a prediction of the sponsor's ability to provide for the family based on the person's income of the previous 6 months. However, the CJEU has also clearly stated that Member States must not use their discretionary powers in a way that could undermine the objective and the effectiveness of the Directive. Some Member States have set a high minimum age for the sponsor and his or her spouse in order to benefit from the right to family reunification. However, the CJEU has held this domestic rule to be proportionate as they aim to prevent forced marriages.³¹¹

Article 14(1) of the directive states that the **general principle of non-discrimination** should be applied, enforcing equal treatment to the reunified family members, similar to the rights of the sponsor. This principle particularity applies in areas such as **education, employment, vocational guidance, initial and further training**.

A new trend in migration is leaving children behind: parents migrate to establish themselves in the host country but leave their children behind, often in the care of a grandparent or another relative. Parents are away until they have legally, socially and economically established and secured themselves, and are able to bring their children to join them. Although family ties between children and parents might have

310 C-558/14 *Khachab* ECLI:EU:C:2016:285, ECLI:EU:C:2016:285.

311 CJEU, C-338/13 *Marjan Noorzia v. Bundesministerin für Inneres* ECLI:EU:C:2014:2092

deteriorated by then, this should not be held against the family reunification. Instead, the right of children to settle with their parents should also be taken into consideration.³¹²

Freedom of Religion

Article 10 of the European Charter of Human Rights (ECHR) refers to the freedom of thought, conscience and religion and corresponds to Article 9 ECHR. In accordance with Article 52(3) Charter, Article 10 Charter should have the same scope and meaning than Article 9 ECHR, and the CJEU has held that the concept of religion must be interpreted as covering both beliefs and their manifestation in public.³¹³

Religion is one of the grounds of persecution covered by the Refugee Convention, and is one of the relevant reasons for granting refugee status under the Qualification Directive. It has been interpreted by the Court of Justice in *Y and Z*, noting that the Directive protects individuals from infringements of Article 10 of the EU Charter.³¹⁴ However, not all infringements of the freedom of religion constitute persecution in the terms of the Qualification Directive. In order to assess this, the restriction should satisfy some specific criteria..

Article 6 of the Schengen Borders Code requires border control to be carried out in a way which does not discriminate against a person on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. However, the requirement for a Muslim woman to remove her headscarf for an identity check at a consulate, or for a Sikh man to remove his turban at an airport security check was found not to violate their right to freedom of religion under Article 9 of the ECHR.³¹⁵

Hate Speech

The prohibition of hate speech is implied in several EU instruments. For instance, Article 7 of the Victims' Rights Directive 2012/29/EU states that EU Member States shall ensure that 'victims who do not understand or speak the language of the criminal proceedings concerned are provided, upon request, with interpretation in accordance with their role in the relevant criminal justice system in criminal

312 ECtHR, *El Ghatet v. Switzerland*, Appl. No. 56971/10, 8 November 2016.

313 C188/15 *Bougnaoui* ECLI:EU:C:2017:204 para- 30.

314 Joined Cases C-71/11 and C99/11 *Y and Z* ECLI:EU:-C:2012:518.

315 ECtHR, *Phull v. France* Appl. No. 35753/03; *El Morsli v. France* Appl. No. 15585/06.

proceedings, free of charge'. According to Article 22 of this Directive, particular attention must be paid to victims who have 'suffered a crime committed with a bias or discriminatory ground'. Nevertheless, unfortunately victim support services tailored to the needs of asylum seekers and migrants are quite rare among Member States.³¹⁶

Similarly, Article 1 (1) of the Framework Decision on Racism and Xenophobia penalises intentional public incitement to racist violence or hate. The EU has also taken measures to combat certain forms of racism and xenophobia,³¹⁷ as well as hate crime and hate speech which are relevant also for the ITFLOWS project. This will be specifically assessed in WP5 and also in WP6 during the design and development of the EUMigraTool. It is important that hate speech is not justified, nor tolerated on the ground of public attitudes as analysed in WP3.

316 See FRA, Current migration situation in the EU: hate crime November 2016, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-november-monthly-focus-hate-crime_en.pdf

317 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law OJ L 328, 6.12.2008, p. 55–58.

CHART- SYNTHESIS OF KEY RIGHTS RECOGNISED IN INTERNATIONAL AND EU FRAMEWORKS

(Abbreviations and links to legislation are provided below the Chart)

Rights	Definition/Description	Legal Basis International Law	Legal Basis European Law ³¹⁸
Right to asylum	<ul style="list-style-type: none"> • right to seek asylum • only individualised asylum decisions based on objective and impartial assessment • no pushbacks allowed • applications to be promptly received, registered and referred to asylum authorities • quality of status determination not to be compromised and to be revised • refugee protection must be assessed and given priority to subsidiary protection or other 	<p><u>Refugee Convention</u></p> <p><u>UNHCR Procedural Guarantees</u></p> <p><i>ECtHR case law</i> (ECHR does not contain a right to asylum), incl. <i>ECtHR, Hirsi case</i> <i>ECtHR, MSS v Belgium and Greece</i></p>	<p>EU Charter (Arts.18 and 19)</p> <p><u>Recast Qualification Directive 2011/95</u></p> <p><u>Recast EURODAC Regulation 603/2003</u></p> <p><u>Asylum Procedure Directive (2013/32)</u></p> <p><i>CJEU:</i> <i>Cases C-924/19 PPU and C-925/19 PPU FMS (Hungary)</i> – use of transit detention centres, automatic returns to third countries considered safe and quotas for accessing asylum procedure at border are contrary to Reception Conditions</p>

³¹⁸ This chart only contains important and indicative case-law.

	<p>forms of complementary protection</p> <ul style="list-style-type: none"> • effective access to justice 		Directive and Return Directive
Non-Discrimination	<p>“any distinction, exclusion, restriction or preference based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” CERD Art 1</p> <ul style="list-style-type: none"> • Foundational right binding to everyone – horizontal direct effect • No discrimination allowed on the basis of their status, ethnicity, gender, disability, etc, unless justifiable. Test to be applied: legality, legitimacy and proportionality • no discrimination whether direct or indirect; 	<p><u>ICCPR</u> Article 2 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status</p> <p><u>ICERSCR</u></p> <p><u>CEDAW</u></p> <p><u>CRC</u></p> <p><u>Refugee Convention</u></p> <p><u>CoE Framework Convention on National Minorities</u></p>	<p><u>TEU</u> Arts. 2 and 3: non-discrimination is a foundational value of the EU legal order</p> <p><u>TFEU</u> Art. 10 stipulates eight grounds for the principle of non-discrimination: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and reflects the minimum protection against discrimination in EU equal treatment directives;</p> <p>Art. 18: principle of non-discrimination based on nationality.</p> <p>Art. 157: principle of non-discrimination based on sex (equal pay between men and</p>

	<p>in law or in practice</p> <ul style="list-style-type: none"> • Positive measures for real equality when needed are necessary • Emphasis on vulnerable groups and discrimination • Segregation is prohibited • Intersectional discrimination to be taken into account • Discrimination in socioeconomic rights justified (see socioeconomic rights) 	<p><u>UN Declaration on the Rights of Minorities</u></p> <p><u>ECHR Art. 14: Prohibition of discrimination combined with other articles (no self-standing application); and Protocol 12</u></p> <p>‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’</p>	<p>women).</p> <p><u>Charter of Fundamental Rights Art. 21</u></p> <p>1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.</p> <p>2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.</p> <p><u>Racial Equality Directive</u></p> <p><u>Employment Equality Framework Directive</u></p> <p><u>Qualification Directive</u></p>
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			<i>CJEU-713/17Ayubi</i>
Non-refoulement / no collective expulsions	<ul style="list-style-type: none"> no individual, regardless of their legal status in the EU (e.g. refugee, asylum seeker or migrant) can be returned to a state where they will face 'real and substantiated risk of ill treatment' applicable to any legal status Refugee Convention has exceptions, which EU Charter does not allow, while these are not discussed by the ECtHR no push-backs in international waters (high sea)_ allowed trafficked women should not be returned back to the original country 	<p><u>Refugee Convention</u> Article 33(1): 'no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.</p> <p><u>ECHR</u> Article 3 prohibits the return of anyone to a place where they face a 'real and substantiated risk of ill-treatment.'</p> <p><i>ECtHR, Hirsi Jamaa case</i></p> <p><i>ECtHR, M.S.S. v Greece and Belgium</i></p>	<p><u>TFEU</u> Art. 78.1 ensures compliance with the principle of non-refoulement</p> <p><u>EU Charter</u> Principle of non-refoulment (Art 19(2)), Human dignity (Art 1) Prohibition of ill treatment (Art 4) Effective judicial remedy (Art 47)</p> <p><u>Return Directive</u> Art. 5 codifies EU primary law requirements, and for that reason it takes precedence over other provisions of the RD. The best interests of the child, family life, the state of health of the third country national and respect of the principle of <i>non-refoulement</i></p> <p><u>Dublin III Regulation</u></p>

			<p><u>Frontex Regulation, Art. 4.1</u> Reiterates protection of fundamental rights and principle of <i>non-refoulement</i>.</p> <p><u>Schengen Borders Code</u> Art. 4 'When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter'), relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'), obligations related to access to international protection, in particular the principle of <i>non-refoulement</i>, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis'.</p> <p>CJEU</p>
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			<p>Joined Cases C 391/16, C 77/17 and C 78/17 <i>M, X, X</i>– wider protection of non-refoulement under Art 19(2) Charter than under the Refugee Convention</p> <p>C-562/13 <i>Abdida</i>– protection also for those third country nationals not qualifying for international protection</p>
Prohibition of Torture	<p>any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person in order to get information or confession, intimidate or coerce them for any reason that is discriminatory.</p> <ul style="list-style-type: none"> • absolute right, binding for all states, no limitations or derogations allowed • State Parties must take effective measures to prevent torture. • deplorable living conditions amount to torture 	<p><u>UNCAT</u></p> <p>Definition of Torture according to article 1,</p> <p>‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the</p>	<p><u>Charter of Fundamental Rights</u> Art. 4 ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.</p> <p><u>Reception Directive</u> Art. 21 ‘Member States shall take into account the specific situation of vulnerable persons(...)’</p> <p><u>Dublin III Regulations for forced returns</u></p> <p><u>Returns Directive</u>- for Returns</p> <p>CJEU</p>

		<p>instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'</p> <p><u>ICCPR Art. 7</u> 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'</p> <p><u>ECHR Art. 3 - non-derogable</u> <i>ECtHR Khan v France</i> <i>ECtHR Hirsi</i> <i>ECtHR Khlaifia</i></p> <p><u>European Convention for the Prevention of Torture and Inhumane or Degrading Treatment</u></p> <p><u>Directive on Reception Standards for rights and procedural guarantees during reception and asylum procedures</u></p>	<p>C-411/10 <i>N.S. and others</i> – systemic deficiencies in asylum procedure and reception conditions can lead to violation of Art. 4</p> <p>C-578/16 <i>C.K and others</i> -a Dublin transfer cannot take place if it would result in a real and proven risk of the person concerned suffering inhuman or degrading treatment</p> <p>C-179/11 <i>Cimade</i></p>
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Prohibition of arbitrary detention	<ul style="list-style-type: none"> Refugee Convention: non-penalisation principle: asylum seekers cannot be detained solely on grounds of seeking asylum, being subject to the Dublin transfer procedure, or mere irregular entry or stay. UN HRC: only as last resort and when 'reasonable, necessary and proportionate (UN HRC- GC 35(2014)) ECHR: 2 grounds for asylum detention in ECHR (unauthorised entry and for deportation/extradition) + detention needs not to be arbitrary (but no need to be necessary) EU Law: exhaustive list of grounds under EU law (6 grounds under the Reception Conditions Directive; one ground under the Dublin III Regulation; 2 grounds under the Return Directive) + detention has to fulfil requirements of EU Charter Art 52(1): 1) the limitations must be 	<p><u>ICCPR Art. 9 (1)</u> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.</p> <p><u>ECHR</u> Article 5 Right to liberty and security of persons</p> <p><i>ECtHR Saadi v the UK</i> <i>ECtHR Chowdury and Others v Austria</i> <i>ECHR HA and others v Greece for minors</i></p>	<p><u>EU Charter, (Article 6)</u></p> <p><u>Article 8 Reception Conditions Directive</u>, confirmed in J.N (C-601/15) and K. (C-18/16)</p> <p><u>Returns Directive (Articles 15, 16)</u></p> <p><u>Case C-808/18</u></p> <p>Cases C-924/19 PPU and C-925/19 PPU <i>FMS</i>: The obligation imposed on a third country national to remain permanently in a closed and limited transit zone, within which their movement is limited and monitored, and which the latter cannot legally leave voluntarily, in any direction whatsoever, constitutes a deprivation of liberty, characterised as 'detention' within the meaning of the Reception Conditions (RCD) and Returns Directives (RD)</p> <p>C-528/15 <i>Al Chodor</i> - relevant for</p>
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	<p>provided by law; 2) respect the essence of the right; 3) genuinely meet the objectives of general interest; 4) necessity; and 5) proportionality.</p> <ul style="list-style-type: none"> • Returnees (irregularly staying third country nationals) cannot be detained for longer than a maximum 18 months (Art 15 Return Directive) • unaccompanied minors to be detained only as last resort and with respect to dignity, family, privacy 		<p>the interpretation of the notion of 'law'</p> <p>C-534/11, Arslan, - relevant for delimiting between asylum and return based detention:</p>
Living conditions	<ul style="list-style-type: none"> • Bad living conditions amount to torture • Legitimate for the state to curtail use of public services for short term and irregular migrants • Legitimate to differentiate between certain categories of aliens and others • Reception facilities and reception conditions have to be adapted to the age of the children and ensure compliance with the principle that a family should be kept together whenever possible 	<p><u>ECHR</u>, esp.Arts 1,3 and 8</p> <p><i>ECtHR, MSS v Belgium and Greece</i></p> <p><i>ECtHR, Anakomba Yula v Belgium</i></p> <p><i>ECtHR, Slivenko v Latvia</i></p> <p><i>ECtHR, Ponomararyovi v Bulgaria</i></p> <p><i>ECtHR Niedzwiecki v Germany</i></p> <p><i>ECtHR Tarakhel v Switzerland</i></p>	<p><u>EU Charter, Art. 1 human dignity and chapter on solidarity</u></p> <p><u>Reception Conditions Directive – for asylum seekers</u></p> <p><u>Return Directive – for irregular migrants</u></p> <p>CJEU C-233/18 <i>Haqbin</i>– an UAM cannot be excluded from the material support in an asylum reception centre, even if he was the instigator of a brawl</p>

	<ul style="list-style-type: none"> Under EU law, when a Member State has opted to grant the material reception conditions in the form of financial allowances or vouchers, those allowances must be provided from the time the application for asylum is made; and the amount should ensure dignified living and adequate health, and preservation of family life and best interest of children Sanctions for breaching living rules cannot be a disproportionate limitation on fundamental rights, in particular when the asylum seekers are a minor 		<p>C-179/11:EU:C:2012:594 – access to social benefits should be provided to an asylum seeker until he/she has effectively reached the territory of the country responsible to process the asylum claim</p> <p>C-713/17 <i>Ayubi</i> – no discrimination on access to social assistance between refugees legally resident and nationals</p> <p>C-79/13 <i>Saciri</i> - material reception conditions in the form of financial allowances or vouchers must be provided from the time the application for asylum is made; and the amount should ensure dignified living and adequate health, and preservation of family life and best interest of children</p>
Socio-economic Rights	<ul style="list-style-type: none"> All states must take measures on the progressive realisation of rights irrespective of their situation Specific measures must be taken for the integration of migrants, asylum seekers and refugees 	<p><u>ICESCR</u>, Art 2: Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation,</p>	<p><u>Chapter on solidarity of EU Charter</u></p> <p><u>Qualification Directive (chapter 7)</u></p> <p><u>Reception Conditions Directive – for asylum seekers</u></p>

	<ul style="list-style-type: none"> • Non-discrimination, direct and indirect, in socio-economic measures is important • Same treatment between beneficiaries of international protection and nationals of the Member State where they are located in employment, access to education; social assistance; healthcare • Particular attention to health of undocumented women. • Special measures for housing, education and nutrition of unaccompanied children • Some restrictions allowed by only when absolutely necessary and proportionate • Same treatment in access to accommodation between beneficiaries of international protection and third country national legally resident in the 	<p>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.</p> <p><u>Refugee Convention</u></p> <p><u>International Convention of All Migrant Workers and Members of their Family</u></p> <p><u>CoE Framework Convention on National Minorities</u> (esp. for language, education)</p> <p><u>ILO Conventions</u></p>	<p><u>Return Directive – for irregular migrants</u></p> <p><i>CJEU, C-713/17 Ayubi</i></p>
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	<p>Member State where the beneficiary is present.</p> <ul style="list-style-type: none"> Member States are allowed to introduce restriction under precise conditions as set out under these Articles. Permanent housing for refugees- no ghettos 		
Right to Privacy	<ul style="list-style-type: none"> Right to Privacy restrictions only when absolutely necessary Personal data to be respected – consent essential Restrictions to right subject to lawfulness, fairness and transparency Restrictions to right only when absolutely necessary and in accordance with legality and legitimacy Migrants and asylum seekers especially vulnerable 	<p><u>ECHR</u> Art. 8 ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’</p> <p><u>ICCPR</u> Art. 17 (1) ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.’</p>	<p><u>Charter of Fundamental Rights</u> Art. 7 Everyone has the right to respect for his or her private and family life, home and communications.</p> <p>Art. 8 Everyone has the right to the protection of personal data concerning him or her.</p> <p><u>TFEU art 16</u> Right to data</p> <p><u>GDPR</u> The regulation aims to ensure data subjects rights while providing a clear and solid</p>

Right to Family Life	<ul style="list-style-type: none"> • In principle 1951 Convention applies to family members of the refugees • refusal to allow family reunification may be considered as an interference with the right to family life or to family unity • non-discrimination <p>differences between settled migrants and non-settled migrants in case law.</p>	<p><u>CRC</u> Art. 9 (1) 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'.</p> <p><u>UNHCR Guidelines on Reunification of Refugee Families.</u></p> <p><u>ECHR</u> Art. 8.1 'Everyone has the right to respect for his private and family life, his home and his correspondence.'</p> <p><i>ECtHR, Botta v Italy</i> <i>ECtHR Maslov v Austria</i></p>	<p>framework for businesses</p> <p><u>EU Charter</u> Article 7 'Everyone has the right to respect for his or her private and family life, home and communications'.</p> <p>Article 9 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'.</p> <p><u>Family Reunification Directive</u> The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States</p> <p>Qualification Directive (Art 23)</p> <p><u>Return Directive</u> Art. 14 (a) states Member States to secure, as far as possible, that family unity is maintained in cases where the removal is</p>
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			<p>postponed for practical or legal obstacles</p> <p>CJEU C-82/16 <i>K.A and Others</i>– broader definition of family member under Dublin II Regulation for the purpose of ensuring respect of family life</p>
Hate speech	<ul style="list-style-type: none"> • freedom of expression is not unlimited • states to take immediate and positive measures • an offense to disseminate ideas based on racial superiority 	<p><u>Articles 19 and 20 ICCPR</u></p> <p><u>Article 10 ECHR</u></p> <p><u>CoE Framework Convention on National Minorities</u></p>	<p>Articles 7, 22 of the <u>Victims' Rights Directive</u></p> <p>C-673/16 interpretation of 'spouse' family member and LGBT rights</p> <p>Article 1 (1) of the <u>Framework Decision on Racism and Xenophobia</u></p>
Access to justice	<ul style="list-style-type: none"> • asylum seekers must have access to a practical and effective remedy before an independent and impartial authority against a refusal of asylum or of a residence permit, or for any other complaint alleging a breach of their human rights (under EU law the remedy must be one before a court) 	<p><u>ECHR</u> <u>Art. 13 (does not have a self-standing application, but its application is tied to the application of another ECHR right) –</u></p> <p><i>ECtHR M.S.S. v. Belgium and Greece</i></p> <p><i>ECtHR Maaouia v. France</i></p>	<p>Charter (Art. 47) <u>Asylum Procedures Directive</u>, Arts. 31, 46 <u>Dublin Regulation</u> (Arts 21, 22, 25 and 29) CJEU</p> <p>C-562/13 <i>Abdida</i> - Member States have to grant suspensive effect to an appeal challenging a return decision, which may</p>

	<ul style="list-style-type: none"> Asylum seekers must be recognised the following rights: <ul style="list-style-type: none"> right to legal assistance right to interpretation during asylum proceedings right to an effective remedy right to an oral judicial hearing the appeal brought by the asylum seeker or any other migrant must have an automatic suspensive effect if the implementation of a return measure against him or her might have potentially irreversible effects contrary to the principle of non-refoulement suspensive effect of appeal is provided by EU legislation: applicants for international protection have a right to remain in the Member State's territory until the time limit to lodge an appeal has expired as well as pending the outcome of an appeal 	<p>expose the returnee to a serious risk of grave and irreversible deterioration in his or her state of health</p> <p><i>C-181/16 Gnandi v. Etat belge</i> 5 – suspensive effect of appeal in asylum and suspensive effect of the appeal in asylum on the start of the return procedure</p> <p><i>C-63/15 Ghezelbash</i> – right to an effective judicial remedy against the decision to transfer an asylum seeker to another Member State</p> <p>Joined Cases C-924/19 PPU and C-925/19 PPU <i>FMS</i> – Member States may make provision for return decisions to be challenged before non-judicial authorities (Article 13 (1) of the Return Directive), nevertheless a person subject to a return decision must, at a certain stage of the procedure, be able to challenge its lawfulness before at least one judicial body, in accordance with the right to an</p>
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			effective remedy before a tribunal guaranteed by Article 47 of the EU Charter.
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Abbreviations and links

Asylum Procedure Directive: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, <https://eur-lex.europa.eu/eli/dir/2013/32/oj>

Charter of Fundamental Rights: Charter of Fundamental Rights in the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>

FRA: Fundamental Rights Charter <https://fra.europa.eu/en/eu-charter>

CRC: Convention on the Rights of the Child, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

CJEU: Court of Justice of the European Union, https://curia.europa.eu/jcms/jcms/j_6/en/

Dublin III Regulation: Regulation No 604/2013 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:en:PDF>

ECHR: European Convention of Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf

ECtHR: European Court of Human Rights, [https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\]}](https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]})

FUD: Family Reunification Directive, Directive 2003/86/EC on the right to family reunification, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0086&from=EN>

Frontex: Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0656&from=en>

ICCPR: International Covenant on Civil and Political Rights, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

ICESCR: The International Covenant on Economic, Social and Cultural Rights, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

ILO: International Labour Organisation, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312256:NO

Qualification Directive: Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the

content of the protection granted, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>

RC: Refugee Convention, Convention and Protocol relating to the Status of Refugees, <https://www.unhcr.org/3b66c2aa10>

Reception Directive: laying down standards for the reception of applicants for international protection, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0033&from=EN>

Return Directive: Directive 2008/115/EC on Common Standards and Procedures in Member States for Returning Illegal staying third country nationals, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN>

Schengen Borders Code, on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0399&from=EN>

TEU: Treaty of the European Union, https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

TFEU: Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

UDHR: The Universal Declaration on Human Rights, https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

UNCAT: United National Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/documents/professionalinterest/cat.pdf>

GDPR: General Data Protection Regulation, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=E>

SECTION 4 – THE LEGAL FRAMEWORK ON PRIVACY AND DATA PROTECTION

Written by Francesca Pichierri and Thilo Gottschalk

4.1 The Right to Privacy

WP6 of ITFLOWS involves gathering and using data in order to predict the inflows of migrants. In doing so, the ITFLOWS team will gather and use indicators and a wide range of data. In gathering and using such data, especially data on the characteristics of migrants, refugees and local population, the right to privacy is an important guarantee to be applied.

The Right to Privacy is enshrined in almost every constitution across the globe in one form or the other and it is expressed in numerous international and regional human rights instruments. Its importance is globally recognised as well as the necessity to ensure that this right is protected.³¹⁹

Article 8 of the ECHR guarantees the right to respect for private and family life, home and correspondence.³²⁰ The right to privacy is also included in Article 17 ICCPR.³²¹ It comprises a ‘general prohibition on interference’,³²² but can be derogated in time of public emergency under specific conditions. After the Snowden revelations in 2013 and the consequent international debate regarding mass surveillance practices via new communications technologies undertaken in some states,³²³ the interest on the right to privacy was renewed. Since then, the United Nations has adopted a series of non-binding resolutions about the right to privacy in the digital age³²⁴ and established a Special Rapporteur on the right to privacy. The United

319 UN, General Assembly, The right to privacy in the digital age: Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/27/37, 30 June 2014, p. 5.

320 Article 8 (1) ECHR.

321 Article 17 ICCPR states that “no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation”. It further states that “everyone has the right to the protection of the law against such interference or attacks.” see UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

322 Handbook on European data protection law, April 2018, p. 19.

323 Privacy International, United Nations Recognition of Privacy, May 2018, available at <https://privacyinternational.org/impact/united-nations-recognition-privacy>.

324 UN, General Assembly, Resolution on the right to privacy in the digital age, A/RES/68/167, New

Nations resolutions point to the state authorities but also to the private sector's responsibilities to respect the right to privacy of individuals.

The Concept of Privacy

In the Western world, privacy has been interpreted in numerous ways, for example as the 'right to be left alone'³²⁵ or as the recent 'right to a form of informational self-determination'.³²⁶ Privacy International, which is one of the most important non-profit organisations in Europe promoting the right to privacy in the world, notices that privacy enables people to create boundaries 'to limit who has access to our bodies, places and things, as well as our communications and our information'.³²⁷ The concept of privacy remains rather broad. It describes a multi-faceted and hard to grasp right.³²⁸ There is no precise definition of privacy which is universally valid and differences in cultural attitudes play an important role in its interpretation and understanding. Furthermore, the concept is permanently evolving with society, in particular with its technological developments.

For the purposes of the ITFLOWS project, we look at privacy from a European perspective and, to make sure this fundamental right is protected, we focus on and follow the rules of the European Union legal framework in the field of privacy and data protection. Partners need to be aware of the complexity of the concept. We encourage them, while e.g. conducting interviews, to be sensitive to the different cultural and individual perceptions of privacy of migrants and asylum seekers which are coming from realities different from the European one. Within ITFLOWS these different perceptions can become relevant where individual perceptions of privacy of migrants and asylum seekers and the legal interpretation within the European

York, 18 December 2013; UN, General Assembly, Revised draft resolution on the right to privacy in the digital age, A/C.3/69/L.26/Rev.1, New York, 19 November 2014; UN, General Assembly, Revised draft resolution on the right to privacy in the digital age, A/C.3/71/L.39/Rev.1, New York, 16 November 2016; UN, Human Rights Council, The right to privacy in the digital age, A/HRC/34/L.7/Rev.1, 22 March 2017.

³²⁵ Warren and Brandeis, "The Right to Privacy", 4 Harvard Law Review 193, 1890.

³²⁶ See ECtHR, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, No. 931/13, 27 June 2017, para. 137.

³²⁷ Privacy International, What is Privacy?, October 2017, available at <https://privacyinternational.org/explainer/56/what-privacy#:~:text=United%20Nations%20Declaration%20of%20Human,against%20such%20interference%20or%20attacks.%E2%80%9D>.

³²⁸ As also stated by the European Court of Human Rights in: ECtHR, Costello-Roberts v. the United Kingdom, No. 13134/87, para. 36, March 25, 1993.

Union diverge. While individual perspectives are not legally binding, possible differences in the understanding can be critical for the enforcement of European legal standards. For example, the exertion of rights in line with the *General Data Protection Regulation* (GDPR) enables the individual to perform his/her rights based on an informed decision. It is, however, questionable if an informed decision under the GDPR is possible if the privacy implications are not or differently understood. An example may be a data subject giving consent to extensive data processing because the envisioned data processing is based on the (wrong) assumption that capabilities of European authorities are similar to the capabilities of authorities in the country of origin (e.g., limited/local sharing vs. highly-interconnected border-control/law enforcement). It would be necessary to inform the data subject in a very broad manner to overcome different perceptions.

The EU legal framework on privacy and data protection: some preliminary clarifications

This section focuses on the relevant European Union legal framework on privacy and data protection.³²⁹ It starts by providing a short and general overview of existing legal instruments that may have an influence on the data processing in the ITFLOWS project, but also on the subsequent operational use of the EUMigraTool (EMT). The section proceeds by focusing on the GDPR and on its application to the project.

A major challenge in projects such as ITFLOWS is the combination of relatively static law with very agile development and analysis processes. To depict and mitigate consequential risks from the very beginning, the following analysis combines a description of the key requirements laid down in the GDPR with a preliminary description of the envisioned data processing approaches and possible related risks to fundamental rights to privacy and data protection. We further provide example-driven general guidance on how compliance with the GDPR can be achieved with

³²⁹ For pragmatic reasons, the report focuses on the analysis of the European Union regulatory instruments on privacy and data protection. We are, however, aware of the influence and importance of the instruments passed by the Council of Europe, such as the European Convention on Human Rights and the Convention 108, which recently underwent a modernisation process. Although different, the regulatory instruments provided by both institutions (CoE and EU) are overlapping and they express common principles in the field.

regard to data subjects' rights, providing a solid foundation for privacy-preserving and compliant research and development activities in the project.

ITFLOWS is an EU funded and based project that pursues a *data-driven research and development approach* on multiple levels. Hence, the intended data processing activities and information flows within the project need to be identified as soon as possible to enable a meaningful legal evaluation and guidance. We need to distinguish between three core categories (**qualitative analysis**, **quantitative analysis** and **development**) of data processing that are expected to take place in the project. Researchers and developers are enabled to extract relevant requirements in the categories they are falling under.

At the time of writing, many technical and organisational approaches within and after the life-course of the project are subject to research (e.g. modelling approaches in WP3/4/5/6, analysis of user-requirements, WP7) are not fully clear yet and require continuous examination and guidance. The need for continuous guidance and research is reflected in T2.2 and T2.4 and the related deliverables. As a consequence, the following analysis lays out a more general overview of the frame on privacy and data protection that will be further specified over the course of the project in WP2. Future reports will address more specific requirements and aim to close the gap between the legal and technical realm in the project by means of evaluating and proposing technical and organizational measures. Thereby, WP2 will help to reduce interference with fundamental rights to data protection and privacy and ensure legal compliance with the privacy and data protection framework. The following analysis sets the foundation for that approach and provides project partners with insights on the legal framework and possible risks in the foreseen technical approaches described in the Grant Agreement (hereafter GA). This foundation will raise awareness of privacy and data protection risks that need to be considered and addressed from the start and enables the partners to pursue a privacy-by-design approach in their research and development.

4.2 Primary EU Law

From a European Union perspective, the fundamental rights to private life and to data protection are most prominently laid down in the EU primary law, namely the ***Charter of Fundamental Rights of the European Union*** (respectively in Article 7 and Article 8 of the EU Charter)³³⁰ and specified in secondary law such as the ***General Data Protection Regulation*** (GDPR). Depending on the framework, the right to data protection is either included as a subset of the right to privacy or as an individual right. In any case, the protective scope of both rights is often overlapping.

The ***Treaty on the Functioning of the European Union*** (TFEU) recognises the right to data protection in Art. 16 TFEU and requires the Union to ensure application of the fundamental right to data protection as enshrined in the ECHR.³³¹ As a consequence, the EU implemented multiple legal instruments in secondary EU law. The development of the (secondary) legal framework to privacy and data protection has been subject to constant development and change and has had to adapt to new challenges such as technological advancement.

4.3 Secondary EU Law

Following a variety of other legal instruments such as ex-***Directive EU 95/46/EC***,³³² in May 2018 the GDPR³³³ became fully operational and since then represents the ‘state-of-the-art’ of data protection within the EU. In an ever more data driven world, the GDPR aims to ensure data subjects’ rights while providing a clear and solid framework for businesses. As such, it is directly applicable in the Member States of the European Union - widely independent of the actual location of controllers and processors offering services or goods to data subjects in the EU or monitoring their

330 EU, Charter of Fundamental Rights of the European Union [2012] OJ C 364/01 and [2010] OJ C 83/389.

331 c.f. Article 6 (3) TEU.

332 EU, Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31995L0046>.

333 EU, Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/E (General Data Protection Regulation), OJ L 119, May 4, 2016, p. 1–88, see <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

behaviour.³³⁴ The GDPR was accompanied by *Directive EU 2016/680* also known as the **Data Protection Law Enforcement Directive** (DP-LED or in short LED)³³⁵ that governs the data processing in the context of law enforcement. While EU institutions themselves do not fall under the scope of GDPR or LED, the EU has its own legal framework laid down in **Regulation 2018/1725**³³⁶ that provides a widely equal level of protection to the GDPR for processing by Union institutions, bodies, offices and agencies.

The applicable frameworks highly depend on the future use cases for the EUMigraTool. Within the life-course of the project - first and foremost the GDPR - will constitute the governing and most specific legal framework that is applicable to the ITFLOWS project. If - for example - testing of the tool is conducted by Union institutions or bodies, other frameworks (e.g., Regulation 2018/1725) need to be considered. However, the currently envisioned use-cases (e.g., usage by NGOs) all fall under the scope of the GDPR. As a consequence, the following subsection outlines key legal terms and key requirements, the so-called data protection principles that ITFLOWS partners must comply with, laid down in the GDPR and recommends procedures that partners should follow to help data subjects exercise their right.

4.4 Application of GDPR and impacts on ITFLOWS

This subsection will focus on the initial analysis of the GDPR framework related to the research activity in the ITFLOWS project. In this regard, two major aspects can be distinguished for the purposes of this deliverable:

334 Article 3 (1) (2) GDPR.

335 EU, Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, OJ L 119, May 2016, p. 89-131, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602577244997&uri=CELEX:32016L0680>.

336 EU, Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 2018, p. 39-98, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725>.

1. **Processing of publicly available data sources** (e.g. T3.1, T3.2, T3.3), and
2. Processing of **primary data** such as **data from interviews** with adult migrants and asylum seekers in Greece, Italy, and Spain (Task 3.4), **workshops data** (e.g. in WP3 or in WP7) and data gathered from the **testing** of the EMT (e.g. Task 7.3).

As for the processing of publicly available data, the **processing for research purposes** (WP3 + WP4 + WP5 + WP6) and the **processing for development purposes** (WP6 - EUMigraTool) can be distinguished. Eventually, the processing conditions will be driven by operational purposes, i.e., use of the tool by end-users (WP7). The latter will be subject to evaluation in Task 2.2 and D2.3 respectively. This deliverable focuses on relevant aspects of the legal framework related to the underlying research activity and the development of the EUMigraTool to provide a solid foundation for a 'privacy-by-design' development approach. All processing of personal data in the project has to be in line with the GDPR's data protection principles. **We encourage ITFLOWS partners to minimise the processing of personal data, anonymise personal data e.g. before disseminating them to other partners and, where anonymization is not possible, apply effective pseudonymisation methods as a means to reduce the risks for the data subjects. Furthermore, we recommend that partners fully respect data subject rights.**

The data protection and privacy experts in the project will support and evaluate the partners' efforts to comply with the requirements described in this deliverable. Since compliance is an ongoing process and needs to be ensured for every new method in the project, WP2 aims to map risks and related mitigation efforts of the partners throughout the project in the following deliverables (D2.3, D2.4). It should be noted that some of the requirements described below could be subject to research exemptions pursuant to Art. 89 GDPR in conjunction with national law. This holds true in particular for Articles 15, 16, 18, 19, 20 and 21 GDPR where the exertion of these rights would render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes. However, such exemptions have to be laid down in

national law and require a collaborative case-by-case examination over the course of the project.

Definitions

Personal Data

Under the GDPR, ‘personal data’ is defined as ‘information relating to an identified or identifiable natural person (data subject)’.³³⁷ A person can be considered as 1) ‘identified’ when his or her identity is manifestly clear and distinguished from all other persons;³³⁸ 2) ‘identifiable’ when his or her identity can be established by obtaining and combining additional information. A person can be identified, directly and indirectly, ‘in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person’.³³⁹ Personal data covers information belonging to both the private and public sphere of an individual.³⁴⁰

Pseudonymised data, namely personal data which have undergone pseudonymisation (attributes that could lead to identification such as name, sex, date of birth, are replaced by a pseudonym),³⁴¹ are considered ‘information on an identifiable natural person’,³⁴² therefore they are still personal data. For example, if data are pseudonymised through encryption, re-identification is always possible by those entitled to use the decryption key linked to the pseudonym.³⁴³

In ITFLOWS, **personal data** can appear in a variety of contexts. Data can be personal data from the point of collection, but can also become personal data due to the way it is processed. ITFLOWS contains multiple pillars of processing that can potentially

³³⁷ Article 4 (1) GDPR.

³³⁸ Art. 29 Working Party, Op 4/2007 on the concept of personal data, WP 136, June 20, 2007, p. 12.

³³⁹ Article 4 (1) GDPR.

³⁴⁰ See ECtHR, *Amann v. Switzerland*, No. 27798/95, February 2000, para. 65.

³⁴¹ According to Article 4 (5) GDPR, “pseudonymisation means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person”.

³⁴² Recital 26, GDPR.

³⁴³ For more detailed and accessible information regarding the concept of personal data and its main aspects see Handbook on European data protection law, April 2018, p. 83-95.

include personal data. For the qualitative analysis that is mainly driven by interview-data; it is likely that data are related to natural persons at the point of initial collection. The quantitative analysis itself can be split up into different approaches and methodologies. While data from Twitter has an initial relation to a natural person, data from other sources (e.g. data on displacement provided by the Displacement Tracking Matrix, DTM)³⁴⁴ may be less likely to contain personal data. However, even in the latter case, the connection of multiple datasets within the project could result in subsequent relation to a natural person as described above. The existence of personal data and hence the applicability of the GDPR with all its consequences for the processing have to be examined continuously and not only at the initial collection of data.

Special categories of personal data

The GDPR identifies some types of personal data which merit enhanced protection. The processing of such '**sensitive data**', in fact, may create higher risks to the rights and freedoms of data subjects.³⁴⁵ A possible misuse of such data could be irreversible and create severe and long-term consequences on the life of individuals.³⁴⁶ Article 9 GDPR names as special categories of personal data: personal data revealing racial or ethnic origin; personal data revealing political opinions, religious or philosophical beliefs or trade union membership; personal data concerning health or sexual life or sexual orientation; genetic data and biometric data processed for the purpose of uniquely identifying a natural person.³⁴⁷

The processing of such data, in principle, is prohibited pursuant to Art. 9 (1) GDPR - unless one of the exemptions in Art. 9 (2) GDPR applies.

In ITFLOWS information on racial or ethnic origin, political opinions, religious or philosophical beliefs can play an important role as this information can constitute possible drivers for migration (e.g., persecution of religious minority groups). In particular in Task 3.4, ITFLOWS will conduct interviews with migrants and asylum

³⁴⁴ See <https://dtm.iom.int/>.

³⁴⁵ Recital 51, GDPR.

³⁴⁶ Art 29 Working Party, Advice paper on special categories of data ("sensitive data") Ap 20/2011 p4

³⁴⁷ Article 9 (1) GDPR.

seekers to identify migration drivers and trajectories. To achieve meaningful results and insights, special categories of data play an important role and can hence not be blanketly excluded. As with all personal data, the risks associated with special categories can be amplified where such information is shared and connected with other partners and datasets (e.g. to create migration flow models). Where special categories of personal data play a role in ITFLOWS, the processing must be subject to specific safeguards and mitigation measures that reduce the risks to the data subject. It will be necessary to examine the applicability of the exemptions laid down in Art. 9 (2) GDPR. One applicable exemption could be the explicit consent to the processing of those personal data for one or more specified purposes (Art. 9 (2) (a) GDPR). In this case, the interviewees must be informed about the subsequent processing of their (special categories) of personal data - for example the possible connection with other datasets by other partners. In addition, Art. 9 (2) (j) GDPR lifts the prohibition where processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89 (1) GDPR based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject. In this context, it will be necessary to conduct an analysis in how far the processing within ITFLOWS can be seen as proportionate in relation to the public interest and the pursued research purposes.

Data processing

The GDPR applies only when personal data are processed. Processing of personal data means ‘any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction’.³⁴⁸ The definition of processing is extremely broad as to include any possible operation that

³⁴⁸ Article 4 (2) GDPR.

could be performed on personal data.

In ITFLOWS the following activities are examples of processing: the collection of data from interviews, its mere storage, its analysis, the sharing of information between partners, etc.

Controllers and processors

‘Data controllers’ and ‘data processors’ are the main actors who process personal data. Under the GDPR, a ‘controller’ is defined as ‘the natural or legal person, public authority, agency or other body which, alone or jointly with others, *determines the purposes and means of the processing of personal data*’.³⁴⁹ Unless there are specific conditions laid down in national law, the controller is specified by his or her *factual* power to determine the conditions of the respective processing.³⁵⁰ A ‘processor’ is a natural or legal person who ‘*processes personal data on behalf of the controller*’,³⁵¹ following specific instructions. A processor hence must be a separate legal entity with respect to the controller and process data on the controllers’ behalf. Determining has to take place in light of concrete activities in a specific context. This means that an entity can act as a controller for some processing operations and as processor in others.³⁵² Data controllers and processors have legal responsibility for complying with the respective obligations set by the law.³⁵³

In ITFLOWS, the clear identification of which partners could be the ‘controllers’ or the ‘processors’ for certain data processing operations has not yet taken place as we are at a very early stage of the project. This process of identification is of high importance due to the varieties of players involved in the project and in the development of the EUMigraTool. Same considerations are valid for ‘third parties’ and ‘recipients’. A continuous assessment of the roles in the respective processing constellations is recommended.

349 Article 4 (7) GDPR, emphasis added.

350 c.f. Article 29 Working Party, Opinion 01/2010 on the concepts of “controller” and “processor”, WP 169, 2010, p. 8.

351 Article 4 (8) GDPR, emphasis added.

352 Article 29 Working Party, Opinion 01/2010 on the concepts of “controller” and “processor”, WP 169, 2010, p. 24.

353 See in particular chapter IV GDPR.

Third Party

According to Article 4 (10) GDPR, a ‘third party’ is ‘a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorised to process personal data’.³⁵⁴ A third party could hence be described as a subject without a specific legitimation or authorization (e.g. stemming from a role as controller or processor) to process personal data.³⁵⁵

Recipient

The term ‘recipient’ means ‘a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not’.³⁵⁶ However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing.³⁵⁷

Consent

‘Consent’ of the data subject means ‘any *freely given, specific, informed and unambiguous indication of the data subject's wishes* by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her’.³⁵⁸

Consent must be given by a ‘clear affirmative act’ (a written/oral statement or an action).³⁵⁹ The indication of the data subject’s agreement to the processing must be:

³⁵⁴ Article 4 (10) GDPR.

³⁵⁵ Article 29 Working Party, Opinion 01/2010 on the concepts of “controller” and “processor”, WP 169, 2010, p. 31.

³⁵⁶ Article 4 (9) GDPR.

³⁵⁷ Article 4 (9) GDPR.

³⁵⁸ Article 4 (11) GDPR, emphasis added.

³⁵⁹ Recital 32 GDPR.

- 1) **Unambiguous**, namely no reasonable doubts should exist regarding whether or not the data subject wanted to communicate his or her agreement (e.g. consent cannot be deduced from silence);³⁶⁰
- 2) **Freely given**, which means that no pressure of any kind must be exercised on the data subject when consenting (no deception, intimidation, take advantage of imbalance of power etc.);³⁶¹ the GDPR specifies that consent is not considered freely given 'if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment';³⁶²
- 3) **Informed**, namely the data subject must have all the necessary information about the subject matter requiring consent as well as information regarding the implications and consequences of consenting before taking decisions; furthermore, data subjects must be informed that they are free to withdraw consent at any time without any negative consequence³⁶³ and that they have the opportunity to give their consent 'only to certain areas of research or parts of research projects to the extent allowed by the intended purpose';³⁶⁴ descriptions/communications need to be precise and easily understandable while the language clear and adapted to the addressees of the information³⁶⁵ (e.g. risks of misunderstandings with incorrect translations); partners should be extremely careful about meeting the needs of migrants and asylum seekers and adapting their requests and their consent forms to the specific case;

360 Kuner C., *European Data Protection Law*, Oxford University Press, 2007, p. 67-69.

361 See Article 29 Working Party, Opinion 15/2011 on the notion of consent, WP 187, Brussels, July 13, 2011, p. 12; according to Recital 43 GDPR, "Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance".

362 Recital 42 GDPR.

363 See Article 7 (3) GDPR.

364 See Recital 33 GDPR.

365 For more detailed and accessible information on this see Handbook on European data protection law, April 2018, p. 142-150.

- 4) **Specific** to the purpose of the processing; in fact, Recital 32 specifies that 'when the processing has multiple purposes, consent should be given for all of them'.³⁶⁶

We recommend ITFLOWS partners to obtain a freely given, specific, informed and unambiguous consent from the data subjects *in a written form and prior to their involvement in the research activities*. The series of criteria set by the GDPR for consent to be legally valid will be further discussed in the next deliverables.

General Requirements

The GDPR sets out key principles governing the processing of personal data in Article 5. These principles include: lawfulness, fairness and transparency; purpose limitation; data minimisation; data accuracy; storage limitation; integrity and confidentiality.

Lawfulness, fairness and transparency

According to Article 5 (1) (a) GDPR, the processing of personal data in ITFLOWS must be 'lawful, fair and transparent' in relation to the data subject concerned.

Lawful processing requires either a) consent of the data subject; b) necessity to enter a contract; c) necessity to comply with legal obligation; d) necessity to protect the vital interests of the data subject or of another natural person; e) necessity for the performance of a task carried out in the public interest; f) necessity for the purposes of the legitimate interests pursued by the controller or a third party, if such interests are not overridden by the interests or rights and freedoms of the data subject.³⁶⁷

Fair processing relates mainly to the relationship between the controller and the data subject. The data subject must not be deceived in order to obtain data. Processing activities must be clear, transparent and conducted in an ethical

³⁶⁶ Recital 32 GDPR.

³⁶⁷ Article 6 GDPR.

manner;³⁶⁸ the potential risks should be highlighted so that the data subject has a broad and complete overview of the pros and cons of the data processing.

Transparency provides a solid foundation for the exercise of data subject rights (see subsection 3 on Data Subject Rights). Pursuant to this principle, the controller is obliged to take any appropriate measures to keep the data subject informed regarding the processing of his/her personal data before and during the processing activities and also in regard to a request of access.³⁶⁹ According to Article 13 GDPR, at least the following information should be included:

- **The identity and the contact details of the controller and, where applicable, of the controller's representative;**

In the context of ITFLOWS, there are, in principle, two possible points of contact for data subjects. On the one side, data subjects can reach out to the project coordinator (UAB) as a representative of the consortium members. On the other, the data subjects can reach out to each processing partner individually.

- **The contact details of the data protection officer, where applicable;**

Where applicable, the contact details of DPOs of the respective partner in the consortium have to be published. Most commonly, this information is published in the Privacy Statement of the project website.³⁷⁰

- **The purposes of the processing for which the personal data are intended as well as the legal basis for the processing;**

The purposes for the processing (c.f. above) need to be described as transparent as possible. In line with the described purposes, the legal bases for different approaches need to be published as well.

- **Where the processing is based on point (f) of Article 6 (1), the legitimate interests pursued by the controller or by a third party;**

³⁶⁸ See Handbook on European data protection law, April 2018, p. 117-119.

³⁶⁹ Article 12-15 GDPR.

³⁷⁰ ITFLOWS.eu

As some of the processing in ITFLOWS is likely to be based on Art. 6 (1) (f) GDPR, the legitimate interests need to be described. These interests need to be identified for each individual partner individually.

- **The recipients or categories of recipients of the personal data, if any;**

If data is shared with others, the recipients of personal data need to be described. In a project such as ITFLOWS it is expected that data is shared between Work Packages (WP) and partners. Consequently, the data flows in the project need to be described in a transparent manner. The data flows will be identified as part of the Data Management Plan (D1.1), the outcomes should be included in the publicly available privacy statement.

- **Where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available.**

Transfers of personal data to third countries are not planned for the project. However, data driven approaches often rely on external services that host and/or process data in third countries. Following the legal uncertainty of the Schrems-II decision³⁷¹, such constellations should at least be avoided for data-transfers to the USA but also to other third countries as far as possible. If transfers are necessary, such transfers must not undermine the data protection standards of the EU.

Purpose Limitation

Purposes for the processing of personal data must be **specified, explicit** and **legitimate**.³⁷² The *specification* of the purpose is necessary to delimit the scope of

³⁷¹<http://curia.europa.eu/juris/document/document.jsf?jsessionid=AA9E1B5E01AA87A04BBC0406F86D427A?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8819350>

³⁷² Article 5 (1) (b) GDPR.

the processing; it enables the controller to implement any necessary safeguards and the data subject to effectively exercise his/her rights (e.g. the right to object to processing).³⁷³ The purpose must further be *explicit*, i.e. it has to be unambiguous and clearly expressed. It also has to be legitimate, i.e. in line with the law. The latter comprises the necessity to have a legal ground but also requires compliance with other legal principles. **The purpose of processing must be defined before processing is started.**

Furthermore, Article 5 GDPR specifies that **personal data must not be further processed in a manner that is incompatible with the original purposes**;³⁷⁴ compatibility needs to be assessed on a case-by-case basis. Each new purpose for data processing incompatible with the initial one must have its own specific legal basis. Exceptions to the rule, however, are considered for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes,³⁷⁵ with the application of appropriate safeguards (e.g. anonymisation).³⁷⁶

ITFLOWS will conduct a variety of data driven (quantitative) as well as qualitative analyses. Each individual approach needs to be in line with the principle of purpose limitation. The following sections outline the most important aspects in the respective analysis-pillar in ITFLOWS.

Qualitative Analysis

The qualitative analysis in ITFLOWS mainly consists of classic literature research (Task 3.1) and the conduct of interviews (Task 3.4). While the first approach is unlikely to include personal data that would result in the applicability of the GDPR, the second approach will most likely result in the processing of personal data. Interviews will be conducted/handled by CRI, OCC, OIT, IAI and UAB in two rounds during M7 to M11. ITFLOWS acknowledged the need for data protection in this context. However, specific concepts for the processing of such data have yet to be set up.

373 See Art 29 Working Party, WP 203, Op 03/2013 on purpose limitation, Ap 2, 2013, p. 12-14.

374 Article 5 (1) (b) GDPR.

375 Ibid.

376 Article 6 (4) GDPR; Recital 50 GDPR.

Specific: The interviews and the associated data processing will be conducted for the *research purposes* laid down in the Grant Agreement, i.e. to *gain an in-depth understanding of why, where and how people move*. The interviews will be used to shed light on motivations, intentions and personal experiences. The outcomes are intended to be used as factors to fine-tune models to predict propensity and direction of migration in WP6. As fine-tuning models are most likely not dependent on personal data per se, the interview data should be anonymised/pseudonymised as far as possible for the specified purpose.

Explicit: The conducting partners need to agree on and define concrete usage and re-usage conditions for the collected interview data. Given the unified interview structure and common approach, the conducting partners (CRI, OCC, OIT) will most likely act as joint-controllers (Art. 26 (1) GDPR). It is hence necessary to jointly and explicitly define the conditions of the interviews e.g. how interviews will be conducted (record + audio-transcription, questionnaires, etc.). In general, the documentation should include details on how compliance with all data protection principles laid out in this deliverable is ensured. These conditions shall not only be documented internally but should be laid down in the informed consent form (see Req. Transparency).

Legitimate: The processing of interview data can only take place for legitimate purposes. As such the qualitative analysis of personal data must be in accordance with all provisions of applicable law - this includes not only data protection law but also other legal frameworks. *The processing of interview data will be based on informed consent of the interviewee* (Art. 6 (1) (a) GDPR).

Quantitative Analysis

The quantitative analysis in the ITFLOWS project will be based on multiple data driven approaches such as *Twitter* and *Google Trend Analysis* (T3.3, T5.3), *IOM Displacement Tracking Matrix data* and *high-frequency information* (T3.2), *panel data* (T4.1). Additional data sources will be identified over the course of the project (T4.2).

Specific: The purposes of the quantitative analysis are twofold. First, possible

algorithms and metrics for the analysis and prediction of migration flows will be examined to get additional insights (*research*), second the analysis will be used for the prediction of migration flows (*prediction/operation*). To be able to do so, the secondary purpose must be sufficiently specified and compatible with the initial purpose.

Explicit: The data processing purposes have to be explicitly defined. This means that each institution needs to *define and document their individual data sources and processing methodologies* (micro-level). The micro-level processing documentation provides a foundation for the comprehensive processing documentation in ITFLOWS (macro-level). Both levels need to be addressed and documented to ensure explicit definition of the respective purposes.

Legitimate: The quantitative analysis conducted in the project must further be legitimate. That means the processing - where it encompasses personal data - requires a sufficiently detailed legal basis for the processing and must be in line with all other applicable legal principles. The quantitative analysis in the project pursues two goals. On the one side it is *necessary to research data driven approaches in the analysis of migration patterns*. On the other, the methods will be *reused continuously in the EMT* that is developed in the project. Consequently, the chosen approaches for analysing data should ideally be compatible not only in the research realm, but also in operational scenarios. The analysis of publicly available big data usually precludes informed consent of the data subject (Art. 6 (1) (a) GDPR). As indicated by the public funding of the project, the processing for research purposes will most likely be based on Art. 6 (1) (e) GDPR - i.e. to *perform 'a task in the public interest'* that is further specified in the Grant Agreement of the project and initially described in the related EU-funding call (H2020-SU-SEC-2019). Processing of personal data that exceeds this scope could be based on Art. 6 (1) (f) GDPR. However, since the data processing approaches are not yet known in detail, an analysis of the applicable legal basis needs to be conducted on a case-by-case basis over the course of the project.

Similarly, a possible legal basis for the operational use of the EMT that incorporates quantitative analysis methods needs to be examined over the course of the project.

Development

Like quantitative analysis, the legal impacts for the development are governed on two levels. First, *the development itself must comply with the GDPR where personal data are processed*. Second, since the development of the EMT should result in an exploitable tool, *the outcomes of the development process must allow end-users' legally compliant use of the EMT*. Therefore, possible end-user scenarios must be defined and their specific legal, technical and operational requirements observed and aligned in the development of the tool (e.g. privacy-by-design).

Specific: The purpose of the development of the EMT needs to be sufficiently specified. The development is expected to result in a TRL6 tool - i.e. the tool should be demonstrable in a relevant environment. Since the purpose of the development is closely related to the envisioned use-cases, it will hence be necessary to specify such environments over the course of the project. The GA (T7.1) specifies three lead users (OCC, OIT, CRI) and requires at least 10 external practitioners.³⁷⁷ Currently, the user board consists of 12 parties that have been identified in WP7.³⁷⁸ Based on interaction with the user board (e.g. in Workshops), the identified requirements will provide a basis for further specification of the purposes in the data processing of the project.

According to Table 3.2.2., these practitioners could be local authorities as well as CSOs. However, the specific roles of the User will be determined through individual agreements. The purpose of the data processing during development is hence particularly driven (i.e. limited and governed) by external factors - namely the input of the members of the user board.

Explicit: The purpose for the processing of personal data during the development has to be explicitly described. Logically, the explicit description is dependent on the sufficient specification of the purpose (see above). At this point, the specification of development purposes is not sufficiently clear as it is driven by the future/ongoing

³⁷⁷ c.f. GA, Technical Annex p.43

³⁷⁸ Namely Network for Children's Rights, Federazione delle Chiese Evangeliche in Italia, Danish Refugee Council, Red Solidaria de Acogida, CVS bulgaria, Associazione Iroko, Associazione Multietnica del Mediatori Interculturali, Associazione Penelope Coordinamento solidarieta sociale onlus, Red Cross Greece, Red Cross Malaga, Municipality of Katerini, Municipality of Settima Torinese.

input from the User Board (UB).

Legitimate: As pointed out above, the processing in the development context must be legitimate - i.e. it requires a legal basis and must comply with all legal requirements. As such, the development itself is bound to the GDPR and is governed by the purposes defined in the Grant Agreement and the related EU call for proposals. In addition, *development is further governed by future application of the developed tools (EMT)*. For example, personal data processing by Frontex falls outside the scope of the GDPR and - as a EU agency - is governed by Regulation EU 2018/1725. The data processing in this context could be based on Art. 48 (1) (d) in conjunction with Art. 49 (1) Regulation EU 2019/1896.³⁷⁹ In contrast, processing by NGOs would fall under the scope of the GDPR and could, among others, be based on legitimate interest, contractual obligations or public interest. Cooperation between multiple actors (e.g. NGO and Frontex) - could further result in additional contractual requirements for the users of the tools. As a consequence, the examination of legitimacy of the development must include not only the development process itself but also potential envisioned use-cases for the tool.

Data Minimisation

Article 5 (1) (c) GDPR breaks down the concept of ‘data minimisation’: personal data must be ‘adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed’.³⁸⁰ It is hence necessary to *examine the minimum amount of personal data that is needed to fulfil the legitimate purpose* (see above). The impact is highly dependent on the purposes of the processing and can, therefore, differ between the different approaches that are pursued within ITFLOWS. For each approach, the necessary safeguards (e.g. anonymisation) have to be put in place and documented prior to the processing of data. This principle also remains applicable under the research exemptions as laid down in Article 89 GDPR.

Qualitative Analysis

For the qualitative analysis in the project, the collected data has to be minimised

³⁷⁹<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1573722151667&uri=CELEX:32019R1896>
³⁸⁰ Article 5 (1) (c) GDPR.

towards what is actually needed. This principle hence has implications for the design of the interview questionnaire insofar as only questions relevant to the purposes of the project should be included and only relevant information should be stored. For example, if the gender of the participant is irrelevant for the analysis of the outcomes, it should not be stored.

Quantitative Analysis

Data minimisation in the realm of quantitative analysis is often a difficult component. Data collection and processing should not happen on an unplanned trial-and-error basis but *require a specific research conception and planning* that is implemented in the project. This does not mean that ‘big data’ approaches are not possible under the GDPR but rather that *the scope of the collected and processed data must be aligned with the specific purposes (see above)*. Bulk-datasets that include personal data should hence be cleaned as far as possible without undermining the research approach, prior to any further processing. This principle applies to all steps of the quantitative analysis (i.e. Framing, Collection, Analysis). Where possible anonymous data should be used. For example, T3.2 will use approaches similar to Backhaus³⁸¹ to analyse relevant conditions in transit countries such as infrastructure quality, conflicts, climatic conditions and governance indicators.³⁸² The findings will then be incorporated into a dataset on bilateral migration flows. This data, on its own, does not constitute a particularly high risk to natural persons as it is mostly anonymous aggregated data. However, where this data is intended to be connected with more critical datasets (e.g. Twitter data) the connection between these datasets should be limited to what is absolutely necessary for the respective research purpose.

In a second analysis, the time sequence of migration to neighbouring and transit countries will be examined. The analysis will combine data from the IOM Displacement Tracking Matrix (DTM)³⁸³ with high-frequency information on conflict and climatic developments in origin countries. The targeted data for this research approach is expected to be of non-personal nature at the point of collection.

381 Backhaus, A., Martinez-Zarzoso, I. & Muris, C. Do climate variations explain bilateral migration? A gravity model analysis. IZA J Migration 4, 3 (2015). <https://doi.org/10.1186/s40176-014-0026-3>

382 c.f. p. 100, ITFLOWS GA.

383 <https://displacement.iom.int/>.

In consequence, the data minimization principle only applies where connection to personal data is made.

Development

During the development process it is necessary to keep the principle in mind and to ensure that compliance with data minimization is achieved on a technical level where personal data is processed. Since the EMT design is part of the project, the implementation of this principle will further contribute to the concept of 'privacy-by-design' and should be included in the dialogue between the technological partners (WP3/4/5/6) as well as in T6.1 where publicly available data sources are specified.

Storage Limitation

Similar to the data minimisation, the storage limitation principle aims to reduce the scope of data processing by requiring that the data controller store data 'which permits identification of data subject *for no longer than is necessary for the purposes for which the personal data are processed*'.³⁸⁴ Personal data must be deleted or anonymised as soon as they are no longer needed and purposes for the data processing have been achieved. It is hence necessary to specify, for example, retention dates for such data.³⁸⁵

Personal data may be stored for longer periods if they are processed exclusively for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89 (1); implementation of the appropriate technical and organisational measures is required by the law in order to safeguard the rights of individuals.³⁸⁶

Qualitative Analysis

Although, there is no universally valid definition of research, the interviews and qualitative analysis conducted in T3.4 can be seen as 'systematic activity' which

³⁸⁴ Article 5 (1) (e) GDPR, emphasis added.

³⁸⁵ Recital 39 GDPR.

³⁸⁶ Article 5 (1) (e) GDPR.

‘increases the stock of understanding and knowledge and their application’.³⁸⁷ As a consequence, this Task potentially falls under the research exemption of the GDPR (Art. 89 GDPR).

Quantitative Analysis

The use of machine-learning algorithms to process large volumes of data bears a specific risk to build up profiles of individuals. For example, connecting migration routes with twitter data could easily provide individual migrants’ and refugees’ routes for a specific data subject. The principle of storage limitation aims to reduce this risk by requiring the controller to retain personal data for no longer than necessary and proportionate for the purposes of the research within the project.

Development

Development of the EMT is unlikely to fall under the research exemptions of Art 89 GDPR. In addition, the development of the tools has to include specific storage limitations that might be applicable in envisioned contexts (e.g. Frontex specifications on deleting personal data of returnees after 30 days³⁸⁸ or after 3 months³⁸⁹). It would hence be desirable to have flexible mechanisms in place to ensure compliance in all envisioned use-cases. The flexibility further ensures sustainability of the EMT, even if new/other legal frameworks require other retention times.

Accuracy

Personal data has to be ‘accurate and, where necessary, kept up to date’.³⁹⁰ The principle of accuracy must be put into effect by the controller in every processing activity. Reasonable steps must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay.³⁹¹

387 c.f. EDPS, A Preliminary Opinion on data protection and scientific research (06.01.2020), p.9, https://edps.europa.eu/sites/edp/files/publication/20-01-06_opinion_research_en.pdf; c.f. <https://stats.oecd.org/glossary/detail.asp?ID=2206>

388 https://frontex.europa.eu/assets/Data_Protection/Data_Protection_Notice_Returns.pdf

389 https://frontex.europa.eu/assets/Data_Protection/Privacy_Statement.pdf

390 Article 5 (1) (d) GDPR.

391 Ibid.

Qualitative Analysis

For the qualitative analysis, the accuracy of data is mainly reflected in correct representation of the interview outcomes. While there is, by default, no guarantee for the accuracy of the outcomes of the analysis, it must be ensured that the source data is complete and accurate. For example, the participation of cultural mediators during interviews is highly recommended as it may be in favour of data accuracy. In addition, the analysis of the data should be based on accepted and proven methodologies (e.g. attributional coding, grounded theory³⁹², attribution theory³⁹³) for the analysis of semi-structured interviews.

Quantitative Analysis

Data accuracy in the realm of quantitative analysis is a major challenge in data driven approaches. For ITFLOWS this challenge arises in multiple work packages and tasks. All data driven tasks (e.g. T3.2, 3.3, 3.4, 4.1, 4.2) in the project are prone to inaccuracies in the processing of data. While many of the tasks will not process personal data in the first place, special attention should be drawn on possibilities of connecting personal and non-personal sources of information. *It will be a major challenge in the project to address the accuracy of certain applied methodologies and approaches due to the lack of ground-truth.*

Development

In the development phase, challenges similar to quantitative analysis can arise. Beyond making the EMT as accurate as possible, the lack of ground-truth to test models against (future) realities needs to be addressed in the development of the EMT. For example, it could be necessary to make end-users aware of possible *false positives* (e.g. in sentiment analysis) that could lead to false actions or impressions against individuals or groups. Such challenges and related technical and operational mitigation measures will be addressed over the course of the project as they depend on the context of use and technical possibilities.

392 Glaser & Strauss, "The Discovery of Grounded Theory - Strategies for Qualitative Research" (1967), http://www.sxf.uevora.pt/wp-content/uploads/2013/03/Glaser_1967.pdf

393 e.g. Weiner, Bernard, "Attribution Theory, Achievement Motivation and the Educational Process" (1972), <https://journals.sagepub.com/doi/pdf/10.3102/00346543042002203>

Integrity and confidentiality

Pursuant to Article 5 (1) (f) GDPR, processing of personal data has to ensure 'appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures'. For ITFLOWS this becomes relevant on multiple levels. On the internal level, the project has to develop and integrate safeguards to protect the integrity of all data. On the macro level such safeguards will be defined as part of the Data Management Plan (D1.1) and have to be integrated in all research and development activity in the project. Appropriate measures in this regard are independent of the type of analysis conducted but ensure integrity of the data in the respective context. Such measures are, for example:

- **Equipment Access Control:** Only authorised persons should be able to access and use equipment to process personal data;
- **Data media control:** Measures to prevent unauthorised reading, copying, modification or removal of personal data should be in place (e.g. encryption);
- **Data access control:** The EMT and other used/developed tools have to ensure that only authorised persons can use the software to process personal data. The level/scope of access to the data should be governed by the principle of purpose limitation;
- **Storage control:** Data should be stored in a way that prevents unwanted alteration of the data (e.g. encryption). The level of protection depends on the type of data and the risks related thereto. Data should also be held in a secure physical environment;
- **Communication control:** Measures to verify and establish the bodies to which personal data has been or will be transmitted have to be in place;
- **Input control:** It should be transparent who and when personal data has been added to (automated) processing systems;

- **Recovery:** Technical systems that process personal data should be set up in a way that allow restoration of (personal) data in case of unforeseen interruptions;
- **Reliability:** The software used and developed in ITFLOWS has to ensure correct performance and report faults/errors in the processing. Where novel methodologies and approaches are conducted the correct interpretation of errors has to be ensured through the use of a sufficiently qualified researcher;
- **Integrity:** It should be ensured that data cannot be corrupted by malfunctioning of the system. The appropriate safeguards depend on the type of data and the related risks;
- **Pseudonymisation:** Pseudonymising data, namely replacing the attributes in personal data with a pseudonym and keeping the attributes separate, is another good example of an appropriate technical and organisational measure that can be implemented in the project.

All of the abovementioned concepts should be taken into consideration when personal data is processed within ITFLOWS. The necessary safeguards have to be specified on case-by-case basis in collaboration with legal experts in the project for each use case. The appropriateness of security measures has to be reviewed regularly.

Accountability

The principle of accountability generally refers to the controller of the data processing although processors are also expected to be accountable as they have to comply with several obligations. Pursuant to Article 5 (2) GDPR, the controller must be 'responsible for, and be able to demonstrate compliance with' the data protection principles described in Art. 5 (1) and laid out in this section. Controllers can facilitate compliance by e.g. ensuring privacy by design and by default;³⁹⁴ by recording

394 Article 25 GDPR.

processing operations;³⁹⁵ by adhering to approved codes of conduct and certification.³⁹⁶ The algorithms used to analyse personal data should be understood by the controller and in principle open to scrutiny by external parties (e.g. supervisory authorities).³⁹⁷ This principle is applicable in all project contexts (qualitative analysis, quantitative analysis, development) as well as in operational use (e.g. by FRONTEX; NGOs). Since end-users of the tool are unlikely to understand the underlying processing, it should be ensured that they receive sufficient training to understand the implemented functions and approaches (e.g. differences between deterministic and probabilistic approaches). The controller further has to determine the risk to the rights and freedoms of natural persons.³⁹⁸ To be able to do so, the partners will be supported and guided by the legal experts in WP2.

4.5 Data Subject Rights

In addition to the data protection principles explained in above, the controller further has to implement mechanisms to comply with the right of the data subject laid down in Chapter III of the GDPR. The following sections describe the data subject's rights. The procedures regarding the exertion of individual rights are specified on multiple levels (e.g. in the Data Management Plan, the interview methodology or informed consent forms).

Articles 13 & 14: Information to be provided to the data subject

The GDPR differs between information that has been collected from the data subject (e.g. interviews in Task 3.1, 3.4) (Article 13 GDPR) and information that has not been obtained from the data subject (e.g. Task 3.2, 3.3, 4.1, 4.2) (Article 14 GDPR). Both cases require the controller to provide the data subject with comprehensive and clear information about the data processing.³⁹⁹ The scope of the provided information must be widely in line with the transparency requirements (e.g. contact

³⁹⁵ Article 30 GDPR.

³⁹⁶ Article 40 and Article 42 GDPR.

³⁹⁷ WP29, WP173, "Opinion 3/2010 on the principle of accountability", https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp173_en.pdf

³⁹⁸ c.f. Recital 85 GDPR

³⁹⁹ See also Article 12 GDPR.

details of controller and DPO, purposes, legal basis, legitimate interests, recipients, transfers). In addition, specific information that ensures fairness and transparency of the processing has to be provided. Such information includes, retention dates, rights of the data subject (see below), existence of automated decision making, including profiling, and meaningful information about the logic involved (Article 13 (1), Article 14 (2) GDPR).

In cases of direct collection, the data subject has to be directly provided with all the relevant information. If data is not directly obtained from the data subject the same obligations principally apply. However, if the provision of information to the data subject proves impossible or would involve disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards of Art. 89 (1) GDPR, the obligation to inform will not apply.⁴⁰⁰ In ITFLOWS, the provision of information to data subjects could potentially involve a disproportionate effort especially in the context of quantitative analysis and the development of the EMT. If this is the case, alternative mechanisms have to be implemented to ensure the data subject receives the necessary information. One way to achieve this, can be publication of the information on the project website or through other publicly available channels. The appropriate measure will have to be identified and updated over the course of the project for the tasks in the project.

Article 15: Right of access by the data subject

The right to access one's own data is recognized by Article 15 GDPR. In line with the information obligations from Article 13 and 14 GDPR, the data subject has the right to obtain from the controller 'confirmation as to whether or not personal data concerning him or her are being processed'⁴⁰¹; furthermore, where that is the case, the data subject has the right to access his or her personal data and, in principle, certain information about the processing as laid down in Article 13 and 14 GDPR (purposes, categories of personal data, recipients, retention dates, right of the data subject, provenance information, existence of automated decision making). On

⁴⁰⁰ Article 14 (5) (b)-(e).

⁴⁰¹ Article 15 (1) GDPR.

request, the data controller must provide a copy of the personal data processed to the data subject.⁴⁰²

Article 16: Right to rectification

Pursuant to Article 16 GDPR, the data subject has a right to obtain rectification of inaccurate personal data concerning him or her. Inaccurate personal data must be rectified without undue delay. Especially in the context of machine learning and probabilistic approaches, this right will need specific examination over the course of the project. The application of this right to probabilistic data processing approaches is subject to ongoing discussion. The initial exertiation and application of the right does not sound too difficult, however - future processing must ensure that the rectified data points stay intact. For example, the processing of a tweet results in a certain sentiment-score. The data subject argues and proves that the sentiment-data is wrong and wants the data to be rectified. Even if the data is corrected in that specific dataset it must be ensured that future iterations of the sentiment analysis do not reproduce the initial (faulty) outcome. If and to what degree such problems actually arise in ITFLOWS is subject to future research and requires further clarification. This will particularly take place as part of Task 2.3 and Task 2.4.

Article 17: Right to erasure (right to be forgotten)

The data subject further has the right to obtain from the controller the erasure of personal data concerning him or her without undue delay.⁴⁰³ Consequently, ITFLOWS has to have measures in place to ensure complete erasure of personal data if requested by the data subject. For example, if interviewees want their personal data to be erased from the project, the respective partners in ITFLOWS must ensure that data is not only erased at the initial point of collection (NGO) but rather at all locations in the project. This right applies where e.g. personal data are no longer necessary for the purposes of the data processing; the data subject withdraws consent; personal data have been unlawfully processed.⁴⁰⁴ Exceptions to the right to

⁴⁰² Article 15 (3) GDPR.

⁴⁰³ Article 17 GDPR.

⁴⁰⁴ See Article 17 GDPR.

erasure are listed in Article 17 (3).

Article 18: Right to restriction of processing

Where the accuracy of the personal data is contested (e.g. Twitter analysis), unlawful, the data are not needed by the controller but are required by the data subject or a verification of an objection pursuant to Art. 21 (see below) is pending, the data subject has the right to obtain from the controller the restriction of processing.⁴⁰⁵ In these cases, processing is only allowed with specific consent of the data subject or for establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest of the Union or of a Member State.⁴⁰⁶ In addition, the controller has to inform the data subject when the restriction is lifted.⁴⁰⁷

In ITFLOWS, each controller has to implement measures to ensure compliance with this right. As such, each partner should implement technical (e.g. exclude specific users from the Twitter sentiment analysis) and organisational measures (e.g. concept to avoid processing of specific interview-data in the project) to ensure that the restriction of processing is efficiently enforced.⁴⁰⁸

Article 19: Obligation to notify regarding rectification or erasure of personal data or processing restriction

According to Article 19 GDPR, the controller must communicate any rectification or erasure of personal data or any processing restriction to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. If the data subject requests it, the controller must inform the data subject about those recipients.

Article 20: Right to data portability

If the data was provided based on consent or a contract and the processing is carried out by automated means, the data subject further has the right to receive personal

⁴⁰⁵ Article 18 (1) GDPR.

⁴⁰⁶ Article 18 (2) GDPR.

⁴⁰⁷ Article 18 (3) GDPR.

⁴⁰⁸ See also Recital 67 GDPR.

data concerning him/her ‘in a structured, commonly used and machine-readable format’;⁴⁰⁹ Furthermore, the data subject has ‘the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided’.⁴¹⁰

As a consequence, ITFLOWS partners who process data based on consent (e.g. interviews), have to ensure that the data subject can be provided with his or her personal data (e.g. transcripts) on request.⁴¹¹

Article 21: Right to object automated decision making

According to Article 21 GDPR, the data subject has the right to object to automatic decision making, on grounds relating to his or her particular situation, at any time, where the legal basis for the processing is the controller’s performance of a task carried out in the public interest (Article 6 (1) (e)), or where the processing is based on the legitimate interests pursued by the controller (Article 6 (1) (f)). The right applies to profiling activities.

In these cases, the respective ITFLOWS partners can no longer process the personal data unless they demonstrate ‘compelling legitimate grounds that override the interests, rights and freedoms of the data subject or if the processing is required for the establishment, exercise or defence of legal claims’.⁴¹²

However, pursuant to Art. 21 (6) GDPR, where personal data are processed for scientific or historical research purposes or statistical purposes pursuant to Article 89 (1), the data subject, on grounds relating to his or her particular situation, must have the right to object to processing of personal data concerning him or her (unless the processing is necessary for the performance of a task carried out for reasons of public interest). In the context of ITFLOWS this means that on exertion of this right the reasons of public interests need to be included in the balancing on a case-by-case basis to evaluate the importance of the respective data to achieve the project

⁴⁰⁹ Article 20 (1) GDPR.

⁴¹⁰ Ibid.

⁴¹¹ See also Recital 68 GDPR and Article 29 Working Party (2016), Guidelines on the right to data portability, WP242, December 2016, revised in April 2017.

⁴¹² Article 21 (1) GDPR.

goals.

Article 22: Automated individual-decision making

Pursuant to Art. 22 (1), GDPR the data subject has the right not to be subject to a decision solely based on automated processing, including profiling, which produces either legal or similarly significant effect on him or her.

It is expected that the processing in the research context of the project will not result in legal or similarly significant effects. However, the outcomes of the tools could potentially have such effects if it is used to steer border control or to evaluate asylum applications. It is hence necessary to either exclude such use cases on a technical level or at least implement (technical) safeguards that avoid unwanted automated processing.

Section 5 - ETHICAL ISSUES IN ITFLOWS

Written by Mario Macías, Andrea Guillén and Emma Teodoro

5.1 Introduction

The aim of this section is twofold: i) identifying an ethical framework for the Project in strict compliance with the highest standards of the Research Ethics and the Responsible Research and Innovation (RRI) framework of the European Commission⁴¹³; ii) and, providing ethical guidelines on human participation, data protection and misuse for ITFLOWS researchers in charge of carrying out qualitative research activities.

The ITFLOWS Consortium is fully aware of the risks and their potential impacts in terms of jeopardising human rights that both empirical migration research activities and technological developments foreseen in the Project may pose as described in Section 5 (Ethics) of the proposal. Preliminary risks assessments on human rights, with a particular emphasis on data protection, and ethical and societal impacts conducted at this early stage of ITFLOWS certified the need of setting up a dedicated ethical and legal strategy to mitigate negative impacts on individual's fundamental rights. This **strategy for the monitoring of the ethical and legal implications** of the ITFLOWS research activities consists of the following four stages:

- **Stage 1: Knowledge acquisition:** This stage entails the extraction of the requirements needed to be met when conducting empirical research activities (empirical requirements) and developing the EUMigraTool (technical requirements) within the Project.
- **Stage 2: Assessing the risks:** Human rights, ethical and societal risk assessments will be conducted with the aim of identifying, monitoring and minimising potential risks. These risks assessments will be updated when necessary during the lifecycle of the Project.

413 <https://ec.europa.eu/programmes/horizon2020/en/h2020-section/science-and-society>

- **Stage 3: Risks mitigation actions and procedures:** An initial, mid-term and final set of ethical guidelines and recommendations will be provided by the Ethical Lead Partner in close collaboration and under the supervision of the internal and external monitoring bodies of the Project. The aim of these recommendations will be to ensure compliance with the relevant ethical and legal provisions applicable to the Project.
- **Stage 4: Ongoing monitoring:** In addition to the internal bodies involved in ensuring compliance with the ethical and legal framework identified for the Project, three independent monitoring bodies –the Data Protection Advisor (DPA), the Independent Ethics Board (IEB) and the Independent Gender Committee (IGC)- have been appointed. They will monitor and supervise tasks according to the ethical guidelines and recommendations provided to the Consortium.

Tasks described in WP2 of the Project display such ethical and legal strategy by: i) **identifying** an EU and international human rights, legal and ethical framework (Task 2.1); ii) **assessing** the ethical, data protection and privacy risks posed by the research activities and the technological solution of the Project -*EUMigraTool*- (Task 2.2); iii) **defining and implementing** an ITFLOWS Regulatory Model (Task 2.3); iv) and ethical and legal monitoring (Task 2.4). In addition, three external bodies have been appointed for assessing and monitoring the implementation of the ethical and legal strategy within the Project: **the IEB, the IGC and the DPA.**

The following aspects have been considered to set up the ethical guidelines presented in Section 5.4: i) the ethical risks inherent to qualitative research activities in the context of migration research, and in particular the ones foreseen in ITFLOWS involving vulnerable people (e.g. interviews with migrants, refugees and asylum seekers); ii) the core ethical challenges that may arise in the context of such research activities (e.g. setting up proper measures to protect vulnerable people, protecting personal data, addressing unexpected findings produced outside the scope of the original research aims -known as *incidental findings*-, or the potential misuse of the research); iii) these ethical challenges might pose ethical dilemmas,

which constitute the backbone of the general ethical and legal strategy specifically designed for addressing the risks derived from the ITFLOWS research activities in terms of possible interferences in human rights; iv) and, the empirical needs, constraints and requirements pointed out by the partners in charge of conducting qualitative research activities in the project. The extraction of such requirements has been carried out in the context of the knowledge acquisition stage⁴¹⁴.

Finally, it is relevant to note the pragmatic rationale behind the ethical guidelines provided in the following sections. They should serve as an **operational guide for researchers** in order to tackle ethical challenges in ITFLOWS. In this regard, detailed requirements, procedures and measures have been described to be compliant with the ethical and legal framework identified as applicable for the project. Moreover, due to the ethical requirements imposed on the project as a result of the ethics check carried out by the European Commission, some aspects tackled in these initial ethical guidelines concerning human participation and data protection will be further addressed in D10.1, D10.2, and D10.3. These deliverables will be submitted in M6 (February 2021) of the Project⁴¹⁵.

5.2 Ethical framework for compliance in ITFLOWS

The Ethical Lead Partner has identified the following legal sources, ethical guidelines and internal policies that will serve to constitute the ethical framework applicable to the project upon which the ITFLOWS ethical guidelines have been developed. In this regard, decisions and recommendations of the independent

⁴¹⁴ The involvement of the task leaders of WP3 (T.3.1 and T.3.4) and the Non-Governmental Organisations (NGOs) responsible for conducting interviews with vulnerable people such as migrants and asylum seekers as described in Task 3.4 of WP3 needs to be particularly highlighted due to their significant contribution to identify needs, constraints and empirical requirements on the basis of their background and expertise in conducting such interviews in compliance with the ethics values and principles that govern EU research ethics.

⁴¹⁵ The EC identified the need to address the following ethics issues concerning human participation: i) specific measures to prevent the exploitation of vulnerable people and to guarantee the safety of the participants; ii) an incidental findings policy; iii) a recruitment plan before conducting the interviews with migrants and asylum seekers; iv) informed consent forms; v) authorisations from relevant authorities to conduct the study. The EC has, in addition, requested further clarification on the protection of personal data such as with regard to the monitoring of participants, description of the anonymisation techniques, the need to provide a Data Management Plan for the project, and a clear description of the ITFLOWS Data Protection Advisor tasks and responsibilities.

external monitoring bodies (IEB, IGC and DPA) will constitute binding counsel toward the ethical framework.

Legal Sources:

- Universal Declaration of Human Rights (United Nations, 1948)⁴¹⁶.
- Charter of Fundamental Rights of the European Union⁴¹⁷.
- The European Convention for the Protection of Human Rights and Fundamental Freedoms⁴¹⁸.
- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)⁴¹⁹.
- National and local provisions applicable to the ITFLOWS Consortium partners related to privacy and data protection.

Ethical guidelines:

- Refugee Studies Centre, Queen Elizabeth House - University of Oxford (2007). Ethical Guidelines for Good Research Practice. UNHCR.⁴²⁰
- European Commission (2013). *Ethics for Researchers*⁴²¹.
- Iphofen, Ron (2013). *Research Ethics in Ethnography/Anthropology*. European Commission⁴²².
- European Commission (2016). *H2020 Programme: Guidelines on FAIR Data Management in Horizon 2020*⁴²³.
- ALLEA (2017). *The European Code of Conduct for Research Integrity*⁴²⁴.

416 https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

417 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>

418 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>

419 <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

420 <https://academic.oup.com/rsq/article/26/3/162/1590874>

421 https://ec.europa.eu/research/participants/data/ref/fp7/89888/ethics-for-researchers_en.pdf

422 <https://www.eur.nl/sites/corporate/files/2018-07/Research%20Ethics%20in%20Ethnography%20-%20Anthropology.pdf>

423 https://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/oa_pilot/h2020-hi-oa-data-mgt_en.pdf

424 https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/horizon/guidance/european-code-of-conduct-for-research-integrity_horizon_en.pdf

- European Commission (2018a). *Ethics in Social Science and Humanities*⁴²⁵.
- European Commission (2018b). *Ethics and Data Protection*⁴²⁶.
- European Commission (2019). *Horizon 2020 Programme: Guidance How to Complete your Ethics Self-Assessment*⁴²⁷.
- Christina Clark-Kazak (2019). *Developing ethical guidelines for research. The International Association for the Study of Forced Migration (IASFM)*⁴²⁸.
- European Commission (2020). *Guidance Note – Research on Refugees, Asylum Seekers & Migrants*⁴²⁹.
- European Data Protection Supervisor (2020). *A Preliminary Opinion on Data Protection and Scientific Research*⁴³⁰.

As for the **internal policies** of the NGOs which will conduct empirical research activities involving human participants, the following documents have been identified:

- One Oxfam Policy on Protection from Sexual Exploitation and Abuse (PSEA)⁴³¹
- One Oxfam Child Safeguarding Policy⁴³².
- British Red Cross: British Red Cross staff and volunteer guide to anti-trafficking: Helping people get the support they need in crisis⁴³³.
- Italian Red Cross: Codice Etico - Provvedimenti Disciplinari e Collegi Disciplinari⁴³⁴.
- Italian Red Cross: Codice di Condotta per la Prevenzione ed il Contrasto alle Molestie Sessuali⁴³⁵.
- Italian Red Cross: Manuale Antitratta: Metodologia e procedure di identificazione e risposta ai bisogni di persone migrant potenziali vittime di tratta (unpublished

⁴²⁵ https://ec.europa.eu/info/sites/info/files/6_h2020_ethics-soc-science-humanities_en.pdf

⁴²⁶ https://ec.europa.eu/info/sites/info/files/5_h2020_ethics_and_data_protection_0.pdf

⁴²⁷ https://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/ethics/h2020_hi_ethics-self-assess_en.pdf

⁴²⁸ <https://www.fmreview.org/ethics/clarkkazak>

⁴²⁹ https://ec.europa.eu/research/participants/data/ref/h2020/other/hi/guide_research-refugees-migrants_en.pdf

⁴³⁰ https://edps.europa.eu/sites/edp/files/publication/20-01-06_opinion_research_en.pdf

⁴³¹ https://www-cdn.oxfam.org/s3fs-public/one_oxfam_psea_policy_en.pdf

⁴³² https://www-cdn.oxfam.org/s3fs-public/one_oxfam_child_safeguarding_policy_en.pdf

⁴³³ <https://trafficking-response.org/wp-content/uploads/2020/12/BRC-Staff-and-Volunteer-Guide-to-Anti-trafficking-pocket-guide.pdf>

⁴³⁴ <https://www.cri.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/32258>

⁴³⁵ https://www.cri.it/flex/cm/pages/ServeBLOB.php/SU_/regolamenti-croce-rossa?p1=0&n1=&d1=&dd1=&di1=&df1=&t1=19&oby1=1

- internal document).
- Italian Red Cross: Manuale RFL: Linee guida e procedure del servizio Restoring Family Links (unpublished internal document).
 - Italian Red Cross: Safeguarding Children and Vulnerable Adults (unpublished internal document).
 - Italian Red Cross: Safe Point della Croce Rossa Italiana: Guida operativa per l'istituzione e la gestione di 'punti sicuri' per l'orientamento, la protezione e l'assistenza delle persone migranti (unpublished internal document).
 - Red Cross: Restoring Family Links Code of Conduct on Data Protection⁴³⁶.

Moreover, **decisions and recommendations** of the three external bodies of the Project will be binding for the ITFLOWS Consortium. Their nature, composition and powers are:

- a) The **Independent Gender Committee (IGC)**⁴³⁷ is currently comprised of Professor Eleonore Kofman and Professor Floya Anthias, who will ensure that gender aspects are considered in all WPs and at the different stages of the Project. The IGC will meet throughout the Project to discuss gender-related issues arising in the research and compile guidelines on good practice in addressing gender in migration. These guidelines will be a useful tool for future research;
- b) The **Independent Ethics Board (IEB)**⁴³⁸ is comprised of Dr. Lilian Mitrou, Dr. Marta Poblet and Dr. Ruth Fee, who will regularly monitor the list of ethics issues identified and advice the ITFLOWS Consortium on the appropriate procedures to mitigate ethical concerns and risks. Besides, the IEB reports will be communicated inter alia directly to the ITFLOWS Project Officer. Moreover, in the delivering of six ethics screening reports, the IEB tasks can be summarised as follows: i) reviewing, reporting and advising; ii) cooperating closely with WP2 (Societal impact, human rights, legal and ethical framework) to monitor the overall ethics-related issues; iii) reviewing all Deliverables, and

⁴³⁶ <https://www.icrc.org/en/document/rfl-code-conduct>

⁴³⁷ <http://www.itflows.eu/about/boards/the-gender-committee/>

⁴³⁸ <http://www.itflows.eu/about/boards/the-ethical-board/>

producing semi-annual reports on ITFLOWS research activities (six ethics screening reports); iv) convening at the kick-off meeting of the Project with the aim of setting up the rules of conduct that will conform the needs described in the ITFLOWS project work plan; v) and, at least once a year, the IEB will convene before the annual meetings and will present an annual report during the plenary meetings of the Project: First Review Meeting-M12 (Rome, Italy); Intermediate Technical Review-M24 (Barcelona, Spain); and, Final Review-M36 (Brussels, Belgium);

- c) The **Data Protection Advisor (DPA)**: Dr. Jonathan Andrew has been appointed as DPA for the Project to assist and supervise the ITFLOWS Consortium partners in any issues along the lifecycle of the Project that may arise as potentially risky from an ethical and legal perspective. In general terms, his tasks include supervising the adequate use and processing of personal data by all ITFLOWS partners throughout the Project; advising on data protection matters during the Consortium meetings; providing consistent procedures for the data processing activities conducted by all ITFLOWS partners; supervising that the development of the technological results (the EUMigraTool) complies with the provisions set out in the General Data Protection Regulation (GDPR) and; reviewing all deliverables that pose data protection concerns and produce specific data protection reports before every annual meeting.

Each member of the Consortium will be responsible for ensuring compliance with the abovementioned ethical framework, which will be supervised by the Ethical Lead Partner and the external monitoring boards and individual experts (IGC, IEB and the DPA). Any concern or doubt of the partners will be submitted to the DPA or/and the IEB for evaluation through the Ethical Lead Partner (IDT-UAB) of the Project.

In the subsequent sections, the ITFLOWS governing ethical principles have been identified. Section 5.3 contains general ethical principles applicable to all research activities in ITFLOWS. Section 5.4 focuses on the specific ethical principles that

apply to the qualitative research activities envisaged for the Project.

5.3 General ethical principles governing the research activities in ITFLOWS

The ITFLOWS Consortium will abide by the highest standards, principles and good practices of research ethics as described in the European Code of Conduct for Research Integrity (ALLEA 2017). Thus, all the research activities foreseen within the Project should be conducted in strict compliance with the general **principle of integrity** (ALLEA 2017: 9). The following ethical principles should be also applied by researchers in a complementary manner to the integrity principle:

- **Reliability**: this ethical principle implies ensuring the quality of the design, the methodology, the analysis and the use of resources in the research;
- **Honesty**: it involves developing, undertaking, reviewing, reporting, and communicating the research in a transparent, fair, full and unbiased way;
- **Respect**: it implies carrying out the foreseen research activities with respect for research colleagues, research participants, society, ecosystems, cultural heritage and the environment;
- **Accountability**: this principle entails being accountable in several aspects of the research such as publication, management and organisation, training activities, supervision and mentoring and for its wider impacts.

Furthermore, the ITFLOWS Consortium fully adheres to the EU Ethical Responsible Research and Innovation Framework (RRI)⁴³⁹. The different stages of the strategy designed for the monitoring of the ethical and legal implications of the ITFLOWS research activities- *as described in Section 1.1*- reflect strict compliance with the RRI framework given that such a strategy: i) ensures **a more broadly** ethical and legal voluntary **engagement of society**; ii) allows **for the anticipation and assessment of potential risks** that may jeopardise human rights; iii) relies, in a complementary manner, on the independent assessment of the DPA, the IEB and IGC; iv) **supervises gender equality** in both the research process and the research content; v) and

439 <https://ec.europa.eu/programmes/horizon2020/en/h2020-section/responsible-research-innovation>

focuses the ongoing monitoring activities of such a strategy in **the ethical dimension of the research** activities.

The fact of complying with both the general ethical principles previously identified and the RRI framework described above does not preclude compliance with other obligations derived from the Grant Agreement (GA) of the project, or the international, EU or national legal frameworks identified as applicable to the project.

5.4 Ethical guidelines for qualitative research activities in ITFLOWS

The ITFLOWS project foresees carrying out a range of interviews, workshops, focus groups, pilot activities, webinars and online forums. Since all these activities involve human participants, they must be carefully and constantly monitored in order to ensure legal and ethical compliance.

Table 2 summarises the qualitative research activities involving human participants in ITFLOWS:

WP	Task Number/Task Description
WP3	T3.1 will conduct a dedicated workshop with experts to present and discuss preliminary results regarding migration drivers and trajectories along the main corridors connecting the EU with the main regions of origin and transit will be presented and discussed with experts.
	T3.4 will conduct qualitative interviews with adult migrants, refugees and asylum seekers.
WP6	T6.5 foresees a dedicated board workshop of end-users with the aim of designing visualisation mock-ups and indicative workflows to be implemented in the EUMigraTool (EMT).
WP7	T7.1: A workshop with all Users Board (UB) members will be held in order to gather first-hand feedback on the challenges, needs, and priorities in their area of expertise and within the territory covered by every end-user. The feedback gathered during the workshop will be essential to draft and deliver the Users Board Participatory Feedback Report (M6).
	T7.2: Training in the use of the EMT tool will be provided to all UB members through webinars, downloadable material, workshops,

	<p>online forums, video tutorials, etc. An online community/forum will be developed to facilitate engagement amongst a sustainable community of UB members. This involves the development of an online environment (support forum, wiki, knowledge repository, access to training material) that facilitates primarily knowledge transfer, but also supports services. The online environment will be seamlessly integrated into the overall Project website.</p> <p>T7.3: Pilot tests in real environments will validate the functionality of the tool. Some members of the User's Board will test function 1 (prediction), and some members will test function 2 (tensions). Tests will take place in at least three Member States: Greece, Italy, and Spain.</p>
WP8	<p>T8.1: The Policy Working Group (PWG) and further policymakers will be engaged for the participation in tailor-made workshops and events. Also, all partners of ITFLOWS will contribute to identifying and approaching policymakers, EU institutions and international organisations, who will be receiving policy briefs (T8.3) and specific workshops (T8.2).</p> <p>T8.2: Five workshops are foreseen to be conducted with policymakers with the aim of discussing the following topics: a) push and pull factors of migration in origin and transit; b) Root causes and factors contributing to possible tensions between migrants and EU citizens; c) Effective relocation policies in light of social and economic realities of the Member States; d) Effective policies for the socio-economic integration of immigrants to the EU; and e) Asylum policy commitments according to human rights. In order to achieve the maximum level of audience among policymakers at both national and EU level, the workshops will run consecutively in a 3-day conference in Brussels (M22). CSD and CEPS will organise the conference, and each specific workshop will be managed by the partner that leads that task in WP2, WP3, WP4 and WP5 respectively (IAI, EUI, IfW, UAB and BUL).</p>

Table 2: WP tasks involving human participation

a. Specific ethical principles applicable to the qualitative research activities in ITFLOWS including their corresponding ethical guidelines

Apart from the general ethical principles applicable to all the research activities of the Project, the ITFLOWS researchers involved in conducting qualitative research activities should also adhere to the following specific ethical principles: **autonomy, doing no harm, equity, diversity, competence, voluntary participation, confidentiality and privacy, transparency and accountability**. These principles have been identified from the catalogue of ethical guidelines presented in Section 5.2 and have been translated into ethical guidelines to be implemented by ITFLOWS researchers in order to ensure that ITFLOWS qualitative research activities are conducted ethically.

- **Autonomy:** Researchers involved in qualitative research activities should ensure the right of people to make their own decisions concerning their lives and particularly their participation in the Project;
- **Doing no harm:** Researchers should prioritise the dignity, safety and well-being of participants as well as that of all members of the research team. Individual or collective actions that may increase racism, discrimination, the criminalisation of migration or retraumatise migrants, refugees and asylum seekers should be avoided;
- **Equity:** Researchers should take proactive actions with the aim of minimising potential negative impacts that may occur due to unbalanced power relationships between participants and researchers;
- **Diversity:** Researchers should respect cultural, ethnic, gender and sexual orientation differences. Ethnocentric research perspectives and behaviour must be avoided;
- **Competence:** Adequate training should be provided to researchers involved in conducting qualitative research activities. Research profiles with expertise and empirical background in the field of migration research should be prioritised for those research activities that entail the participation of migrants, refugees and asylum seekers;
- **Voluntary participation:** Researchers must obtain participants' informed consent before their involvement in the qualitative research activities with the aim of ensuring voluntary participation. Informed Consent Forms should be

specifically designed for each foreseen research activity in accordance with the ethical and legal applicable framework previously identified for the Project. Moreover, Informed Consent Templates in the context of the Project will be validated by the ITFLOWS DPA as well as by the IEB and the IGC as a mechanism to ensure: i) compliance with EU and national data protection legal frameworks; ii) compliance with the applicable ethical principles identified for the Project; and iii) un-biased and gender-sensitive research. Researchers will gather informed consent in writing as a general rule. However, due to the challenges related to obtaining written informed consent in forced migration research contexts (e.g., illiteracy, unequal power relations, dependence on NGO's services, among others) researchers will be provided with clear ethical guidelines and protocols in those cases in which oral consent genuinely ensures informed and voluntary participation;

- **Confidentiality and privacy:** Processing of personal data in the context of the qualitative research activities of the Project must be compliant with the GDPR. In particular, with the data protection principles laid down in Article 5 of the GDPR: i) lawfulness, fairness and transparency; ii) purpose limitation; iii) data minimisation; iv) accuracy; v) storage limitation; vi) integrity and confidentiality; and vii) accountability. In addition, the processing of personal data for scientific purposes will be subject to appropriate safeguards with the aim of safeguarding the rights and freedoms of the data subjects. In particular, technical and organisational measures should be taken by the Consortium *-in accordance with Article 89 of the GDPR and the applicable national data protection frameworks* - to ensure respect for the data minimisation principle. Clear technical descriptions on the anonymisation techniques will be provided by the partners responsible for conducting any qualitative research activity that entails the processing of personal data.;
- **Transparency and accountability:** Qualitative research activities should be presented in a clear and accurate manner by the researchers, avoiding biased and misleading information that makes such activities excessively attractive for the participants. Recruitment plans should be specifically designed by the researchers before conducting the research activities. These plans will contain: i) a clear description of the research activity (location, regulatory

status of the research, time or other commitment required from the participants, among others); ii) inclusion/exclusion criteria of the participants and the research team in charge of conducting the specific qualitative research activity; iii) legal basis and technical and organisational safeguards for the processing of personal data; iv) Informed Consent Templates approved by the DPA and the IEB of the Project; v) anonymisation techniques for ensuring the confidentiality of the information gathered from the research participants; and vi) the incidental findings policy.

b. Ethical guidelines on challenging issues in the context of ITFLOWS qualitative research activities with refugees, asylum seekers and migrants.

In the ITFLOWS project, several activities involving human participants have been planned -namely, workshops, seminars, interviews with refugees and asylum seekers, etc. Considering that the interviews with migrants, refugees and asylum seekers entail greater potential ethical risks, the following sections are focused on this sort of activities (to be conducted in Task 3.4 of WP3; see Table 2 of Section 5.4 of this deliverable). Unlike the activities involving professionals and stakeholders who are not in a situation of vulnerability, the interviews require a more careful and individualised approach.

Therefore, the ethical guidelines presented below aim to provide researchers with specific initial recommendations to address challenging ethical issues related to: i) the particular vulnerability of the participants; ii) the recruitment plan for the interviewing team and the research participants; iii) the protection of personal data; iv) the need to ensure voluntary participation; v) and, the incidental findings policy to address potential incidental findings that may arise in the context of these interviews.

- The vulnerability of the research participants:

1. People in charge of conducting interviews (the interviewing team) with particularly vulnerable individuals such as refugees, asylum seekers and migrants should '*treat them with care and sensitivity*'; '*be objective and transparent*'; '*...avoid ethnocentricity*'; '*rigorously safeguard the dignity*,

wellbeing, autonomy, safety and security of their family and friends'; 'respect their values and the right to make their own decisions'; 'give special protection to participants with diminished autonomy...involving NGOs or national authorities with relevant experience to provide, legal advice, psychological support, language interpreting and/or legally appointed supervision' according to the Guidance note on Research of refugees, asylum seekers and migrants of the EU Directorate-General for Research and Innovation (European Commission 2020);

2. Under no circumstances will the interviewing team create unjustified expectations in research participants about their future residence in the EU Member States, their status as asylum seekers or reward for their participation (European Commission 2020: 2).

Nevertheless, all research participants in the interviews will be provided with a small compensation with the aim of recognizing their time, effort and valuable participation. Each NGO partner in charge of conducting the interviews must decide and specify the type of compensation (monetary compensation, voucher or some gift) that will be offered to all participants. This compensation will be subject to the approval of the Ethical Lead Partner.

As a general rule monetary compensation is highly discouraged. In this vein, if one of the NGOs decides to consider monetary compensation, a specific request in this respect - justifying the suitability of this compensation - must be sent to the Ethical Lead Partner of the Project. This request will be subject to the specific approval of the IEB and the DPA with the aim of ensuring that the proposed monetary compensation is reasonable, fair and does not increase participants' vulnerability, undue influence, or causes disadvantaged situations for the research participants. In this context, the potential impact of monetary compensation on freely given consent will be carefully assessed by the IEB and the DPA.

A clear description of the small compensation will be included in the

Informed Consent Form;

3. The interview must be presented in an unbiased manner and free of misleading emphasis that makes such research activity excessively appealing;
4. Interviews must be conducted in a comfortable and private setting to favour the well-being of the research participant. Questions that could potentially cause distress, discomfort or fear should be carefully managed. If the described feelings are detected, the principles of autonomy and dignity should guide the actions to be taken by the interviewing team, e.g., to take a break or to avoid insisting on specific questions;
5. Authorisations from national/local/reception centres authorities must be obtained before conducting the interviews.

- **Recruitment plan for the interviewing team**

A detailed recruitment plan will be provided in D10.1. The Ethical Lead Partner is working in close contact with the NGOs on a recruitment plan based on their field expertise. Nevertheless, several initial recommendations can be made at this stage of the Project:

1. Interviews will be conducted by members of Croce Rossa Italiana (CRI), Oxfam Italia (OIT) and Open Cultural Centre (OCC). The professionals who will be present in the interviews will be referred to as the interviewing team, which will be composed of an interviewer and a translator – if needed. In order to facilitate the transcript of the interviews, the audio of the interviews will be recorded. To this end, data protection safeguards will be implemented in accordance with the data protection and privacy legal requirements identified by the ethical and legal partners (IDT-UAB & FIZ);
2. If these NGOs plan to recruit new staff members, robust recruitment screening procedures must be put in place;

3. These NGOs will ensure the adequate background and expertise of the interviewing team and will prioritise people with refugee or migrant background or from the same culture (European Commission 2020: 2);
4. NGOs might enlist other professionals in order to ensure fluid communication and research participants' safety during the interviews. These professionals will not be considered members of the interviewing team since they will not directly participate in the interviews. These professionals might include cultural mediators and mental health experts;
5. When the research participant is a female-identifying person, the presence of female-identifying interviewers is strongly recommended. Nevertheless, the interviewing team must take into consideration the opinion and preferences of the research participant;
6. It is mandatory to provide the interviewing team with training on the most likely incidental findings to be discovered during the interviews with migrants. The aim is to promote knowledge, skills and awareness that enable the interviewing team to identify possible incidental findings during the interview. The interviewing team must be familiarized with the ITFLOWS Incidental Findings Policy and the applicable national referral system;
7. Appropriate sanitary measures will be implemented to protect interviewing teams' and research participants' health. Particular emphasis will be placed on COVID-19 given the current global pandemic.

- **Recruitment plan for the research participants**

The Ethical Lead Partner is currently working with the NGOs on the design of a recruitment plan, which will be provided in D10.1. Nevertheless, a number of initial recommendations for the elaboration of a recruitment plan for research participants have been provided:

1. No minors will be interviewed. Only adult migrants, refugees and asylum seekers will be interviewed. To this end, NGOs will put mechanisms in place

to verify the legal age of the research participant. Verifications cannot be based solely on the research participant's statement;

2. Those research participants who are already identified as especially vulnerable will be automatically discarded. This measure includes people diagnosed with severe chronic illnesses and psychological traumas, as well as victims of human trafficking and genital mutilation, among others;
3. NGOs will strive for gender representativeness in the interview sample, in accordance with the ITFLOWS Gender Policy included in the Gender Action Plan (D2.2);
4. Participation must be voluntary and based on free and informed consent. Research participants will be properly informed about the nature of the project and of the activity they are taking part in, as well as about their rights. They will be allowed to withdraw their consent at any time without detriment.

- **Protection of personal data**

Compliance with the GDPR will be ensured in all ITFLOWS research activities. The following focuses on how personal data will be protected in the context of the interviews.

The processing of personal data for scientific purposes is addressed specifically in Article 89 (1) of the GDPR. This article, in line with Recital 156, states that:

'Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in

that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.'

The data minimisation principle referred to in Article 89 (1) is defined in Article 5 (1)(c) with the following wording: *'Personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')'*. In relation to *'appropriate safeguards'* (Article 89(1) GDPR), the European Data Protection Board clarifies in its *'Guidelines 05/2020 on consent under Regulation 2016/679'* that data minimisation, anonymisation and data security are mentioned as examples of possible safeguards, being anonymisation the preferred solution if the research purpose cannot be achieved without processing personal data (European Data Protection Board 2020: 31).

Due to the nature of the interviews, it is possible that special categories of data emerge. Since ITFLOWS falls under Article 89 GDPR due to its scientific purpose, the processing of special categories of data is allowed (Article 9(2)(j) GDPR). Although the processing of such data is not prohibited, its sensitive nature implies that compliance with this principle requires utmost attention. The data minimisation principle will be applied as a precautionary principle and its effective implementation will be strongly monitored by all the internal and external structures foreseen for monitoring the project from an ethical and legal perspective.

In particular, technical and organisational measures should be taken by the Consortium *-in accordance with Article 89 of the GDPR and the applicable national data protection frameworks* - to ensure respect for the data minimisation principle. Clear technical descriptions on the anonymisation techniques will be provided by the partners responsible for the interviews.

In addition to the data minimisation principle, the processing of personal data in the context of the interviews will also be compliant with the rest of data protection principles laid out in Article 5 of the GDPR: i) lawfulness, fairness and transparency;

ii) purpose limitation; iii) accuracy; iv) storage limitation; v) integrity and confidentiality; and vi) accountability.

Finally, the legal basis for the processing of personal data include: i) consent; ii) performance of a contract; iii) legal obligation; iv) vital interest of the data subject or another natural person; v) public interest; and vi) legitimate interests (Article 6(1) GDPR). The processing of personal data gathered from the interviews relies on informed consent.

- **Voluntary participation**

Ensuring voluntary participation is a seminal requirement for conducting any kind of research involving human participants (European Commission 2013: 14-16 and 2018a: 13-14; European Data Protection Supervisor 2020: 18-20). Informed consent is the main instrument to meet this target. Article 4(11) of the GDPR defines consent as *'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'*. In this sense, informed consent requires providing sufficient and understandable information about the research, the use of data and participant's rights (Loue 2012: 119-120; Krause 2017: 10; Lattorf 2018: 1026-1027; Santana 2019: 3).

Considering this premise, the ITFLOWS Ethical Lead Partner is currently working on an Informed Consent Form Template to be adapted and implemented by those partners in charge of conducting activities with human participants (to be provided in D10.1).

Nevertheless, the informed consent procedure cannot be limited to the mere signature of a formal and jargonised document. It is necessary to ensure that consent is indeed informed. This concern has notoriously spread among scholars whose research fields entail the interaction with migrants who might have problems to understand a traditional written form. Some of the reasons argued in favour of oral informed consents are (i) the illiteracy or lack of education of migrants, refugees and asylum seekers (Benítez *et al.* 2002; Citro *et al.* 2003: 105-106; Block *et al.* 2012: 79;

Birman 2015: 165-166; Thapliyal and Baker 2018: 53); (ii) their unacquaintance with research processes (Krause 2017: 10); (iii) suspicion against authorities and written forms (Clark-Kazak 2017: 5; Humpage et al. 2019: 6) and (iv) fear to be identified (Hugman et al. 2011: 666; Loue 2012: 120).

Perhaps the most prominent alternative is oral consent, which can be a useful and effective solution for ITFLOWS in the context of the interviews. Firstly, data protection laws enable oral consent. The European Data Protection Board has highlighted that information to be provided to the participant can be presented verbally (European Data Protection Board 2020), and Recital 32 of the GDPR allows obtaining oral consent. Secondly, as the European Data Protection Board has stated, the kind of audience must be assessed when designing informed consent procedures and must be adapted to that purpose (European Data Protection Board 2020: 16). This is paramount in settings such as the one presented by ITFLOWS, where participants may be illiterate or may be unwilling to sign written forms due to their situation or cultural background. In this regard, the Guidance note – Research on Refugees, Asylum Seekers & Migrants (European Commission 2020: 3), also acknowledges the use of oral consent.

For all the above-mentioned reasons, the Ethical Lead Partner has developed an alternative procedure based on oral consent to be implemented in ITFLOWS interviews. This alternative procedure will be presented in D10.1.

- Incidental findings

Incidental Findings refer to risks that may emerge in any research activity involving human participants, which are unrelated to the purpose of the research activity. In social science and humanities, research relies on methods – fieldwork, surveys, interviews or focus groups – that may unexpectedly produce findings outside the scope of the original research aims. In this context, incidental findings may comprise indications of being a victim of criminal activity and human rights violations (European Commission 2018a: 14).

However, the probability of dealing with incidental findings varies depending on the

kind of research activity, and in particular, the research participants envisaged to take part in. Thus, in the context of ITFLOWS, in seminars, workshops and any other activity with professionals and stakeholders, the likelihood of an incidental finding is negligible. Conversely, interviews with migrants, refugees and asylum seekers – where participants are in a situation of particular vulnerability – the likelihood of coming across incidental findings is considerably high. The assessment of this likelihood has already been discussed with the ITFLOWS NGOs during the knowledge acquisition stage.

ITFLOWS interviewing team must handle appropriately any information regarding the discovery of incidental findings (European Commission 2020: 1). Despite interviewers' commitment to confidentiality and anonymity, incidental findings require researchers to take action (European Commission 2018a: 14). They shall inform the responsible and appropriate persons within their organisation as to any incidental finding encountered during the interviews. As a general rule, the interviewing team must respect the autonomy of the research participant to freely decide on the next steps to take, if any. The purpose of this approach is to avoid putting the research participant in danger. If the interviewing team considers that the research participant is in concrete danger, emergency services will be contacted. The interviewing team will strictly follow the applicable national referral system.

The interviewing team must comply with the following ethical principles that govern the Incidental Findings Policy and its procedure.

- Protection of migrants' best interests;
- Do no harm;
- Zero-tolerance approach;
- Procedural fairness: accountability and transparency;
- Fair benefit-sharing;
- Shared responsibility.

The Ethical Lead Partner has developed an ITFLOWS Incidental Findings Policy for the interviews in close collaboration with the NGOs, which is elaborated in D10.1.

5.5 Ethical guidelines on the potential misuse of the research

The research outcomes of ITFLOWS can be misused, which may lead to negative impacts on human rights. In particular, the results of the ITFLOWS research activities may pose several risks if misused for stigmatising, discriminating, harassing, or intimidating individuals, especially those that are in vulnerable situations such as migrants, refugees and asylum seekers.

At this stage of the Project, a set of initial measures aimed at minimising the risks related to the potential misuse of the research outcomes are currently under development, such as:

1. Multidisciplinary internal and external monitoring bodies and procedures have been designed for the Project with the aim of ensuring that the research activities will be conducted in strict compliance with the EU and international human rights legal and ethical framework applicable to the Project;
2. The Project will implement information security technologies;
3. Ethical advice will be provided by the Ethical Lead Partner and the IEB throughout the lifecycle of the Project;
4. A Data Management Plan will be presented by the Coordinator of the Project;
5. Human Rights, Ethical, Societal and Data protection risk assessments will be conducted and updated when required;
6. A policy for addressing incidental findings in ITFLOWS will be set up and delivered by the Ethical Lead Partner.

These points are further developed in D2.3

5.6 Recommendations for ITFLOWS partners

- General recommendations:
 - All research activities foreseen within the Project should be conducted in strict compliance with the general **principle of integrity**.
 - In addition to the principle of integrity, the following principles must be applied: **reliability, honesty, respect and accountability**.

- Recommendations for conducting qualitative research activities:
 - ITFLOWS researchers involved in conducting qualitative research activities should also adhere to the following specific ethical principles: **autonomy, doing no harm, equity, diversity, competence, voluntary participation, confidentiality and privacy, transparency and accountability.**
- Recommendations for conducting interviews with migrants, refugees and asylum seekers:
 - ITFLOWS Partners in charge of conducting interviews must comply with the abovementioned ethical guidelines.
 - Additionally, specific recommendations must be adopted to address the following challenging ethical issues:
 - **The particular vulnerability of the participants**
 - The interviewing team must comply with the Guidance note on Research of refugees, asylum seekers and migrants of the EU Directorate-General for Research and Innovation;
 - Under no circumstances will the interviewing team create unjustified expectations in research participants;
 - All research participants in the interviews will be provided with a small compensation. Specific procedures concerning different types of compensations have been set up;
 - The interview must be presented in an unbiased manner and free of misleading emphasis that makes such research activity excessively appealing;
 - Interviews must be conducted in a comfortable and private setting to favour the well-being of the research participant. Questions that could potentially cause distress, discomfort or fear should be carefully managed;
 - Authorisations from national/local/reception centres authorities must be obtained before conducting the interviews.

- The **recruitment plan for the interviewing team and the research participants**
 - Interviews will be conducted by members of Croce Rossa Italiana (CRI), Oxfam Italia (OIT) and Open Cultural Centre (OCC). The professionals who will be present in the interviews will be referred to as the interviewing team, which will be composed of an interviewer and a translator – if needed. In order to facilitate the transcript of the interviews, the audio of the interviews will be recorded;
 - If these NGOs plan to recruit new staff members, robust recruitment screening procedures must be put in place;
 - NGOs will ensure the adequate background and expertise of the interviewing team and will prioritise people with refugee or migrant background or from the same culture;
 - NGOs might enlist other professionals to ensure fluid communication and research participants' safety during the interviews. These professionals will not be considered members of the interviewing team since they will not directly participate in the interviews;
 - When the research participant is a woman, the presence of female interviewers is strongly recommended. Nevertheless, the interviewing team must take into consideration the opinion and preferences of the research participant;
 - It is mandatory to provide the interviewing team with training on the most likely incidental findings to be discovered during the interviews with migrants. The interviewing team must be familiarized with the ITFLOWS Incidental Findings Policy and the applicable national referral system;
 - Appropriate sanitary measures will be implemented to protect interviewing teams' and research participants' health.
- The **protection of personal data**

- Compliance with the data protection principles: i) lawfulness, fairness and transparency; ii) purpose limitation; iii) accuracy; iv) storage limitation; v) integrity and confidentiality; and vi) accountability;
 - ITFLOWS research activities must comply with Article 89(1) GDPR on scientific purpose.
-
- The need to ensure **voluntary participation**
 - Research participants' informed consent must be obtained;
 - Oral consent has been established as an alternative to ensure voluntary participation.

 - The **incidental findings policy**
 - The interviewing team must be familiarised with the ITFLOWS Incidental Findings Policy and will strictly follow the applicable national referral system;
 - The interviewing team must respect the autonomy of the research participant to freely decide on the next steps to take, if any;
 - The interviewing team must comply with the following ethical principles that govern the Incidental Findings Policy and its procedure: i) protection of the research participant's best interests; ii) do no harm; iii) zero-tolerance approach; iv) procedural fairness: accountability and transparency; v) fair benefit-sharing; and, vi) shared responsibility.

5.7 Conclusion

Strict compliance with the highest standards of the RRI framework of the European Commission and the applicable international, EU and national legislation is a key priority within the ITFLOWS project. According to this approach, the Ethical Lead Partner is developing guidelines, procedures and measures aimed at ensuring and promoting ethical and legal compliance within ITFLOWS.

As such, this section presented an ethical framework and general guidelines that must govern ITFLOWS research activities, with a special emphasis on those research activities that unquestionably entail the highest risks, i.e. interviews with particularly vulnerable people – migrants, refugees and asylum seekers.

ANNEX B: LEGAL SOURCES

- Charter of Fundamental Rights of the European Union. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>
- Committee on Economic and Social Rights (CESCR), Concluding Observations on Belgium, UN Doc E/C.12/ESP/CO/6 of 25 April 2018. Retrieved here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/ESP/CO/6&Lang=En
- Committee on Economic and Social Rights (CESCR), Concluding Observations on Denmark, UN Doc E/C.12/DNK/CO/6 of 12 November 2019. Retrieved here: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW7I1MtEjVgFZjOTx%2Bv7mTUvkKWW%2FrjBRu8HNz0Bl%2Bzb87gtYlimVL5%2BjFD6f1L76xMZCYMwTzITb2Jpme6cOwejXBwB%2Bnoj%2FiM2aq3gz1%2BR9>
- Committee on Economic and Social Rights (CESCR), Concluding Observations on Germany UN Doc E/C.12/DEU/CO/6 of 27 November 2018. Retrieved here: <https://digitallibrary.un.org/record/1653881?ln=en>
- Committee on Economic and Social Rights (CESCR), Concluding Observations on Slovakia, UN Doc E/C.12/SVK/CO/3 of 19 November 2019. Retrieved here: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuWx8AhHloWaPQKfnd2BAOkQNSKXtJaFyw3u2VrX%2FfxVoEUQwmaxUDmNxNZKjWyVOPi15uIwTnS0SWFVK1Nh9AUa7k2d63tzlQdZ66zrQ5tk8m>
- Committee on Economic and Social Rights (CESCR), Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019. Retrieved here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/DNK/CO/6&Lang=En
- Committee on Economic and Social Rights (CESCR), UN CESCR, Concluding Observations on Ukraine, UN Doc E/C.12/UKP/CO/7 of 2 April 2020. Retrieved here: <https://digitallibrary.un.org/record/3865968?ln=ru>
- Committee on Economic and Social Rights, General Comment No. 14: the Right to the Highest Attainable Standard of Health (Art.12), Doc. E/C.12/2000/4), of 11 August 2000. Retrieved here: <https://www.refworld.org/pdfid/4538838d0.pdf>
- Committee on the Elimination of Discrimination Against Women, Concluding observations on the 9th periodic report of Austria, CEDAW/C/BUL/CO/8 of 30

- July 2019. Retrieved here:
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/AUT/CO/9&Lang=En
- Committee on the Elimination of Discrimination Against Women, Concluding observations on the 8th periodic report of Bulgaria, CEDAW/C/BGR/CO/8 of 10 March 2020. Retrieved here:
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/BGR/CO/8&Lang=En
 - Committee on the Elimination of Discrimination Against Women, Concluding observations on the combined 4th to 7th periodic reports of Latvia, CEDAW/C/LVA/CO/4-7 of 10 March 2020. Retrieved here:
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/LVA/CO/4-7&Lang=En
 - Committee on the Elimination of Discrimination Against Women, Concluding observations on the 9th periodic report of Norway, CEDAW/C/NOR/CO/9 of 22 November 2017. Retrieved here:
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/NOR/CO/9&Lang=En
 - Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined 12th and 13th reports of Czechia, CERD/C/CZE/CO/12-23 of 19 September 2019. Retrieved here:
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCZE%2fCO%2f12-13&Lang=en
 - Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined 21st to 23rd reports of Iceland, CERD/C/ISL/21-23 of 29 August 2018. Retrieved here:
<https://www.stjornarradid.is/library/02-Rit--skyrslur-og-skrar/Mannrettindaskyrslur/21.%20til%2023.%20sk%C3%BDrsla%20%C3%8Dslands%20um%20framkv%C3%A6md%20Al%C3%BEj%C3%B3%C3%B0asamnings%20um%20afn%C3%A1m%20alls%20kyn%C3%BE%C3%A1ttamisr%C3%A9ttis.pdf>
 - Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined 5th to 9th reports of Ireland, CERD/C/IRL/CO/5-9 of 12 December 2019. Retrieved here:
https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf
 - Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined 22nd to 24th reports of Poland,

CERD/C/POL/CO/22-24 of 24 September 2019. Retrieved here: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsrvH7CU4hlDYCm%2FQk5dWFUfg2vXGNFWBc%2F6mIf5L63ad9qagFzKbnoRg4hVGBvPILWxPs6a0BBfqZhmokVVF4K6a0frSbYkWuX67gLK4wD%2BBx0GhA%2Bk21PL2UH2cCZT3A%3D%3D>

- Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994). Retrieved here: <http://hrlibrary.umn.edu/gencomm/genrxv.htm>
- Committee on the Elimination of Racial Discrimination, General Recommendation No. 35, Combatting Hate Speech, 26 September 2013. Retrieved here: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhssyNNtgI51ma08Cma6o7Bglz8iG4SuOjovEP%2Bcqr8joDoVEbW%2BQ1MoWdOTNEV99v6FZp9aSSA1nZya6gtpTo2JUBMI0%2BoOmjAwk%2B2xJW%2BC8e>
- Committee on the Rights of the Child, Communications No. 16/2017 A.L. v. Spain; 17/2017 M.T. v. Spain; 24/2017 M.A.B. v. Spain and 27/2017 R.K. v. Spain. CRC/C/83/D/24/2017. Retrieved here: <https://juris.ohchr.org/Search/Details/2634>
- Committee on the Rights of the Child, Concluding observations on the 5th and 6th periodic report of Austria of 6 March 2020. CRC/C/AUT/CO/5-6. Retrieved here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUT/CO/5-6&Lang=En
- Committee on the Rights of the Child, Concluding observations on the 6th periodic report of Hungary of 3 March 2020. CRC/C/HUN/CO/6. Retrieved here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/HUN/CO/6&Lang=En
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Committee against Torture. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>
- Convention on the Elimination of All Forms of Discrimination Against Women. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>
- Convention on the Rights of the Child. Retrieved from: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

- Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913>
- Court of Justice of the European Union (First Chamber) Case C-16/11 El Dridi, Hassen El Dridi, alias Soufi Karim, 28 April 2011. ECLI:EU:C:2011:268. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0061>
- Court of Justice of the European Union (Grand Chamber) Case C-18/16 K. v Staatssecretaris van Veiligheid en Justitie, 14 September 2017, ECLI:EU:C:2017:680. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-18/16>
- Court of Justice of the European Union (Grand Chamber) Case C-28/05, G. J. Dokter, Maatschap Van den Top and W. Boekhout v Minister van Landbouw, Natuur en Voedselkwaliteit, June 2006, ECR I-5431. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-28/05>
- Court of Justice of the European Union (First Chamber) Case 43/75 Gabrielle Defrenne v. Soci  t   Anonyme Belge de Navigation A  rienne Sabena, 8 April 1976, ECLI:EU:C:1976:56. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=43-75&td=ALL>
- Court of Justice of the European Union (First Chamber) Case C-61/11, Hassen El Dridi, alias Soufi Karim, 28 April 2011, ECLI:EU:C:2011:268. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-61/11>
- Court of Justice of the European Union (Grand Chamber) Case C-71/11, Bundesrepublik Deutschland v Y and Z, 5 September 2012, ECLI:EU:C:2012:518. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-71/11&language=EN>
- Court of Justice of the European Union (Fourth Chamber) Case C-79/13 Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others, 27 February 2014, ECLI:EU:C:2014:103. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-79/13>
- Court of Justice of the European Union (Grand Chamber) Case C-82/16, K.A. and Others v Belgische Staat, 8 May 2018. EU:C:2018:308. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0082>

- Court of Justice of the European Union (Grand Chamber) Case C-71/11, Bundesrepublik Deutschland v Y and Z, 5 September 2012, ECLI:EU:C:2012:518. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-71/11&language=EN>
- Court of Justice of the European Union (Grand Chamber) Case C-144/04 Werner Mangold v Rüdiger Helm, 22 November 2005, ECLI:EU:C:2005:709. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-144/04>
- Court of Justice of the European Union (Fifth Chamber) Case C-147/19, Atresmedia Corporación de Medios de Comunicación SA v Asociación de Gestión de Derechos Intelectuales (AGEDI), Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE), 18 November 2020. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CJ0147&from=EN>
- Court of Justice of the European Union (Fifth Chamber) Case C-166/13 Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis, 5 November 2014. ECLI:EU:C:2014:2336. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-166/13>
- Court of Justice of the European Union (Grand Chamber), Case C-175/08 Aydin Salahadin Abdulla, (C-176/08) Kamil Hasan, (C-178/08) Ahmed Adem, Hamrin Mosa Rashi and (C-179/08) Dler Jamal v Bundesrepublik Deutschland, 2 March 2010. EU:C:2010:105. Retrieved here : <http://curia.europa.eu/juris/liste.jsf?num=C-175/08&language=en>
- Court of Justice of the European Union (Grand Chamber) Case C-179/11 Cimade and Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, 27 September 2012, ECLI:EU:C:2012:594. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-179/11&language=EN>
- Court of Justice of the European Union (Grand Chamber) Case C-181/16, Sadikou Gnandi v État belge, June 2018. ECLI:EU:C:2018:465. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-181/16>
- Court of Justice of the European Union (Grand Chamber) Case C-188/15 Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA, 14 March 2017. ECLI:EU:C:2017:204. Retrieved here : <http://curia.europa.eu/juris/liste.jsf?num=C-188/15>
- Court of Justice of the European Union (Fourth Chamber) Case C-199/12, Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en

- Asiel, 7 November 2013, ECLI:EU:C:2013:720. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-199/12&language=EN>
- Court of Justice of the European Union (Grand Chamber), Joined Cases 201 and 202/85, Marthe Klensch and Others v Secrétaire d'État à l'Agriculture et à la Viticulture, November 1986. ECLI:EU:C:1986:439. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-201/85>
 - Court of Justice of the European Union (Grand Chamber), Case C-216/18 PPU, L.M., July 2018. ECLI:EU:C:2018:586. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2018:586>
 - Court of Justice of the European Union (Grand Chamber), C-233/18 Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers, 12 November 2019, ECLI:EU:C:2019:956. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-233/18>
 - Court of Justice of the European Union (Sixth Chamber), Case C-238/19, EZ v Bundesrepublik Deutschland, 19 November 2020, ECLI:EU:C:2020:945. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-238/19>
 - Court of Justice of the European Union (Fifth Chamber) Case, C-249/13 Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, 11 December 2014, ECLI:EU:C:2014:2431. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-249/13>
 - Court of Justice of the European Union (Grand Chamber) Case C-269/118, July 2018. ECLI:EU:C:2018:544. Retrieved here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=203754&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=414037>
 - Court of Justice of the European Union (Grand Chamber) Case C-311/18, Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems, 16 July 2020, ECLI:EU:C:2020:559. Retrieved here: <http://curia.europa.eu/juris/document/document.jsf?sessionId=AA9E1B5E01AA87A04BBC0406F86D427A?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8819350>
 - Court of Justice of the European Union (Grand Chamber) Case C-329/11, Alexandre Achughbabian v Préfet du Val-de-Marne, 6 December 2011, ECLI:EU:C:2011:807. Retrieved here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=115941&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1260912>

- Court of Justice of the European Union (Grand Chamber) Case C338/13, Marjan Noorzia v Bundesministerin für Inneres, 17 July 2014, ECLI:EU:C:2014:2092. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-338/13>
- Court of Justice of the European Union (Grand Chamber) Case C356/11, O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L, 6 December 2016, ECLI:EU:C:2012:776. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-356/11>
- Court of Justice of the European Union (Grand Chamber) Case C-357/09, Said Shamilovich Kadzoev (Huchbarov), 30 November 2009, ECLI:EU:C:2009:741. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-357/09>
- Court of Justice of the European Union (Grand Chamber) Case C-362/14, Schrems, October 2015. ECLI:EU:C:2015:650. Retrieved here: <http://curia.europa.eu/juris/documents.jsf?num=c-362/14>
- Court of Justice of the European Union (Grand Chamber), Joined Cases C-391/16, C-77/17 and C-78/ M and Others v Commissaire général aux réfugiés et aux apatrides, 14 May 2019, ECLI:EU:C:2019:403. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0391>
- Court of Justice of the European Union (Grand Chamber) Case C-400/10 PPU, J. McB v. L.E., October 2010. ECLI:EU:C:2010:582. Retrieved here: <https://www.incadat.com/en/case/1104>
- Court of Justice of the European Union (First Chamber) Case C-403/16, Soufiane El Hassani v Minister Spraw Zagranicznych, 13 December 2017, ECLI:EU:C:2017:960. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62016CJ0403>
- Court of Justice of the European Union (Grand Chamber) Case C-411/10, N.S. v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, (December 2011), par. paras 65-69. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0411>
- Court of Justice of the European Union (Grand Chamber) Case C-426/11, Mark Alemo-Herron and Others v Parkwood Leisure Ltd, July 2013. ECLI:EU:C:2013:521. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-426/11&language=EN>

- Court of Justice of the European Union (Grand Chamber), Case C-441/14 Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen, 19 April 2016, ECLI:EU:C:2016:278. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-441/14>
- Court of Justice of the European Union (Grand Chamber), Case C-443/14 and C-444/14, Kreis Warendorf v Ibrahim Alo and Amira Osso v and Region Hannover, 1 March 2016, EU:C:2016:127. Retrieved here : <http://curia.europa.eu/juris/liste.jsf?num=C-443/14>
- Court of Justice of the European Union (Grand Chamber) Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, ECLI:EU:C:2018:36. Retrieved here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=200671&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1265132>
- Court of Justice of the European Union (Fifth Chamber) Case C-517/17, *Milkiyas Addis v Bundesrepublik Deutschland*, 16 July 2020, ECLI:EU:C:2020:579. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-517/17>
- Court of Justice of the European Union (Grand Chamber) Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, 19 January 2010, ECLI:EU:C:2010:21. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-555/07>
- Court of Justice of the European Union (Fourth Chamber) Case C-558/14, *Mimoun Khachab v Subdelegación del Gobierno en Álava*, 21 April 2016, ECLI:EU:C:2016:285. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-558/14>
- Court of Justice of the European Union (Grand Chamber) Case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, 18 December 2014, EU:C:2014:2453. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&T,F&num=c-562/13>
- Court of Justice of the European Union (Grand Chamber) Case C-601/15 *J.N. v Staatssecretaris van Veiligheid en Justitie*, 15 February 2016 ECLI:EU:C:2016:84. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-601/15>
- Court of Justice of the European Union (Grand Chamber) Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, February 2013. EU:C:2013:105. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0617>

- Court of Justice of the European Union (Grand Chamber) Case C-638/16 PPU, X and X v État belge, 7 March 2017, ECLI:EU:C:2017:173. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-638/16%2520PPU>
- Court of Justice of the European Union (Third Chamber) Case C-713/17 Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Land, 21 November 2018, ECLI:EU:C:2018:929. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-713/17>
- Court of Justice of the European Union (Grand Chamber) Case C-808/18, European Commission v. Hungary, 17 December 2020. Retrieved here: <http://curia.europa.eu/juris/liste.jsf?num=C-808/18>
- Court of Justice of the European Union (Full Chamber), Opinion of the Court (Full Court) of 18 December 2014.
- Opinion pursuant to Article 218(11) TFEU. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002>
- Data Protection Working Party, Article 29 Opinion 4/2007 on the concept of personal data, WP 136, June 20, 2007. Retrieved here: <https://www.clinicalstudydatarequest.com/Documents/Privacy-European-guidance.pdf>
- Declaration on the Rights of Persons Belonging to National, or Ethnic, Religious and Linguistic Minorities. Retrieved from: <https://www.ohchr.org/en/professionalinterest/pages/minorities.aspx>
- Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31995L0046>
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L204, 26 July 2006. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0054>
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 24.12.2008.

Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115>

- Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0052>
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>
- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. Retrieved here: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032>
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>
- Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, *OJ L 94, 28.3.2014*. Retrieved here: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32014L0036>
- Directive EU 2016/680, Data Protection Law Enforcement Directive. Retrieved from: <https://eur-lex.europa.eu/eli/dir/2016/680/oj>
- Dublin III Regulation - Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R0604>
- European Asylum Support Office, Guidance on reception conditions for unaccompanied children: Operational Standards and Indicators. Retrieved

here: <https://www.easo.europa.eu/sites/default/files/Guidance-on%20reception-%20conditions-%20for-unaccompanied-children.pdf>

- European Commission (2015). Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, A European Agenda on Migration. Retrieved here: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf
- European Commission (2003). Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions on immigration, integration and employment, 3 June 2003, COMM (2003) 336 final. Retrieved here: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0336:FIN:EN:PDF>
- European Commission [2011], Communication from the Commission of the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility, SEC(2011) 1353 final / COM(2011) 743 final. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0743&from=EN>
- European Commission (2020). Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, on a New Pact on Migration and Asylum. Retrieved here: https://ec.europa.eu/info/sites/info/files/1_en_act_part1_v7_1.pdf
- European Commission (2016), Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. COM/2016/0467 final - 2016/0224 (COD). Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0467%3AFIN>
- European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:610:FIN>
- European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008,

(EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. COM/2020/612 final. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:612:FIN>

- European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of crisis and force majeure in the field of migration and asylum. COM/2020/613 final. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:613:FIN>
- European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final 2018/0329 (COD). Retrieved here: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-returning-illegally-staying-third-country-nationals-directive-634_en.pdf
- European commission, Recast Eurodac Regulation - Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale it systems in the area of freedom, security and justice (recast), OJ L 180/1, 29 June 2013. Retrieved here: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R0603>
- European Commission Recommendation of 23 September 2020, on an EU mechanism for Preparedness and Management of Crises related to Migration. (Migration Preparedness and Crisis Blueprint). Retrieved here: https://ec.europa.eu/info/sites/info/files/commission_recommendation_on_a_n_eu_mechanism_for_preparedness_and_management_of_crises_related_to_migration_migration_preparedness_and_crisis_blueprint.pdf
- European Commission, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R0604>

- European Convention for the Protection of Human Rights and Fundamental Freedoms. Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>
- European Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L 180*, 19.7.2000. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0043>
- European Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L 303*, 2.12.2000. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>
- European Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0055>
- European Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ L 251*, 3 October 2003. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0086>
- European Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L 373*, 21 December 2004. Retrieved here: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF>
- European Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R2007>
- European Court of Human Rights, *Ahmed v Austria*, App. No 25964/94, 17 December 1996. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-ahmed-v-austria-application-no-2596494-17-december-1996>
- European Court of Human Rights, *Amann v. Switzerland*, App. No. 27798/95, February 2000. Retrieved here: <https://www.legal-tools.org/doc/6e49ed/pdf/>

- European Court of Human Rights, Anakomba Yula v Belgium, App. No. 45413/07, 10 March 2009, Retrieved here: <https://www.refworld.org/cases,ECHR,49f9c7032.html>
- European Court of Human Rights, Antwi and Others v Norway, App. No. 26940/10 [2012], 14 February 2012. Retrieved here: <https://www.refworld.org/cases,ECHR,583eddf74.html>
- European Court of Human Rights, Botta v Italy (App. No. 21439/93, 24 February 1998. Retrieved here: <https://www.equalrightstrust.org/sites/default/files/ertdocs//Botta%20v.%20Italy.pdf>
- European Court of Human Rights, Boultif v Switzerland, App. No. 54273/00, 2 August 2001. Retrieved here: <https://www.refworld.org/cases,ECHR,468cbc9e12.html>
- European Court of Human Rights, Chowdury and Others v Greece, App. No.21884/15, 30 March 2017. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-chowdury-and-others-v-greece-application-no-2188415-30-march-2017>
- European Court of Human Rights, Čonka v. Belgium, App. No. 51564/99, 5 February 2002. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-%C4%8Donka-v-belgium-application-no-5156499-5-february-2002>
- European Court of Human Rights, Costello-Roberts v. the United Kingdom, App. No. 13134/87, March 25, 1993. Retrieved here: <https://www.refworld.org/cases,ECHR,3ae6b6f08.html>
- European Court of Human Rights, D v the United Kingdom, App. No 30240/96, 2/05/1997. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-d-v-united-kingdom-application-no-3024096-2-may-1997>
- European Court of Human Rights, El Ghatet v. Switzerland, App. No. 56971/10, 8 November 2016. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-el-ghatet-v-switzerland-application-no-5697110-8-november-2016>
- European Court of Human Rights, Gebremedhin v. France, ECHR, (2007), Appl. No. 25389/05, 26 April 2007. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-gebremedhin-gaberamadhien-v-france-application-no-2538905>

- European Court of Human Rights, El Morsli v. France App. No. 15585/06, 4 March 2008. Retrieved here: <http://echr.ketse.com/doc/15585.06-fr-20080304/>
- European Court of Human Rights, HA and Others v Greece, App. No. 199951/16, 28 February 2019. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-ha-and-others-v-greece-1995116-28-february-2019>
- European Court of Human Rights, Hirsi Jamaa and Others v Italy, pp. No. 7765/09, 23 February 2012. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509>
- European Court of Human Rights, HLR v France, App. No. 24573/94, 22 April 1997. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-hlr-v-france-application-no-2457394>
- European Court of Human Rights, Jabari v Turkey, App. No. 40035/98, 11 October 2000. Retrieved here: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-58900%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58900%22]})
- European Court of Human Rights, Jeunesse v The Netherlands, App. No. 12738/10, 3 October 2014. Retrieved here: <https://www.refworld.org/cases,ECHR,584a96604.html>
- European Court of Human Rights, Kebe and others v. Ukraine, Application no. 12552/12, 12 January 2017. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-kebe-and-others-v-ukraine-application-no-1255212-12-january-2017>
- European Court of Human Rights, Khlaifia and others v. Italy, App. No. 16483/12, 15 December 2016. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-gc-no-1648312-15-december-2016-0>
- European Court of Human Rights, K.R.S. v the United Kingdom, App. No. 32733/08 (decision on admissibility), 2 December 2008. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-krs-v-united-kingdom-application-no-3273308-decision-admissibility-2-december-2008>
- European Court of Human Rights, M.A. and Others v. Lithuania, App. No. 59793/17, 11 December 2018. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-ma-and-others-v-lithuania-no-5979317-11-december-2018>

- European Court of Human Rights, Maaouia v. France, App. No. 39652/98, 5 October 2000. Retrieved here: **Error! Hyperlink reference not valid.**
- European Court of Human Rights, Maslov v Austria, App. No. 1638/03, 23 June 2008. Retrieved here: [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-87156%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-87156%22])
- European Court of Human Rights, M.K. and Others v. Poland, App. Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/mk-and-others-v-poland-repeated-refusal-accept-asylum-applications-amounted-collective>
- European Court of Human Rights, M.S.S. v. Belgium and Greece [GC], App. No. 30696/09, 21 January 2011. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>
- European Court of Human Rights, N. v. The United Kingdom, App. No. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008. Retrieved here: <https://www.refworld.org/cases,ECHR,483d0d542.html>
- European Court of Human Rights, Niedzwiecki v Germany, App. No. 58453/00, 25 October 2005. Retrieved here: <https://www.refworld.org/pdfid/4406d6cc4.pdf>
- European Court of Human Rights, Nunez v Norway, App. No. 55597/09 [2011], 28 June 2011. Retrieved here: <https://www.refworld.org/cases,ECHR,4e26e22c2.html>
- European Court of Human Rights, Omojudi v. the United Kingdom, App. No. 1820/08, [2009]. Retrieved here: <https://www.refworld.org/cases,ECHR,4b1e560b2.html>
- European Court of Human Rights, Okpiz v Germany, App. No. 59140/00, 25 October 2005. Retrieved here: <https://www.refworld.org/cases,ECHR,4406d7ea4.html>
- European Court of Human Rights, Paposhvili v Belgium [GC], App. No. 41738/10, 13 December 2016. Retrieved here: <https://www.refworld.org/cases,ECHR,5859459b4.html>
- European Court of Human Rights, Phull v. France App. No. 35753/03, 11 January 2005. Retrieved here: <http://echr.ketse.com/doc/35753.03-en-20050111/>

- European Court of Human Rights, Ponomaryovi v Bulgaria, App. No. 5335/05, 28 November 2011. Retrieved here: <https://archive.crin.org/en/library/legal-database/ponomaryovi-v-bulgaria.html>
- European Court of Human Rights, Rodrigues Da Silva and Hoogkamer v The Netherlands, App. No. 50435/99 [2006], 31 January 2006. Retrieved here: <https://www.refworld.org/cases,ECHR,464dcaca2.html>
- European Court of Human Rights, Saadi v Italy, App. No. 37201/06, 28 February 2008. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93saadi-v-italy-application-no-3720106-28-february-2008>
- European Court of Human Rights, Saadi v. the United Kingdom, App. No. 13229/03, 29 January 2008. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-saadi-v-united-kingdom-no-1322903-29-january-2008>
- European Court of Human Rights, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, App. No. 931/13, 27 June 2017. Retrieved here: <https://www.cambridge.org/core/journals/international-legal-materials/article/abs/satakunnan-markkinaporssi-oy-and-satamedia-oy-v-finland-eur-ct-hr/2422B53C2171622C34BC3F244A67D5E8>
- European Court of Human Rights, Sh.D. and others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia, App. No. 141165/16), 13 June 2019. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-shd-and-others-v-greece-austria-croatia-hungary-northern-macedonia-serbia-and-slovenia>
- European Court of Human Rights, Sharifi v Italy, App. No. 16643/2009, 21 October 2014, Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-sharifi-and-others-v-italy-and-greece-application-no-1664309>
- European Court of Human Rights, Slivenko v Latvia, App. No. 48321/99, 9 October 2003. Retrieved here: <https://www.refworld.org/pdfid/402b5b034.pdf>
- European Court of Human Rights, Tarakhel v Switzerland, App. No. 29217/12, 4 November 2014. Retrieved here: <https://www.asylumlawdatabase.eu/en/content/ecthr-tarakhel-v-switzerland-application-no-2921712>

- European Court of Human Rights, Üner v The Netherlands, App. No. 46410/99, 18 October 2006. Retrieved here: <https://www.refworld.org/cases,ECHR,45d5b7e92.html>
- European Data Protection Supervisor, A Preliminary Opinion on data protection and scientific research, 6 January 2020. Retrieved here: https://edps.europa.eu/sites/edp/files/publication/20-01-06_opinion_research_en.pdf
- European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), OJ C 388, 13 November 2020, Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52018IP0494>
- Framework Convention for the Protection of National Minorities of the Council of Europe. Retrieved here: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cdac>
- FRONTEX, European Border and Coast Guard Agency, Data Protection Notice for Frontex Application for Return. Retrieved here: https://frontex.europa.eu/assets/Data_Protection/Data_Protection_Notice_Returns.pdf
- FRONTEX, European Border and Coast Guard Agency, Processing personal data for risk analysis – Privacy Statement. Retrieved here: https://frontex.europa.eu/assets/Data_Protection/Privacy_Statement.pdf
- Fundamental Rights Agency, Fundamental Rights Report 2020. Retrieved here: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf
- Fundamental Rights Agency (2016), Asylum and migration into the EU in 2015. Retrieved here: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-focus-0_en.pdf
- Fundamental Rights Agency, Border Controls and fundamental rights at external land borders, 24 July 2020. Retrieved here: <https://fra.europa.eu/en/publication/2020/border-controls-and-fundamental-rights-external-land-borders?fbclid=IwAR2X0SrcA4PSQeIY-zHa1880Z09YsJTupJklwUBY0WuqtAfCXhkgO8056Ds>
- Fundamental Rights Agency, Current migration situation in the EU: hate crime, November 2016. Retrieved here: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-november-monthly-focus-hate-crime_en.pdf

- Fundamental Rights Agency, April 2018, Handbook on European data protection law. Retrieved here: https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-edps-2018-handbook-data-protection_en.pdf
- Fundamental Rights Agency (December 2020). Handbook on European law relating to asylum, borders and migration. Retrieved here: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-handbook-law-asylum-migration-borders-2020-ed_en.pdf
- Global Approach to Migration and Mobility. Retrieved here: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A52011DC0743>
- Global Compact for Safe, Orderly and Regular Migration. Retrieved here: <https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf>
- Global Compact for Refugees. Retrieved here: https://www.unhcr.org/gcr/GCR_English.pdf
- Human Rights Committee of the United Nations Concluding observations on the 6th periodic report of Belgium, UN Doc. CCPR/C/BEL/CO/6 of 6 December 2019. Retrieved here: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPRIcAqhKb7yhsnKB82NyZV5e4fvxB6eLo8Gs8cRiyobIhZtt9wB%2B250G0UrgGFeAgnnzwy3bBH6nhyTjVKxHKj8m09dfYppzjwUjiQyEz%2B%2B3BeusogbMjOqP>
- Human Rights Committee of the United Nations Concluding Consideration of reports submitted by States parties under article 40 of the Covenant, Bulgaria, UN Doc. CCPR/C/BGR/CO/3 of 19 August 2011. Retrieved here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/BGR/CO/3&Lang=En
- Human Rights Committee of the United Nations Concluding observations on the 4th periodic report of Bulgaria, UN Doc. CCPR/C/BGR/CO/4 of November 2018. Retrieved here: <https://www.refworld.org/docid/5b4dec787.html>
- Human Rights Committee of the United Nations Concluding observations on the periodic report of Czechia, UN Doc. CCPR/C/CZE/CO/4 of 6 December 2019. Retrieved here: <https://undocs.org/pdf?symbol=en/A/72/40>
- Human Rights Committee of the United Nations, Concluding observations of the Human Rights Committee on the periodic report of Estonia, UN Doc. CCPR/CO/77/EST of 15 April 2003. Retrieved here:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCO%2F77%2FEST&Lang=en

- Human Rights Committee of the United Nations Concluding Consideration of reports submitted by States parties under article 40 of the Covenant, Latvia, UN Doc. CCPR/CO/79/LVA, of 1 December 2003. Retrieved here: <https://www.refworld.org/docid/3fdc68164.html>
- Human Rights Committee of the United Nations Concluding Consideration of reports submitted by States parties under article 40 of the Covenant, Lithuania, UN Doc CCPR/CO/80/LTU, 4 May 2004. Retrieved here: <https://undocs.org/CCPR/CO/80/LTU>
- Human Rights Committee of the United Nations Concluding observations on the periodic report of Netherlands, UN Doc. CCPR/C/NLD/CO/5 of 22 August 2019, Retrieved here: <https://www.refworld.org/docid/4aa7aa642.html>
- Human Rights Committee of the United Nations Concluding observations on the 7th periodic report of Norway, UN Doc. CCPR/C/PRT/CO/5 of April 2020. Retrieved here: <https://digitallibrary.un.org/record/1485075?ln=en>
- Human Rights Committee of the United Nations Concluding observations on the 5th periodic report of Portugal, para. 34, 128th Session, UN Doc. CCPR/C/PRT/CO/5 of April 2020. Retrieved here: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPRIcAqhKb7yhshYSuxMUifRly90VnAxQecFFu5LsMgLbK6DPLrapwcZGXfBBP%2Bzn8vhH7bEXeRxYqBrwl8jTyJQesxx53Sgg%2Bs%2BGxAxpYhir%2F9YAn%2FUlrHmM>
- Human Rights Council of the United Nations, The right to privacy in the digital age, A/HRC/34/L.7/Rev.1, 22 March 2017. Retrieved here: <https://digitallibrary.un.org/record/1307661?ln=en>
- International Convention on the Elimination of All Forms of Racial Discrimination. Retrieved from: <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>
- International Covenant on Civil and Political Rights. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- International Covenant on Economic, Social and Cultural Rights. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

- International Convention on the Rights of Migrant Workers and their Families. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx>
- New York Declaration for Refugees and Migrants. Retrieved here: <https://www.unhcr.org/57e39d987>
- Office for the High Commissioner for Human Rights, CCPR General Comment No. 23, on “The Rights of Minorities”, Article 27, UN Doc. CCPR/C/21/Rev.1?Add.5 para.5.2. Retrieved here: <https://www.refworld.org/docid/453883fc0.html>
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/opcat.aspx>
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/opcedaw.aspx>
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx>
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/opscrc.aspx>
- Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. Retrieved here: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCR.aspx>
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Retrieved here: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>
- Optional Protocol to the International Covenant on Civil and Political Rights. Retrieved here: <https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx>
- Protocol against the Smuggling of Migrants by Land, Sea and Air. Retrieved here: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TransnationalOrganizedCrime.aspx>
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Retrieved here:

<https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx>

- Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016, on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0399&from=EN>
- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Retrieved from <https://eur-lex.europa.eu/eli/reg/2016/679/oj>
- Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1624>
- Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union repelling Directive 2013/32/EU. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1896&from=EN>
- Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 2018. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725>
- Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code). PE/29/2019/REV/1. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L.2019.188.01.0025.01.ENG>
- Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, PE/33/2019/REV/1, OJ

- L 295, 14.11.2019. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1573722151667&uri=CELEX:32019R1896>
- Resolution of the European Parliament of 18 April 2018 on the progress on the UN Global Compacts for Safe and Orderly Migration and on Refugees (2018/2642/(RSP). Retrieved here: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0118_EN.html
 - Return Directive, Directive 2008/115/EC - Return Directive. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115>
 - Roadmap to implement the New Pact on Migration and Asylum of the European Commission. Retrieved here: Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020, https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en.
 - Schengen Information System II Supervision Coordination Group. Retrieved here: https://edps.europa.eu/data-protection/european-it-systems/schengen-information-system_en
 - Siracusa Principles: Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. Retrieved here: <https://undocs.org/pdf?symbol=en/E/CN.4/1985/4>
 - Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. Retrieved here: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF>
 - Treaty on the European Union. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>
 - Treaty on the Functioning of the European Union. Retrieved here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>
 - Universal Declaration of Human Rights (United Nations, 1948). Retrieved from https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf
 - United Nations Convention relating to the Status of Refugees. Retrieved from: <https://www.unhcr.org/5d9ed32b4>
 - United Nations General Assembly Official Records, 31 October 1977, Thirty-second Session, Supplement No. 12 (A/32/12/Add.1). Retrieved here: <https://www.unhcr.org/excom/unhcrannual/3ae68c304/addendum-report-united-nations-high-commissioner-refugees.html>

- United Nations General Assembly Resolution adopted by the General Assembly on 17 December 2018. A/RES/73/151. Retrieved here: <https://www.unhcr.org/excom/unhcrannual/5c4088f44/resolution-adopted-general-assembly-17-december-2018.html>
- United Nations General Assembly, The right to privacy in the digital age: Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/27/37, 30 June 2014. Retrieved here: <https://www.ohchr.org/EN/Issues/DigitalAge/Pages/ReportDigitalAge.aspx>
- United Nations, General Assembly, Revised draft resolution on the right to privacy in the digital age, A/C.3/69/L.26/Rev.1, New York, 19 November 2014. Retrieved here: <https://digitallibrary.un.org/record/783636?ln=en>
- United Nations, General Assembly, Revised draft resolution on the right to privacy in the digital age, A/C.3/71/L.39/Rev.1, New York, 16 November 2016. Retrieved here: <https://digitallibrary.un.org/record/848969?ln=en>
- UNHCR, Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice, 4 June 1999, EC/49/SC/CRP.13. Retrieved here: <https://www.refworld.org/docid/47fdfaf33b5.htm>
- UNHCR, (1979), General Assembly Document No 12A (A/34/12/Add.1), Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees. Refugees without an Asylum Country, No. 15 (XXX). Retrieved here: <https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html>
- UNHCR, (4 September 2001), Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems. EC/GC/17. Retrieved here: <https://www.refworld.org/docid/3bfa81864.html>
- UNHCR, (May 2002). Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02). Retrieved here: <https://www.unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>
- UNHCR, (February 2003), Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), HCR/GIP/03/03. Retrieved here:

<https://www.unhcr.org/publications/legal/3e637a202/guidelines-international-protection-3-cessation-refugee-status-under-article.html>

- UNHCR, (July 2003), Guidelines on International Protection No. 4: The “Internal Flight or Relocation Alternative” within the context of Article 1A (2) of the 1951 Convention and/or its Protocol relating to the Status of Refugees, HCR/GIP/03/04. Retrieved here: <https://www.unhcr.org/publications/legal/3f28d5cd4/guidelines-international-protection-4-internal-flight-relocation-alternative.html>
- UNHCR, (April 2006), Guidelines on International Protection No. 7: The Application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked. Retrieved here: <https://www.unhcr.org/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html>
- UNHCR, (October 2012). Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/12/09. Retrieved here: <https://www.unhcr.org/509136ca9.pdf>
- UNHCR (February 2019). Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Retrieved here: <https://www.unhcr.org/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>
- UNCHR, (August 1993), ‘Note on International Protection: Submitted by the High Commissioner’, UN Doc A/AC.96/815, 5. Retrieved here: <https://www.refworld.org/pdfid/3ae68d5d10.pdf>
- UNCHR, (7 September 1994), ‘Note on International Protection: Submitted by the High Commissioner’, UN Doc A/AC.96/830. Retrieved here: <https://www.unhcr.org/uk/3f0a935f2.pdf>
- UNHCR, (1981) Protection of Asylum-Seekers in Situations of Large-Scale Influx, Conclusion No.22 (XXXII). Retrieved here: <https://www.unhcr.org/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html>

ANNEX C: ETHICAL GUIDELINES

- Refugee Studies Centre, Queen Elizabeth House - University of Oxford (2007). Ethical Guidelines for Good Research Practice. UNHCR. Retrieved here: <https://academic.oup.com/rsq/article/26/3/162/1590874>
- European Commission (2012). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 25 January 2012: Safeguarding Privacy in a Connected World. A European Data Protection Framework for the 21st Century. Retrieved here: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0009:FIN:EN:PDF>
- European Commission (2013). Ethics for Researchers. Retrieved here: https://ec.europa.eu/research/participants/data/ref/fp7/89888/ethics-for-researchers_en.pdf
- Iphofen, Ron (2013). Research Ethics in Ethnography/Anthropology. European Commission. Retrieved here: <https://www.eur.nl/sites/corporate/files/2018-07/Research%20Ethics%20in%20Ethnography%20-%20Anthropology.pdf>
- European Commission (2016). H2020 Programme: Guidelines on FAIR Data Management in Horizon 2020. Retrieved here: https://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/oa_pilot/h2020-hi-oa-data-mgt_en.pdf
- ALLEA (2017). The European Code of Conduct for Research Integrity. Retrieved here: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/horizon/guidance/european-code-of-conduct-for-research-integrity_horizon_en.pdf
- European Commission (2018a). Ethics in Social Science and Humanities. Retrieved here: https://ec.europa.eu/info/sites/info/files/6_h2020_ethics-soc-science-humanities_en.pdf
- European Commission (2018b). Ethics and Data Protection. Retrieved here: https://ec.europa.eu/info/sites/info/files/5_h2020_ethics_and_data_protection_0.pdf
- European Commission (2019). Horizon 2020 Programme: Guidance How to Complete your Ethics Self-Assessment. Retrieved here: https://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/ethics/h2020_hi_ethics-self-assess_en.pdf

- European Data Protection Board (2020). Guidelines 05/2020 on consent under Regulation 2016/679 (Version 1.1). Retrieved here: https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf
- Christina Clark-Kazak (2019). Developing ethical guidelines for research. The International Association for the Study of Forced Migration (IASFM). Retrieved here: <https://www.fmreview.org/ethics/clarkkazak>
- European Commission (2020). Guidance Note – Research on Refugees, Asylum Seekers & Migrants. Retrieved here: https://ec.europa.eu/research/participants/data/ref/h2020/other/hi/guide_research-refugees-migrants_en.pdf
- European Data Protection Supervisor (2020). A Preliminary Opinion on Data Protection and Scientific Research. Retrieved here: https://edps.europa.eu/sites/edp/files/publication/20-01-06_opinion_research_en.pdf
- European Commission (n/d). Research Ethics and the Responsible Research and Innovation. Retrieved here: <https://ec.europa.eu/programmes/horizon2020/en/h2020-section/responsible-research-innovation>

ANNEX D: NGOs' INTERNAL POLICIES

- British Red Cross: British Red Cross staff and volunteer guide to anti-trafficking: Helping people get the support they need in crisis. Retrieved from https://trafficking-response.org/wp-content/uploads/2020/12/BRC-Staff-and-Volunteer-Guide-to-Anti-trafficking_pocket-guide.pdf
- Italian Red Cross child protection policy. Retrieved from https://media.ifrc.org/ifrc/wp-content/uploads/sites/5/2018/03/193_e_v100_child-protection-policy.pdf
- Italian Red Cross: Codice Etico - Provvedimenti Disciplinari e Collegi Disciplinari. Retrieved from <https://www.cri.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/32258>
- Italian Red Cross: Codice di Condotta per la Prevenzione ed il Contrasto alle Molestie Sessuali. Retrieved from <https://www.cri.it/flex/cm/pages/ServeBLOB.php/SU/regolamenti-croce-rossa?p1=0&n1=&d1=&dd1=&di1=&df1=&t1=19&oby1=1>
- Italian Red Cross: Safeguarding Children and Vulnerable Adults (unpublished)

internal document)

- Italian Red Cross: Manuale Antitratta: Metodologia e procedure di identificazione e risposta ai bisogni di persone migrant potenziali vittime di tratta (unpublished internal document)
- Italian Red Cross: Manuale RFL: Linee guida e procedure del servizio Restoring Family Links (unpublished internal document)
- Italian Red Cross: Safe Point della Croce Rossa Italiana: Guida operativa per l'istituzione e la gestione di 'punti sicuri' per l'orientamento, la protezione e l'assistenza delle persone migranti (unpublished internal document)
- Red Cross: Restoring Family Links code of conduct on data protection. Retrieved from <https://www.icrc.org/en/document/rfl-code-conduct>
- Oxfam Policy on Protection from Sexual Exploitation and Abuse (PSEA). Retrieved from https://www-cdn.oxfam.org/s3fs-public/one_oxfam_psea_policy_en.pdf
- Oxfam Child Safeguarding Policy. Retrieved from https://www-cdn.oxfam.org/s3fs-public/one_oxfam_child_safeguarding_policy_en.pdf

ANNEX E: SECONDARY SOURCES (Alphabetical Order)

- Backhaus, A., Martinez-Zarzoso, I. & Muris, C. "Do climate variations explain bilateral migration? A gravity model analysis." IZA J Migration 4, 3 (2015). <https://doi.org/10.1186/s40176-014-0026-3>
- Benítez, Oscar et al. "Audiovisual Documentation of Oral Consent: a New Method of Informed Consent for Illiterate Populations". Lancet, 20-359 (2012), pp. 1406-7.
- Bird Lucia, Global Initiative against Transnational Organised Crime, Smuggling in the Time of COVID-19", April 2020, pp 5-6.
- Birman, D. (2015): "Ethical Issues in Research With Immigrants and Refugees" in Trimble, J. E. and Fisher, C. The Handbook of Ethical Research with Ethnocultural Populations & Communities. Newbury Park: SAGE Publications, Inc., 2015, pp. 155-177.
- Block, Karen et al. "Addressing Ethical and Methodological Challenges in Research with Refugee-background Young People: Reflections from the Field". Journal of Refugee Studies Vol. 26, No. 1 (2012), pp. 69-87.
- Bodart, S., C Dubois Fransen, 'EU Charter and the dialog of the judges in asylum and immigration cases', EUI RSCAS Working Paper 2020/10, Centre for Judicial Cooperation
- Çalı B., 'All You Need Is Time? Discrepancies between the European Court of Human Rights Case Law and Liberal Normative Theory on Long-Term Migrants' (2017) 50 3 Israel Law Review 447-497
- Citro, Constance F. et. al. Protecting Participants and Facilitating Social and Behavioral Sciences Research. National Research Council. (2003)
- Clark-Kazak, Christina. "Considérations en matière d'éthique de la recherche auprès de personnes en situation de migration forcée". *Refuge*, Vol. 33, N. 2 (2017), pp. 3-10
- Collins, P.H. and Bilge, S., Intersectionality, (John Wiley & Sons, 2020)
- Crenshaw K., "Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics", (1989), U. Chi. Legal F., 139.
- De Bruycker P., M. Moraru, G. Renaudiere, "ReDial Research Report", 2016/01,8

- D J Cantor, 'Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence' (2015) 34 1 Refugee Survey Quarterly 79-106 at 89-90.
- Elberling B., " Articleicle 16 (Access to Courts/Droit d'Ester en Justice", in A. Zimmermann (ed.), "The 1951 Convention Relating [sic] to the Status of Refugees and its 1967 Protocol", Oxford, Oxford University Press, 2011, 931–947, at 938–940 and 944–947
- Filippo Fontanelli 'Implementation of EU law through Domestic Measures after Fransson: The Court of Justice Buys Time and 'Non-Preclusion' Troubles Loom Large' (2014) ELR 682
- Glaser & Straus, "The Discovery of Grounded Theory - Strategies for Qualitative Research" (1967), http://www.sxf.uevora.pt/wp-content/uploads/2013/03/Glaser_1967.pdf
- Godwin-Gill, Guy s. "The International Law of Refugee Protection". Michigan Yearbook of International Legal Studies, (1982), pp. 299
- Goodwin-Gill, Guy & J McAdam, "The Refugee in International Law", 3d edition (Oxford: OUP, 2007), p. 537
- Grütters C., 'The Return of Children', Chapter 18 in Law and Judicial Dialogue on the Return of Irregular Migrants from the EU (eds), M Moraru, G Cornelisse and P de Brucyker (Hart 2020).
- Hathaway James C., "The Rights of Refugees under International Law", Cambridge University Press, 645–646
- Hugman, Richard et al. "Human Agency and the Meaning of Informed Consent: Reflections on Research with Refugees". Journal of Refugee Studies Vol. 24, No. 4 (2011), pp. 655-671.
- Humpage, Louise *et al.* "Photovoice and Refugee Research: The Case for a 'Layers' versus 'Labels' Approach to Vulnerability". *Research Ethics*, Vol. 15, No. 3-4 (2019), pp. 1-16
- Hurwitz Agnès, 'The Dublin Convention: A Comprehensive Assessment' (1999) 11 IJRL 646, 648
- Joannon, B., Pope, S. and Welander, M. (2020). "New Pact on Migration: An Exacerbation of Past Failures in Shiny New Packaging". Available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/09/new-pact> [20 January 2020]

- Krause, U. (2017). "Researching Forced Migration: Critical Reflections on Research Ethics during Fieldwork". *Refugee Studies Center, Working Paper Series NO. 123*, retrieved from [Researching forced migration: critical reflections on research ethics during fieldwork — Refugee Studies Centre \(ox.ac.uk\)](#)
- Kuner C., *European Data Protection Law*, Oxford University Press, 2007, p.67-69
- Lattof, Samantha R. "Collecting data from migrants in Ghana: Lessons learned using respondent-driven sampling". *Demographic Research*, Vol. 38 (2018), pp. 1017-1058.
- Lock T., 'Rights and Principles in the EU Charter of Fundamental Rights', 56(5) *Common Market Law Review* (2019) p. 1201
- Loue, S. (2012): "Ethical Issues in Research with Immigrants and Refugees" in Loue, S. and Sajatovic, M. (Eds.). *Encyclopedia of Immigrant Health*. Cham: Springer, 2012, pp. 113-124.
- Lutz F. and Mananashvili S., 'Commentary of the Return Directive' in K. Hailbronner, D. Thym (eds), *EU Immigration and Asylum Law A Commentary*, 2nd edition 2016 BECK
- Nicholson F., 'The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition', UNHCR Doc PPLA/2018/01 (Jan 2018), <https://www.unhcr.org/5a8c40ba1.pdf>
- Nowak M., "U.N. Covenant on Civil and Political Rights: CCPR Commentary", Kehl, N.P. Engel, (2005)
- Santana de Andrade, G. (2019) "Reflections on research ethics in the case of Syrians in urban spaces in Jordan and Turkey" in *Briefs on Methodological, Ethical and Epistemological Issues*, No. 5, in www.migrationresearch.com
- Slingenbergh Lieneke, 'Asylum Seekers' Access to Employment: Tensions with Human Rights Obligations in the Recast of the Directive on Reception Conditions for Asylum Seekers'
- Spaventa E., "The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures", Study for the PETI Committee, EP, DG for Internal Policies, PE 556.930 (2016), p 19
- Stefan M. and Carrera S. (eds.), "Justicing Europe's Frontiers: Effective Access to Justice in Bordering and Expulsion Policies" (Routledge 2019)

- Thapliyal, N.; Baker, S. "Research with former refugees" in Australian Universities Review , Volumee 60, No. 2 (2018)
- Visser, Robert K., 'Two Realities: Striking the Balance' in Claudio Matera and Amanda Taylor (eds), The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies (Asser Institute, CLEER 2014)
- Warren and Brandeis, "The Right to Privacy", 4 Harvard Law Review 193, 1890
- Weiner, Bernard, "Attribution Theory, Achievement Motivation and the Educational Process" (1972), <https://journals.sagepub.com/doi/pdf/10.3102/00346543042002203>
- Xanthaki A., 'Against integration, for human rights' (2016) 20 6 The International Journal of Human Rights 815-838