

### 3.3. PATIENTS' RIGHTS

This section is structured around nine critical patient rights:

- ▶ Liberty and security of person;
- ▶ Privacy;
- ▶ Access to information;
- ▶ Bodily integrity;
- ▶ Life;
- ▶ Highest attainable standard of mental and physical health;
- ▶ Freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- ▶ Participation in public policy;
- ▶ Equality and freedom from discrimination; and
- ▶ Effective remedy.

The ECHR and the ESC constitute the two main complementary instruments covering the range of human rights in the European region, with the ECtHR and the ECSR taking a cross-fertilization approach in terms of developing human rights protection and understanding of the substantive content of rights.

The lack of an explicit provision guaranteeing the right to health in the ECHR has not prevented the ECtHR, the ECHR's supervisory and enforcement body, from addressing many patients' rights issues through other articles in the ECHR (the most common ones being Articles 2, 3, 5, 8, 13 and 14). Article 5, which guarantees the right to liberty and security of person, has been used by the ECtHR to protect the rights of those detained on mental health grounds. Article 3 provides an absolute prohibition on the use of torture and/or cruel, inhuman, or degrading treatment against detainees, including those detained on mental health grounds. Article 8, safeguarding the right to privacy, has been successfully argued in relation to unlawful disclosure of personal medical data. Beyond these examples, however, the ECtHR has been reluctant to indirectly recognize a positive right to health, although the door has been left open in relation to the right to life under Article 2 in cases in which preexisting obligations have not been fulfilled. This reluctance is in line with the ECtHR's general desire not to make decisions that could have a significant economic and/or social impact on policy or resources.

On the other hand, in Article 11 of the ESC, the ECSR has specifically defined the right to protection of health, together with a number of related guarantees, such as the right to social and medical assistance under Article 13. Because the ESC cannot be used by individual victims, however, all of the ECSR's analysis relates to country reports or to the collective complaints mechanism and, therefore, tends to be general in nature (stating, for example, that health care systems must be accessible to everyone or that there must be adequate staff and facilities). To date, under the collective complaints mechanism, the ECSR has considered eight right-to-health cases, concerning issues ranging from detrimental effects on health from environmental pollution to denial of medical assistance to poor illegal immigrants.<sup>1</sup> Therefore, there is great potential for further development of the ECSR's case law in this area.

Other significant sets of standards discussed in this chapter, such as the European Charter of Patients' Rights, also contain a number of specific relevant guarantees, but these standards lack any form of supervisory body. They, therefore, cannot be directly enforced by victims to gain redress. Nonetheless, that does not mean that they cannot be referenced when arguing claims under binding treaties, such as the ECHR and the ESC, in order to better

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<sup>1</sup>COE.International Federation of Human Rights Leagues (FIDH) v. Belgium.Collective Complaint No. 75/2011.January 23, 2013; COE.International Federation of Human Rights Leagues (FIDH) v. Greece.Collective Complaint No.72/2011.January 23, 2013; COE.Defence for Children International (DCI) v. Belgium. Collective Complaint No. 69/2011.October 23, 2012; COE.Médecins du Monde - International v. France. Collective Complaint No. 67/2011.September 11, 2012; COE. Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007.March 30, 2009; COE. European Roma Rights Centre (ERRC) v. Bulgaria. Collective Complaint No. 46/2007.December 3, 2008; COE.Marangopoulos Foundation for Human Rights (MFHR) v. Greece.Collective Complaint No. 30/2005.December 6, 2006; COE.Confédération Générale du Travail (CGT) v. France. Collective Complaint No. 22/2003. December 8, 2004.

interpret the treaties' own provisions. In turn, increased references to nonbinding documents such as the European Charter of Patients' Rights will help them gain further credibility and strength so that, over time, some of their provisions might attain customary international law status.<sup>2</sup>

## RIGHT TO LIBERTY AND SECURITY OF PERSON

As it relates to patients' rights, the right to liberty of the person protects the individual from arbitrary or unjustified physical confinement on the basis of mental or physical health, such as involuntary hospitalization. The detention of an individual based on health grounds, such as quarantine and isolation, must be done in accordance to established law and must safeguard the individual's rights to due process under the law. The detention is considered "lawful" only if it occurs in a hospital, clinic, or other appropriate authorized setting.<sup>3</sup> However, the fact that detention may be in a suitable institution has no bearing on the appropriateness of the patient's treatment or conditions under which she/he may be detained.<sup>4</sup>

The ECtHR has established procedural guarantees in relation to the application of Article 5(1)(e), which guarantees this right under the ECHR:

- ▶ Committing an individual to confinement must only occur according to a properly prescribed legal procedure and cannot be arbitrary. In relation to the condition of "unsound mind," this guarantee means that the person must have a recognized mental illness and require confinement for the purposes of treatment;<sup>5</sup>
- ▶ Any commitment must be subject to a speedy periodic legal review that incorporates the essential elements of due process;<sup>6</sup> and
- ▶ Where such guarantees have not been adhered to, the ECtHR has been prepared to award damages for breaches of a person's liberty under Article 5(1)(e).<sup>7</sup>

With respect to the right to security of person, it is often enshrined under the same provision as the right to liberty, such as Article 5 of the ECHR. The right to liberty protects the individual from arbitrary or unjustified physical confinement. The right to security of person safeguards the individual's freedom from bodily injury or interference. As shown in this section, the facts present in relevant case law have led the ECtHR to address issues concerning physical or bodily integrity (right to security of person) under Article 5 without making a distinction between the two rights. Moreover, most cases concerning violations of physical or bodily integrity in health care settings have been analyzed under related rights that include the right to freedom from torture and cruel, inhuman and degrading treatment (ECHR, Art. 3), the right to privacy (ECHR, Art. 8), and the right to the highest attainable standard of health (ESC, Art. 11). For example, the Court has examined cases involving the administration of forced medication (including injections), forced feeding and nonconsensual sterilizations under the right to privacy (ECHR, Art. 8)<sup>8</sup> and the right to freedom from torture, cruel, inhuman or degrading treatment (ECHR, Art. 3).<sup>9</sup> Therefore, there is little analysis emanating from the ECtHR solely on the right to security of person. For this reason, this section contains case law that focuses primarily on the right to liberty.

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<sup>2</sup>Article 38(1)(b) of the Statute of the International Court of Justice refers to "international custom" as a source of international law, specifically emphasizing the two requirements of state practice and acceptance of the practice as obligatory.

<sup>3</sup>ECtHR. *De Donder and de Clippel v. Belgium*. App. No. 8595/06. December 6, 2011.

<sup>4</sup>ECtHR. *Ashingdane v. The United Kingdom*. App. No. 8225/78. May 28, 1995.

<sup>5</sup>ECtHR. *Winterwerp v. The Netherlands*. App. No. 6301/73. October 24, 1979; see also ECtHR. *H.L. v. The United Kingdom*. App. No. 45508/99. January 1, 2004. (system of detaining "informal patients" in psychiatric institutions did not incorporate sufficient procedural safeguards in order to prevent arbitrary deprivations of liberty).

<sup>6</sup>ECtHR. *X v. The United Kingdom*. App. No. 7215/75. July 7, 1977.

<sup>7</sup>ECtHR. *Gajcsi v. Hungary*. App. No. 34503/03. October 3, 2006. (patient unlawfully detained for three years in a Hungarian psychiatric hospital, where the commitment procedure was superficial and insufficient to show dangerous conduct).

<sup>8</sup>ECtHR. *Storck v. Germany*. App. No. 61603/00. June 16, 2005; see also ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012; *V.C. v. Slovakia*. App. No. 18968/07. November 8, 2011.

<sup>9</sup>ECtHR. *Ciorap v. Moldova*. App. No. 12066/02. June 19, 2007; *V.C. v. Slovakia*. App. No. 18968/07. November 8, 2011; *Gorobet v. Moldova*. App. No. 30951/10. October 11, 2011.

## RELEVANT PROVISIONS

**ECHR, Art. 5(1):** Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants. ...

## . . . RIGHT TO LIBERTY AND SECURITY OF PERSON IN THE CONTEXT OF MENTAL HEALTH

In order to detain an individual on the basis of mental health, three conditions must be satisfied:

- (1) It must be reliably established through objective medical expertise that the person has a mental disorder;
- (2) The mental disorder must be of a kind to warrant compulsory confinement and the deprivation of liberty must be shown to be necessary in the circumstances;
- (3) The mental disorder must persist throughout the period of detention or confinement; and
- (4) The period of confinement must also be under periodic review.<sup>10</sup>

Any detention must be “lawful”—it must be conducted according to a law with adequate substantive and procedural safeguards.<sup>11</sup> Moreover, although the intent of 5(1)(e) is not, in principle, concerned with suitable treatment or conditions of detention, the ECtHR has repeatedly stated that the detention of a person in terms of 5(1)(e) will only be considered lawful if the detention is carried out in a hospital, clinic, or other appropriate institution authorized to detain and treat individuals with the relevant mental disorder.<sup>12</sup>

Additionally, the ECtHR has recognized the need to protect the physical and mental integrity of mental health patients. It has considered forced treatment of mental health patients to be in violation of Article 5 when it fails to satisfy the arbitrariness safeguards.<sup>13</sup> For further discussion on physical integrity violations, refer to the section on the “right to bodily integrity” below for more discussion on the issue.

### Cases Relating to Mental Health and the Right to Liberty and Security of Person

***De Donder and De Clippel v. Belgium* (ECtHR)(2012).** The Court held that the placement of the mental health patient in an ordinary section of the prison rather than a specialized institution or the psychiatric wing of the prison constituted a breach of Article 5 of the ECHR. The Court reiterated that the “detention” of a mental health patient is legally justified under Article 5(1)(e) only if it is done “in a hospital, clinic or other appropriate institution.”<sup>14</sup>

***Herz v. Germany* (ECtHR)(2003).** A person was detained in a psychiatric hospital because a judge ordered the person’s emergency confinement on the basis of a diagnosis given over the telephone by a doctor who had not personally examined this person. The Court held that the judge’s order was in conformity with the Convention because of the urgent nature of the situation.<sup>15</sup>

<sup>10</sup>ECtHR. *Winterwerp v. Netherlands*. App. No. 6301/73. October 24, 1979; ECtHR. *Stanev v. Bulgaria*. App. No. 23419/07. November 22, 2012.

<sup>11</sup>See ECtHR. *Stanev v. Bulgaria* (36760/06). January 17, 2012.

<sup>12</sup>ECtHR. *De Donder and De Clippel v. Belgium*. App. No. 8595/06. June 12, 2011. para. 106.

<sup>13</sup>ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012; ECtHR. *Shopov v. Bulgaria*. App. No. 11373/04. December 2, 2010; ECtHR. *Storck v. Germany*. App. No. 61603/00. September 16, 2005.

<sup>14</sup>ECtHR. *De Donder and De Clippel v. Belgium*. App. No. 8595/06. June 12, 2011; see ECtHR. *Aerts v. Belgium*. App. No. 25357/94. July 30, 1998. (psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind).

<sup>15</sup>ECtHR. *Herz v. Germany*. App. No. 44672/98. December 3, 2003.

**H.L. v. United Kingdom (ECtHR)(2005).** The Court found that the involuntary confinement of an autistic person who had shown signs of agitated behavior lacked procedural safeguards and was therefore arbitrary and in violation of Article 5 of the ECHR.<sup>16</sup>

**Shopov v. Bulgaria (ECtHR)(2010).** The Court found the government in violation of Article 5(1) where an applicant was forced to undergo psychiatric treatment for more than five years as a result of the public prosecutor and the police overstepping the limits of a domestic court's judgment ordering treatment in an outpatient clinic and not in a psychiatric hospital.<sup>17</sup>

**Storck v. Germany (ECtHR)(2005).** The Court found the mental health patient's confinement in a psychiatric hospital and forced treatment to be in violation of Article 5(1) as the confinement had not been ordered by a court. The Court stressed the responsibility of the State to protect vulnerable populations (such as mental health patients) and concluded that retrospective measures to protect such individuals from the unlawful deprivation of liberty were insufficient.<sup>18</sup>

**X. v. Finland (ECtHR)(2012).** The Court found that the confinement and forced treatment of a pediatrician in a mental health hospital lacked the proper safeguards against arbitrariness and, therefore, constituted a violation of Article 5.<sup>19</sup>

## **. . . RIGHT TO LIBERTY AND SECURITY OF PERSON IN THE CONTEXT OF INFECTIOUS DISEASES**

Article 5(1)(e) of the ECHR may permit detention based on the threat posed by the spread of infectious diseases. The ECtHR has allowed detention under this provision in the interests of both the individual and public safety.<sup>20</sup> According to the ECtHR, the essential criteria for lawfully detaining an individual "for the prevention of the spreading of infectious diseases" are:

- (1) The spread of the infectious disease poses a danger to public health or safety;
- (2) It is the least restrictive way of preventing the spread of the disease to safeguard the public interest; and
- (3) Both the danger of spreading the infectious disease and detention being the least restrictive means of safeguarding the public interest must persist throughout the period of detention.<sup>21</sup>

Moreover, the right to security of person becomes particularly relevant in instances where individuals with infectious diseases are subjected to coercive measures, such as quarantine and forced treatment. Refer to the section on "right to bodily integrity" for more discussion on violations concerning physical and bodily integrity.

### **Case Relating to Infectious Diseases and the Right to Liberty and Security of Person**

**Enhorn v. Sweden (ECtHR)(2005).** The Court found a violation of Article 5 of the ECHR where an individual living with HIV was placed involuntarily in a hospital for almost one and a half years after having transmitted the virus to another man as a result of sexual activity. The Court concluded that the compulsory isolation was not the least restrictive means available to prevent him from spreading HIV, and therefore, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty.<sup>22</sup>

<sup>16</sup>ECtHR.H.L. v.The United Kingdom.App. No. 45508/99.January 5, 2005.

<sup>17</sup>ECtHR.Shopov v. Bulgaria. App. No. 11373/04.December 2, 2010.

<sup>18</sup>ECtHR.Storck v. Germany. App. No. 61603/00. September 16, 2005.

<sup>19</sup>ECtHR.X. v. Finland.App. No. 34806/04. November 19, 2012.

<sup>20</sup>ECtHR.Enhorn v. Sweden. App. No. 56529/00. January 25, 2005. para. 43; ECtHR.Litwa v. Poland. App. No. 26629/95. April 4, 2000; see ECtHR. Hutchison Reid v.The United Kingdom.App. No. 50272/99. February 20, 2003. (detention under Article 5(1)(e) of a person with psychopathic personality disorder justified both in the interests of the individual and on public safety grounds, even where her/his condition was not susceptible to medical treatment).

<sup>21</sup>ECtHR.Enhorn v. Sweden. App. No. 56529/00. January 25, 2005. para. 43.

<sup>22</sup>ECtHR.Enhorn v. Sweden. App. No. 56529/00. January 25, 2005.

## . . . RIGHT TO LIBERTY AND SECURITY OF PERSON IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH

The right to liberty protects individuals from interference intended to limit or promote their fertility and hinder their sexual autonomy—either by the state or private individuals. In addition to protecting the life and health of the individual, the right to liberty recognizes the individual’s reproductive choice as well as her/his decision on how to conduct her/his sexual life.<sup>23</sup> For example, women can use this right to challenge legal actions involving deprivation of liberty that are taken against them for terminating their own pregnancy.<sup>24</sup>

With respect to the right to security of person, it safeguards the person’s right to control her/his health and body and is pertinent to issues relating to sexual and reproductive health, such as forced sterilization, genital mutilation, and abortion. The European Commission of the EU has committed to ending violence against women and ending female genital mutilation (FGM), recognizing it as a violation of women’s human rights and the international Convention on the Rights of the Child (CRC).<sup>25</sup> The EU Council has stated: “[FGM] constitutes a breach of the fundamental right to life, liberty, security, dignity, equality between women and men, non-discrimination and *physical and mental integrity*” (emphasis added).<sup>26</sup>

However, as in other contexts, ECtHR case law involving these sexual and reproductive health issues have been typically addressed under either the right to privacy (ECHR, Art. 8) or the right to freedom from torture and cruel, inhuman, and degrading treatment (ECHR, Art. 3).

### Case Relating to Sexual and Reproductive Health and the Right to Liberty and Security of Person

**P. and S. v. Poland (ECtHR)(2013).** The Court found that the essential purpose of placing a 14-year-old girl, who had become pregnant as a result of rape, in a juvenile shelter was to separate her from her parents and prevent an abortion—not for educational supervision, which would have been in accordance with Article 5(1)(d). Therefore, the applicant’s confinement was in violation of Article 5.<sup>27</sup>

## RIGHT TO PRIVACY

The right to privacy protects the individual from unlawful and arbitrary interference with her/his privacy. As it relates to patients’ rights, the right to privacy has been used to protect the bodily integrity of the individual, the confidentiality of the patient’s medical information, and to prevent the government from unlawfully interfering in matters that should be resolved between the patient and her/his physician (e.g., to terminate pregnancy). The ECtHR has held that a person’s body concerns the most intimate aspect of one’s private life<sup>28</sup> and has used the right to privacy to protect the individual from medical treatment or examination without her/his informed consent.<sup>29</sup> The ECtHR recognizes that the administration of medication against the will of a patient constitutes an interference with an individual’s right to respect for their private life.<sup>30</sup>

<sup>23</sup> See Rebecca Cook. International Human Rights and Women's Reproductive Health. *Studies in Family Planning*, Vol. 24, No. 2 (March-April, 1993). p. 79.

<sup>24</sup> ECtHR. P. and S. v. Poland. App. No. 57375/08. January 30, 2013.

<sup>25</sup> European Commission. Communication from the Commission to the European Parliament and the Council: Towards the elimination of female genital mutilation. November 25, 2013.

<sup>26</sup> EU Council. Council Conclusion on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence. December 6, 2012. para. 1.

<sup>27</sup> ECtHR. P. and S. v. Poland. App. No. 57375/08. January 30, 2013.

<sup>28</sup> ECtHR. Y.F. v. Turkey. App. No. 24209/94. October 22, 2003.

<sup>29</sup> ECtHR. Glass v. The United Kingdom. App. No. 61827/00. March 9, 2004. (the Court found a violation of the right to privacy in the administration of dimorphine to a son against his mother’s wishes and a DNR (Do Not Resuscitate) order placed in his records without his mother’s knowledge).

<sup>30</sup> ECtHR. Storck v. Germany. App. No. 61603/00. September 16, 2005; ECtHR. X. v. Finland. App. No. 34806/04. November 19, 2012; see also ECtHR. Glass v. The United Kingdom. App. No. 61827/00. March 9, 2004.

With regards to the patient's medical information, the ECtHR has held that "the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life." Moreover, it is "crucial ... to preserving his or her confidence in the medical profession and in the health services in general."<sup>31</sup> Failure to protect the confidentiality of the patient's medical information can deter those in need of medical assistance from revealing personal and intimate information that may be necessary to receive appropriate treatment and even from seeking such assistance, thereby endangering their own health and/or those of others.<sup>32</sup>

Generally, any interference with an individual's right to respect for her/his private life will not constitute a breach if such interference is:

- ▶ In accordance with the law;
- ▶ Pursued a legitimate aim or aims under 8(2) of the ECHR (national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others); and
- ▶ Is necessary in a democratic society and proportionate to the legitimate aim pursued.<sup>33</sup>

With regard to "necessary in a democratic society" the ECtHR has stated that the interference would be assessed in a case-by-case basis, taking into account the "case as a whole and having regard to the margin of appreciation enjoyed by the State in such matters."<sup>34</sup>

## RELEVANT PROVISIONS

### ECHR, Art. 8:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

COE Recommendation No. R (2004) 10,<sup>35</sup> Art. 13(1): All personal data relating to a person with a mental disorder should be considered to be confidential. Such data may only be collected, processed and communicated according to the rules relating to professional confidentiality and personal data collection.

### Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data<sup>36</sup>

**Article 5 – Quality of data:** Personal data undergoing automatic processing shall be: obtained and processed fairly and lawfully; stored for specified and legitimate purposes and not used in a way incompatible with those purposes; adequate, relevant and not excessive in relation to the purposes for which they are stored; accurate and, where necessary, kept up to date; preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

**Article 6 – Special categories of data:** Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.

**Article 8 – Additional safeguards for the data subject:** Any person shall be enabled: (a) to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file; (b) to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form; (c) to obtain, as the case may be, rectification or erasure

<sup>31</sup>ECtHR. M.S. v. Sweden. App. No. 20837/92. August 27, 1997; ECtHR.Z v. Finland. App. No. 22009/93. February 25, 1997.

<sup>32</sup>ECtHR.Z v. Finland. App. No. 22009/93. February 25, 1997.

<sup>33</sup>ECtHR.L.L. v. France.App. No. 7508/02.October 10, 2006; ECtHR.X. v. Finland.App. No. 34806/04. November 19, 2012.

<sup>34</sup>ECtHR.L.L. v. France.App. No. 7508/02. October 10, 2006.

<sup>35</sup>COE.Recommendation Rec No.R (2004) 10. September 22, 2002.

<sup>36</sup>COE.Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data. January 28, 1981.

of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this convention; (d) to have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with.

#### Declaration on the Promotion of Patients' Rights in Europe<sup>37</sup>

1.4 Everyone has the right to respect for his or her privacy.

4.1 All information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind must be kept confidential, even after death.

4.6 There can be no intrusion into a patient's private and family life unless and only if, in addition to the patient consenting to it, it can be justified as necessary to the patient's diagnosis, treatment and care.

4.8 Patients admitted to health care establishments have the right to expect physical facilities which ensure privacy.

European Charter of Patients' Rights,<sup>38</sup> Art. 6 (Right to Privacy and Confidentiality): Every individual has the right to the confidentiality of personal information, including information regarding his or her state of health and potential diagnostic or therapeutic procedures, as well as the protection of his or her privacy during the performance of diagnostic exams, specialist visits, and medical/surgical treatments in general.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,<sup>39</sup> Art. 10(1): Everyone has the right to respect for private life in relation to information about his or her health.

## **. . . RIGHT TO PRIVACY IN THE CONTEXT OF MENTAL HEALTH**

The ECtHR does not automatically condemn the interference in a mental health patient's private life, but it does condemn any breach of privacy that is not in accordance with the law. The placement of a mental health patient in guardianship must be "in accordance with the law and based on a legitimate aim."<sup>40</sup> In cases where an individual has been deprived of her/his legal capacity, such an individual is entitled to a periodic review of her/his condition.<sup>41</sup> Moreover, with respect to persons in need of psychiatric treatment, the State must secure the right to physical integrity to its citizens in accordance to Article 8 of the ECHR.

In deciding to interfere with the mental health patient's right to privacy, authorities must "strike a fair balance between the interests of a person of unsound mind and the other legitimate interests concerned."<sup>42</sup> However, when determining someone's mental health status, authorities enjoy a wide margin of appreciation,<sup>43</sup> which will be evaluated based on "the degree of interference" in the patient's life and the "quality of the decision-making process."<sup>44</sup> Should the interference with the individual's private life be disproportionate to the legitimate aims of the government,<sup>45</sup> or should the decision-making process employed by the State be flawed<sup>46</sup> (including failure by the State to periodically re-access the individual's condition<sup>47</sup>), the Court is likely to find a breach of Article 8.

### **Cases Relating to Mental Health and the Right to Privacy**

<sup>37</sup> WHO. Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

<sup>38</sup> Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

<sup>39</sup> COE. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. April 4, 1997.

<sup>40</sup> ECtHR. A.G. v. Switzerland. App. No. 28605/95. April 9, 1997.

<sup>41</sup> ECtHR. Lashin v. Russia. App. No. 33117/02. April 22, 2013; see also ECtHR. Salontaji-Drobnjak v. Serbia. App. No. 36500/05. January 13, 2010.

<sup>42</sup> ECtHR. Shtukaturov v. Russia. App. No. 44009/05. June 27, 2008. para. 87

<sup>43</sup> ECtHR. Shtukaturov v. Russia. App. No. 44009/05. June 27, 2008.

<sup>44</sup> ECtHR. Shtukaturov v. Russia. App. No. 44009/05. June 27, 2008.

<sup>45</sup> ECtHR. Shtukaturov v. Russia. App. No. 44009/05. June 27, 2008.

<sup>46</sup> ECtHR. Salontaji-Drobnjak v. Serbia. App. No. 36500/05. January 13, 2010.

<sup>47</sup> ECtHR. Lashin v. Russia. App. No. 33117/02. April 22, 2013; see ECtHR. Salontaji-Drobnjak v. Serbia. App. No. 36500/05. January 13, 2010.

**Lashin v. Russia (ECtHR)(2013).**The Court found a violation of the right to privacy where the applicant, a person with schizophrenia, was committed by the domestic courts to a psychiatric hospital against his will and without possibility of review, which prevented him from getting married.<sup>48</sup>

**Salontaji-Drobnjak v. Serbia (ECtHR)(2010).**The applicant was diagnosed with litigious paranoia and was placed under guardianship. The Court found a violation of the right to privacy on account of the serious limitation of the applicant's legal capacity (he was unable to independently take part in legal actions, file for a disability pension, or decide about his own medical treatment) and because the procedure that the domestic courts had applied in depriving the applicant of his legal capacity had been "fundamentally flawed," and further, the domestic courts had failed to appropriately reassess the applicant's legal capacity.<sup>49</sup>

**Shtukaturov v. Russia (ECtHR)(2008).**The Court found the domestic court's decision to hospitalize the applicant based on a medical report that had not sufficiently analyzed the degree of the applicant's incapacity to constitute a violation of the right to privacy. The Court determined that the interference with the applicant's private life was disproportionate to the legitimate aim of the State.<sup>50</sup>

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### . . . RIGHT TO PRIVACY IN THE CONTEXT OF INFECTIOUS DISEASES

The ECtHR considers that the unauthorized disclosure of confidential health data could be detrimental to the individual's private and family life, as well as his/her social and work life, and could put him/her at risk of being ostracized.<sup>51</sup> Disclosure of medical information can be particularly damaging to persons living with HIV or other infectious diseases. Therefore, sufficient safeguards in domestic law are necessary. In cases concerning individuals living with HIV, the ECtHR has also established that States have positive obligations to enforce the right to privacy against others.<sup>52</sup>

#### Cases Relating to Infectious Diseases and the Right to Privacy

**Biriuk v. Lithuania (ECtHR)(2009) and Armoniene v. Lithuania (ECtHR)(2009).** The Court held that the State's failure to enforce the applicants' right to privacy against the newspaper that published the applicants' HIV status on its front page amounted to a violation of the right to privacy.<sup>53</sup>

**Colak and Tsakiridis v. Germany (ECtHR)(2009).**The Court affirmed the domestic court's finding that the physician's failure to disclose the HIV status of a patient to the patient's sexual partner (the applicant) did not amount to "gross error in treatment"—which was required to find the physician liable for malpractice—and that the physician did not disregard medical standards but overestimated his duty of confidence to the patient. The Court held that there was no breach of the right to privacy.<sup>54</sup>

**Mitkus v. Latvia (ECtHR)(2013).** The Court found the disclosure of the inmate applicant's HIV status in a prison newspaper to constitute a violation of the right to privacy—it led other inmates to ostracize the applicant.<sup>55</sup>

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### . . . RIGHT TO PRIVACY IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH

The right to privacy has served an important role in the promotion of sexual and reproductive health in ECtHR case law. While the right to privacy is often seen as implicating negative State obligations, the ECtHR has been clear in

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<sup>48</sup>ECtHR. *Lashin v. Russia*. App. No. 33117/02. April 22, 2013.

<sup>49</sup>ECtHR. *Salontaji-Drobnjak v. Serbia*. App. No. 36500/05. January 13, 2010.

<sup>50</sup>ECtHR. *Shtukaturov v. Russia*. App. No. 44009/05. June 27, 2008.

<sup>51</sup>ECtHR. *Z v. Finland*. App. No. 22009/93. February 25, 1997.

<sup>52</sup>ECtHR. *Biriuk v. Lithuania*. App. No. 23373/03. February 25, 2009. para. 35; ECtHR. *Armoniene v. Lithuania*. App. No. 36919/02. February 25, 2009. para. 36.

<sup>53</sup>ECtHR. *Biriuk v. Lithuania*. App. No. 23373/03. February 25, 2009; ECtHR. *Armoniene v. Lithuania*. App. No. 36919/02. February 25, 2009.

<sup>54</sup>ECtHR. *Colak and Tsakiridis v. Germany*. App. No. 77144/01 and 35493/05. June 5, 2009.

<sup>55</sup>ECtHR. *Mitkus v. Latvia*. App. No. 7259/03. January 2, 2013.

emphasizing the positive obligations that arise in enforcing respect for an individual's private and family life—particularly where individuals seek access to information regarding risks to their health (such as genetic testing<sup>56</sup> and the health of their fetus<sup>57</sup>) or seek access to their medical records.<sup>58</sup> In fact, States have a positive obligation under Article 8 to ensure that individuals have meaningful access to their own medical records.<sup>59</sup> The ECtHR has held in a State-specific context that organizations may not be restrained from providing information about domestic abortion rights, and abortion related services available internationally.<sup>60</sup>

Furthermore, the Court has interpreted the right to include the right to personal autonomy and personal development, encompassing matters concerning gender identification, sexual orientation, sexual life, the physical and mental integrity of the person, and decisions on whether to become a parent.<sup>61</sup>

In the context of abortion, the ECtHR has not interpreted Article 8 as conferring a right to abortion;<sup>62</sup> however, it has recognized that States that permit abortion are responsible for providing the legal framework to determine entitlements to lawful abortion and procedures to resolve disputes between women seeking abortion services and medical practitioners.<sup>63</sup> The ECtHR has also addressed the possible 'chilling effects' that domestic criminal law may have regarding an individual's ability to access reproductive health care services,<sup>64</sup> finding that criminal laws that deter medical providers from providing lawful abortion services, or deter patients from seeking such services for fear of criminal responsibility, may contravene Article 8.

The ECtHR has also held that the choice of whether or not to become a parent is encompassed by Article 8 (for both men and women).<sup>65</sup> Medical procedures that limit a person's ability to conceive and bear children may be contrary to the right to privacy, including forced sterilization<sup>66</sup> and serious medical errors that deprive individuals of their reproductive capacity.<sup>67</sup> The Court found a breach of Article 8 where a detainee was denied access to artificial insemination services, considering that his wife would experience difficulties conceiving after his release due to her age and the time frame her husband was anticipated to remain in detention.<sup>68</sup>

### Cases Relating to Sexual and Reproductive Health and the Right to Privacy

**A, B and C v. Ireland (ECtHR)(2010).** Interpreting Article 8 to include the state's positive obligation of providing the necessary procedures to determine entitlement to lawful abortion, the Court found that Ireland's failure to provide such safeguards constituted a violation of the right to privacy. The Court also noted the uncertainty surrounding the process of establishing whether a woman's pregnancy posed a risk to her life and that the threat of criminal prosecution had "significant chilling" effects both on doctors and the women concerned.<sup>69</sup>

**Costa and Pavan v. Italy (ECtHR)(2012).** A couple, who were healthy carriers of cystic fibrosis, wanted to avoid transmitting the disease to their offspring with the help of medically-assisted procreation and genetic screening.

<sup>56</sup> ECtHR. *Tysic v. Poland*. App. No. 5410/03. March 20, 2007.

<sup>57</sup> ECtHR. *Costa and Pavan v. Italy*. App. No. 54270/10. August 28, 2012; see ECtHR. *R.R. v. Poland*. App. No. 27617/04. May 26, 2011.

<sup>58</sup> ECtHR. *K.H. and Others v. Slovakia*. App. No. 32881/04. April 28, 2009.

<sup>59</sup> ECtHR. *K.H. and Others v. Slovakia*. App. No. 32881/04. April 28, 2009.

<sup>60</sup> ECtHR. *Open Door and Dublin Well Woman v. Ireland*. App. No. 14234/88; 14235/88. October 29, 1992.

<sup>61</sup> ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010. para. 212.

<sup>62</sup> ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010; see ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

<sup>63</sup> ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010; see *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

<sup>64</sup> ECtHR. *Ternovsky v. Hungary*. App. No. 67545/09. December 14, 2010; see ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

<sup>65</sup> ECtHR. *Evans v. The United Kingdom*. App. No. 6339/05. April 10, 2007.

<sup>66</sup> ECtHR. *K.H. and Others v. Slovakia*. App. No. 32881/04. April 28, 2009; ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012; ECtHR. *N.B. v. Slovakia*. App. No. 29518/10. June 12, 2012; ECtHR. *I.G., M.K. and R.H. v. Slovakia*. App. No. 15966/04. November 13, 2012.

<sup>67</sup> ECtHR. *Csoma v. Romania*. App. No. 8759/05. January 15, 2013.

<sup>68</sup> ECtHR. *Dickson v. The United Kingdom*. App. No. 44362/04. December 4, 2007.

<sup>69</sup> ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

The Court found the inconsistency in Italian law that denied the couple access to embryo screening but authorized medically-assisted termination of pregnancy if the fetus showed symptoms of the same disease to constitute a violation of the right to privacy.<sup>70</sup>

***Ternovsky v. Hungary (ECtHR)(2011)***. The Court found the lack of specific and comprehensive legislation on when health professionals would be penalized for assisting in a home birth constituted a violation of the right to privacy, considering that the applicant was not free to choose to give birth at home because of the permanent threat of prosecution deterring health professionals from providing this service.<sup>71</sup>

***Tysic v. Poland (ECtHR)(2007)***. The applicant was refused a therapeutic abortion, after being warned that her already severe myopia could worsen if she carried her pregnancy to term. Following the birth of her child, she had a retinal hemorrhage, which resulted in a disability. The Court found that denying her access to an effective mechanism that would determine her eligibility for a legal abortion was a violation of her right to privacy.<sup>72</sup>

***V.C. v. Slovakia (ECtHR)(2012)***. Where a Roma woman was sterilized at a public hospital without her informed consent, the Court found the lack of legal safeguards to protect her reproductive health to constitute a violation of the right to private and family life.<sup>73</sup>

## RIGHT OF ACCESS TO INFORMATION

The right of access to information guarantees the individual access to personal information concerning her/him, as well as the medical information on the individual's condition, except when this information could be harmful to the individual's life or health. As in international law, the right of access to information is contained within the right to freedom of expression. With respect to patients, the right of access to information requires the government to take the necessary measures to guarantee access to information about the patient's health conditions.<sup>74</sup> The ECtHR has interpreted this right as only prohibiting authorities from restricting a person from receiving information from others and not imposing a positive obligation on the government to provide the information.<sup>75</sup> However, it is worth noting that the ECtHR has interpreted a positive state obligation to provide information under Article 8 (right to respect for family and private life).<sup>76</sup>

## RELEVANT PROVISIONS

### ECHR

**Art. 8(1)**: Everyone has the right to respect for his private and family life, his home and his correspondence.

**Art. 10(1)**: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....

### Declaration on the Promotion of Patients' Rights in Europe<sup>77</sup>

2.2 Patients have the right to be fully informed about their health status, including the medical facts about their conditions; about the proposed medical procedures, together with the potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment; and about the diagnosis, prognosis and progress of treatment.

2.5 Patients have the right not to be informed, at their explicit request.

<sup>70</sup>ECtHR. *Costa and Pavan v. Italy*. App. No. 54270/10. August 28, 2012.

<sup>71</sup>ECtHR. *Ternovsky v. Hungary*. App. No. 67545/09. March 14, 2011.

<sup>72</sup>ECtHR. *Tysic v. Poland*. App. No. 5410/03. September 24, 2007.

<sup>73</sup>ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012.

<sup>74</sup>ECtHR. *Herczegfalvy v. Austria*. App. No. 10533/83. September 24, 1992.

<sup>75</sup>ECtHR. *Guerra v. Italy*. App. No. 14967/89. February 19, 1998.

<sup>76</sup>ECtHR. *Tysic v. Poland*. App. No. 5410/03. March 20, 2007.

<sup>77</sup>WHO. *Declaration on the Promotion of Patients' Rights in Europe*. June 28, 1994.

2.6 Patients have the right to choose who, if any one, should be informed on their behalf.

European Charter of Patients' Rights,<sup>78</sup> Art. 3 (Right to Information): Every individual has the right to access to all kind of information regarding their state of health, the health services and how to use them, and all that scientific research and technological innovation makes available.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,<sup>79</sup> Art. 10:

1. Everyone has the right to respect for private life in relation to information about his or her health.
2. Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed.
3. In exceptional cases, restrictions may be placed by law on the exercise of the rights contained in paragraph 2 in the interests of the patient. Everyone has the right to know any information collected about his or her health.

Recommendation No. R (2000) 5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care<sup>80</sup>

6. Information on health care and on the mechanisms of the decision-making process should be widely disseminated in order to facilitate participation. It should be easily accessible, timely, easy to understand and relevant.
7. Governments should improve and strengthen their communication and information strategies should be adapted to the population group they address.
8. Regular information campaigns and other methods such as information through telephone hotlines should be used to heighten the public's awareness of patients' rights. Adequate referral systems should be put in place for patients who would like additional information (with regard to their rights and existing enforcement mechanisms).

## ... RIGHT OF ACCESS TO INFORMATION IN THE CONTEXT OF MENTAL HEALTH

Under this right, health care providers have an obligation to provide mental health patients with accurate information about their medical data and/or the treatment they are receiving. Therefore, continuous treatment lacking regular evaluation would undermine the right of access to information, as the patient would not have access to accurate information on her/his mental health status, making it difficult for her/him to challenge the treatment.<sup>81</sup> Indeed, the ECtHR has found that the denial of access to information may violate Article 10 of the ECHR, even if the denial of access to information is defended by the government on therapeutic grounds.<sup>82</sup>

It is worth noting that the right of access to information is closely linked to the concept of consent, and the ECtHR has held that even if a person is diagnosed with a mental illness, a patient always has the right of access to her/his medical records.<sup>83</sup>

### Case Relating to Mental Health and the Right of Access to Information

***Herczegfalvy v. Austria*(ECtHR)(1992).** The applicant who had been diagnosed with a mental illness was detained in a psychiatric hospital. The hospital limited the applicant's access to "reading matter, radio and television," which the ECtHR concluded was a violation of Article 10 of the ECHR.<sup>84</sup>

<sup>78</sup> Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

<sup>79</sup> COE. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. April 4, 1997.

<sup>80</sup> COE. Recommendation Rec No. R (2000) 5. April 30, 2002.

<sup>81</sup> ECtHR. Shopov v. Bulgaria. App. No. 11373/04. September 2, 2010.

<sup>82</sup> ECtHR. Herczegfalvy v. Austria. App. No. 10533/83. September 24, 1992.

<sup>83</sup> ECtHR. Lashin v. Russia. App. No. 33117/02. April 22, 2013.

## . . . RIGHT OF ACCESS TO INFORMATION IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH

Under the right of access to information, States have a positive obligation to provide accurate information regarding reproductive health laws and the availability of abortion services.<sup>85</sup> The ECtHR has interpreted Article 8 (right to respect for private and family life) of the ECHR to include the government's obligation to enable access to information regarding risks to pregnant women's health<sup>86</sup> and the health of their unborn fetuses,<sup>87</sup> as well as the obligation to provide minors with access to information regarding abortion services.<sup>88</sup> This right includes information that is necessary to determine the legality of a woman's access to therapeutic abortion services.<sup>89</sup> Additionally, the right of access to information requires consent of the individual, which is important in the area of sexual and reproductive health. For example, the ECtHR has held that sterilization without consent is impermissible and that full and informed consent is mandatory under Article 8.<sup>90</sup>

Furthermore, government's efforts to prevent organizations from distributing information regarding the procurement of abortion services constitute a violation of this right.<sup>91</sup> The Court found that such restrictions infringed both on the organization's right to impart information and on the right of individuals to receive such information, both of which are protected under Article 10.<sup>92</sup>

### Cases Relating to Sexual and Reproductive Health and the Right of Access to Information

***K.H. and Others v. Slovakia (ECtHR)(2009)***. Eight women of Roma origin could no longer conceive after being treated at gynecological departments in two different public hospitals and suspected that they had been sterilized during their stay in those hospitals. They complained that they could not obtain photocopies of their medical records. The Court concluded that merely providing access to review the records but not providing the applicants with a photocopy of their medical records constituted a violation of Article 8.<sup>93</sup>

***Open Door and Dublin Well Woman v. Ireland (ECtHR)(1992)***. The applicants were two Irish companies that complained about being prevented, by means of a court injunction, from providing pregnant women with information concerning abortion services available abroad. The Court found that the restriction imposed on the applicant companies had created a risk to the health of women who did not have the resources or education to seek and use alternative means of obtaining information about abortion. In addition, given that such information was available elsewhere, and that women in Ireland could, in principle, travel to Great Britain to have abortions, the restriction had been largely ineffective. The Court found a violation of Article 10.<sup>94</sup>

***R.R. v. Poland (ECtHR)(2011)***. A mother of two was pregnant with a child thought to be suffering from a severe genetic abnormality and was deliberately denied timely access to the genetic tests to which she was entitled by doctors who were opposed to abortion. The Court found a violation of Article 8 because Polish law did not include any effective mechanisms which would have enabled the applicant to have access to the available diagnostic services and to make, in the light of their results, an informed decision as to whether or not to seek an abortion.<sup>95</sup>

## RIGHT TO BODILY INTEGRITY

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<sup>84</sup> ECtHR. *Herczegfalvy v. Austria*. App. No. 10533/83. September 24, 1992.

<sup>85</sup> ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

<sup>86</sup> ECtHR. *Tysi c v. Poland*. App. No. 5410/03. March 20, 2007.

<sup>87</sup> ECtHR. *Costa and Pavan v. Italy*. App. No. 54270/10. August 28, 2012; see ECtHR. *R.R. v. Poland*. App. No. 27617/04. May 26, 2011.

<sup>88</sup> ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

<sup>89</sup> ECtHR. *Tysi c v. Poland*. App. No. 5410/03. March 20, 2007.

<sup>90</sup> ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012.

<sup>91</sup> ECtHR. *Open Door and Dublin Well Woman v. Ireland*. App. No. 14234/88; 14235/88. October 29, 1992.

<sup>92</sup> ECtHR. *Open Door and Dublin Well Woman v. Ireland*. App. No. 14234/88; 14235/88. October 29, 1992.

<sup>93</sup> ECtHR. *K.H. and Others v. Slovakia*. App. No. 32881/04. November 6, 2009.

<sup>94</sup> ECtHR. *Open Door and Dublin Well Woman v. Ireland*. App. No. 14234/88; 14235/88. October 29, 1992.

<sup>95</sup> ECtHR. *R.R. v. Poland*. App. No. 27617/04. November 28, 2011.

The right to bodily integrity safeguards the individual's freedom from bodily injury or interference. Most cases concerning violations of physical or bodily integrity in health care settings have been analyzed under related rights that include the right to freedom from torture and cruel, inhuman and degrading treatment (ECHR, Art. 3), the right to privacy (ECHR, Art. 8), and the right to the highest attainable standard of health (ESC, Art. 11). The Court has examined cases involving the administration of forced medication (including injections), forced feeding and nonconsensual sterilizations under the right to privacy (ECHR, Art. 8)<sup>96</sup> and the right to freedom from torture, cruel, inhuman or degrading treatment (ECHR, Art. 3).<sup>97</sup>

## RELEVANT PROVISIONS

### ECHR

**Art. 3:** No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

**Art. 5(1):** Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants. ...

### **Art. 8:**

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Charter of Fundamental Rights of the European Union,<sup>98</sup> Art. 3(1) (Right to the integrity of the person):** Everyone has the right to respect for his or her physical and mental integrity.

**COE Recommendation No. R (2004) 10,<sup>99</sup> Art. 18 (Criteria for Involuntary Treatment):** A person may be subject to involuntary treatment only if the following conditions are met:

- i. the person has a mental disorder;
- ii. the person's condition represents a significant risk of serious harm to his or her health or to other persons;
- iii. no less intrusive means of providing appropriate care are available;
- iv. the opinion of the person concerned has been taken into consideration.

### **Declaration on the Promotion of Patients' Rights in Europe<sup>100</sup>**

1.1 Everyone has the right to respect of his or her person as a human being.

1.3 Everyone has the right to physical and mental integrity and to the security of his or her person.

3.1 The informed consent of the patient is a prerequisite for any medical intervention.

3.2 A patient has the right to refuse or to halt a medical intervention....

3.5 When the consent of a legal representative is required, patients (whether minor or adult) must nevertheless be involved in the decision-making process to the fullest extent which their capacity allows.

3.9 The informed consent of the patient is needed for participation in clinical teaching.

<sup>96</sup>ECtHR. *Storck v. Germany*. App. No. 61603/00. June 16, 2005; ECtHR. *X. v. Finland*. App. No. 34806/04. November 19, 2012; V.C. v. Slovakia. App. No. 18968/07. November 8, 2011.

<sup>97</sup>ECtHR. *Ciorap v. Moldova*. App. No. 12066/02. June 19, 2007; V.C. v. Slovakia. App. No. 18968/07. November 8, 2011; *Gorobet v. Moldova*. App. No. 30951/10. October 11, 2011.

<sup>98</sup>Official Journal of the European Communities. Charter of Fundamental Rights of the European Union. OJ C 364/01. December 7, 2000.

<sup>99</sup>COE. Recommendation Rec No. R (2004) 10. September 22, 2002.

<sup>100</sup>WHO. Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

3.10 The informed consent of the patient is a prerequisite for participation in scientific research.

5.10 Patients have the right to relief of their suffering according to the current state of knowledge.

5.11 Patients have the right to humane terminal care and to die in dignity.

#### European Charter of Patients' Rights<sup>101</sup>

**Art. 4 (Right to Consent):** Every individual has the right of access to all information that might enable him or her to actively participate in the decisions regarding his or her health; this information is a prerequisite for any procedure and treatment, including the participation in scientific research.

**Art. 5 (Right to Free Choice):** Each individual has the right to freely choose from among different treatment procedures and providers on the basis of adequate information.

**Art. 11 (Right to Avoid Unnecessary Suffering and Pain):** Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,<sup>102</sup> **Art. 5:** An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

## **... RIGHT TO BODILY INTEGRITY IN THE CONTEXT OF MENTAL HEALTH**

The ECtHR has recognized the need to protect the physical and mental integrity of mental health patients. Issues concerning a mental health patient's right to bodily integrity are often raised and treated in conjunction with right to liberty and security of person and freedom from torture concerns. For example, in *Stork v. Germany*, the Court analyzed forced treatment of the psychiatric patient under the rubric of the right to liberty and security of person, while recognizing the State's obligation to protect the physical integrity of the individual and underscoring the need for psychiatric institutions to regularly assess the justification of treatment administered to their patients.<sup>103</sup>

### **Cases Relating to Mental Health and the Right to Bodily Integrity**

***M.S. v. United Kingdom (ECtHR)(2012)***. This case involved the detention of a man suffering from mental illness held in police custody for more than three days. The Court found a violation of Article 3, holding that, although there had been no intentional neglect on the part of the police, the applicant's prolonged detention without appropriate psychiatric treatment had diminished his human dignity.<sup>104</sup>

***Shopov v. Bulgaria (ECtHR)(2010)***. The Court found the government in violation of Article 5(1) where an applicant was forced to undergo psychiatric treatment for more than five years as a result of the public prosecutor and the police overstepping the limits of a domestic court's judgment ordering treatment in an outpatient clinic and not in a psychiatric hospital.<sup>105</sup>

***Storck v. Germany (ECtHR)(2005)***. The Court found the mental health patient's confinement in a psychiatric hospital and forced treatment to be in violation of Article 5(1) as the confinement had not been ordered by a court. The Court stressed the responsibility of the State to protect vulnerable populations (such as mental health patients) and concluded that retrospective measures to protect such individuals from the unlawful deprivation of liberty were insufficient.<sup>106</sup>

<sup>101</sup> Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

<sup>102</sup> COE. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. April 4, 1997.

<sup>103</sup> ECtHR. *Storck v. Germany*. App. No. 61603/00. September 16, 2005.

<sup>104</sup> ECtHR. *M.S. v. The United Kingdom*. App. No. 24527/08. August 3, 2012.

<sup>105</sup> ECtHR. *Shopov v. Bulgaria*. App. No. 11373/04. December 2, 2010.

<sup>106</sup> ECtHR. *Storck v. Germany*. App. No. 61603/00. September 16, 2005.

**X. v. Finland (ECtHR)(2012).** The Court found that the confinement and forced treatment of a pediatrician in a mental health hospital lacked the proper safeguards against arbitrariness and, therefore, constituted a violation of Article 5.<sup>107</sup>

### . . . RIGHT TO BODILY INTEGRITY IN THE CONTEXT OF INFECTIOUS DISEASES

The right to bodily integrity becomes particularly relevant in instances where individuals with infectious diseases are subjected to coercive measures, such as quarantine and forced treatment. The ECtHR has established that, under Article 5 of the ECHR, the essential criteria for determining whether the detention of a person “for the prevention of the spreading of infectious diseases” is lawful are:

- (1) The spread of the infectious disease poses a danger to public health or safety;
- (2) It is the least restrictive way of preventing the spread of the disease to safeguard the public interest; and
- (3) Both the danger of spreading the infectious disease and detention being the least restrictive means of safeguarding the public interest must persist throughout the period of detention.

#### Case Relating to Infectious Diseases and the Right to Bodily Integrity

**Enhorn v. Sweden (ECtHR)(2005).** The Court found a violation of Article 5(1)(e) where an individual living with HIV was placed involuntarily in a hospital for almost one and a half years after having transmitted the virus to another man as a result of sexual activity. The Court concluded that the compulsory isolation was not the least restrictive means available to prevent him from spreading HIV, and therefore, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty.<sup>108</sup>

### . . . RIGHT TO BODILY INTEGRITY IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH

The right to bodily integrity safeguards the person's right to control her/his health and body and is pertinent to issues relating to sexual and reproductive health, such as forced sterilization, genital mutilation, and abortion. The European Commission of the EU has committed to ending violence against women and ending female genital mutilation (FGM), recognizing it as a violation of women's human rights and the international Convention on the Rights of the Child (CRC).<sup>109</sup> The EU Council has stated: “[FGM] constitutes a breach of the fundamental right to life, liberty, security, dignity, equality between women and men, non-discrimination and *physical* and mental *integrity*.” (emphasis added).<sup>110</sup>

While these sexual and reproductive health issues directly involve the right to bodily integrity, they have been typically addressed by the ECtHR under either the right to privacy (ECHR, Art. 8) or the right to freedom from torture and cruel, inhuman, and degrading treatment (ECHR, Art. 3).

#### Cases Relating to Sexual and Reproductive Health and the Right to Bodily Integrity

**I.G., M.K. and R.H. v. Slovakia (ECtHR)(2013).** The Court found that the sterilization of two Roma women without their full and informed consent amounted to a violation of Article 3. The Court also considered the government's failure to conduct an effective official investigation into the sterilizations was a procedural violation of Article 3.<sup>111</sup>

<sup>107</sup>ECtHR.X. v. Finland.App. No. 34806/04. November 19, 2012.

<sup>108</sup>ECtHR.Enhorn v. Sweden. App. No. 56529/00. January 25, 2005.

<sup>109</sup>European Commission. Communication from the Commission to the European Parliament and the Council: Towards the elimination of female genital mutilation. November 25, 2013.

<sup>110</sup>EU Council. Council Conclusion on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence. December 6, 2012.para. 1.

<sup>111</sup>ECtHR.I.G., M.K. and R.H. v. Slovakia.App. No. 5966/04. April 29, 2013; see ECtHR. V.C. v. Slovakia. App. No. 18968/07. February 8, 2012; ECtHR.N.B. v. Slovakia. App. No. 29518/10. June 12, 2012.

**V.C. v. Slovakia (ECtHR)(2012).** The Court found that the sterilization of a woman at a public hospital without her informed consent amounted to a violation of Article 3. The Court found that the applicant experienced fear, anguish and feelings of inferiority as a result of her sterilization. Although there was no proof that the medical staff concerned had intended to ill-treat her, they had acted with gross disregard to her right to autonomy and choice as a patient.<sup>112</sup>

## RIGHT TO LIFE

As the right to life relates to patients' rights, the ECtHR has recognized positive obligations, beyond the State's obligation to refrain from intentionally and unlawfully taking the life of an individual.<sup>113</sup> The ECtHR has clarified that Article 2 of the ECHR requires that the State undertake the necessary measures to protect the lives of those living in its jurisdiction, which include the obligations to establish an effective judicial system and to investigate deaths other than those resulting from natural causes.<sup>114</sup> Specifically, in cases of deaths occurring during medical care, it is required to create regulations compelling public and private hospitals: 1) to adopt measures for the protection of patients' lives, and 2) to ensure that the cause of death, if in the case of the medical profession, can be determined by an "effective, independent judicial system" so that anyone responsible can be made accountable. Civil law proceedings may be sufficient in cases of medical negligence provided they are capable of both establishing liability and providing appropriate redress, such as damages.<sup>115</sup> Additionally, the State is required to regulate and monitor private health-care institutions.

In terms of medical negligence claims, the ECtHR has held that where a State has "made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients [the Court] cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient by themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."<sup>116</sup> Further, given the recognizable problems that arise in determining the allocation of limited resources for health care and the general reluctance of the ECtHR to sanction States for the impact of their economic decisions, a breach of the right to life for denial of health care will likely be found only in exceptional cases.<sup>117</sup> However, the ECtHR has held that an issue may arise under this right "where it is shown that the authorities ... put an individual's life at risk through the denial of health care which they had undertaken to make available to the population generally"<sup>118</sup>—in other words, where there are preexisting obligations, these must not be applied in a discriminatory manner.

It is worth noting that the ECtHR has also left open the possibility that the right to life could be implicated in a situation in which sending a terminally ill person back to their country of origin could seriously shorten her/his life

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<sup>112</sup>ECtHR.V.C. v. Slovakia. App. No. 18968/07. February 8, 2012.

<sup>113</sup>ECtHR.Powell v.The United Kingdom.App. No. 45305/99. May 4, 2000. (claim by parents that circumstances surrounding the alleged falsification of their son's medical records and the authorities' failure to investigate this matter properly gave rise to a breach of Article 2 (1) was declared inadmissible).

<sup>114</sup> See ECtHR. Nitecki v. Poland. App. No. 65653/01. [March 21, 2002](#); ECtHR.Erikson v. Italy.App. No. 37900/97. October 26, 1999.

<sup>115</sup>ECtHR.Calvelli and Ciglio v. Italy.App. No. 32967/96. January 17, 2002. (The dissenting judgments favored the use of criminal proceedings. On the facts, by accepting compensation through the settling of civil proceedings with respect to the death of their baby, plaintiffs denied themselves access to the best means of determining the extent of responsibility of the doctor concerned).

<sup>116</sup>ECtHR.Wiater v. Poland.App. No. 42990/08. May 15, 2012. para 34 .

<sup>117</sup>ECtHR.Nitecki v. Poland. App. No. 65653/01. [March 21, 2002](#)(considering that the state had provided the applicant medical treatment and facilities, including covering a large part of the cost of the required medications, the Court found no breach of Article 2—the authorities paid 70 percent of the cost of the lifesaving drugs prescribed to applicant, with the latter expected to pay the remainder); see ECtHR. Pentiacova v. Moldova. App. No. 14462/03. January 4, 2005. (haemodialysis); ECtHR. Wiater v. Poland.App. No. 42990/08. May 15, 2012. (medication to treat narcolepsy); ECtHR. Sentges v. Netherlands. App. No. 27677/02. July 8, 2003 (robotic arm).

<sup>118</sup>ECtHR.Cyprus v. Turkey. App. No. 25781/94. May 10, 2001.

span or could amount to cruel and inhuman treatment due to inadequate medical facilities.<sup>119</sup> Moreover, to date, there have been only a few substantive decisions on euthanasia.<sup>120</sup>

## RELEVANT PROVISIONS

**ECHR, Art. 2(1):** Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

## . . . RIGHT TO LIFE IN THE CONTEXT OF MENTAL HEALTH

The ECtHR has held that the right to life can impose a duty to protect those in custody, including cases in which the risk derives from self-harm.<sup>121</sup> The ECtHR will consider whether the authorities knew or ought to have known that the person "posed a real and immediate risk of suicide and, if so, whether they did all that could have been reasonably expected of them to prevent that risk."<sup>122</sup>

### Cases Relating to Mental Health and the Right to Life

**Çoşelav v. Turkey (ECtHR)(2013).** A juvenile detained in an adult prison committed suicide. The Court concluded that there was a violation of the right to life, finding that authorities had not only been indifferent to his grave psychological problems but had been responsible for a deterioration of his state of mind by detaining him in a prison with adult inmates without providing any medical or specialist care, all of which led to his suicide.<sup>123</sup>

**Reynolds v. United Kingdom (ECtHR)(2012).** Upon admission, a voluntary psychiatric patient suffering from schizophrenia was determined to be a low risk of suicide by the psychiatric institution. The patient spoke of hearing voices telling him to kill himself and subsequently jumped from a window and died. The Court determined that the right to life was violated because appropriate measures had not been taken to protect the patient and because the applicant (the patient's mother) lacked recourse to domestic remedies to seek non-pecuniary damages for her son's death.<sup>124</sup>

## . . . RIGHT TO LIFE IN THE CONTEXT OF INFECTIOUS DISEASES

The ECtHR has addressed the right to life in relation to infectious diseases in the context of detention. The Court has recognized the State's responsibility to provide appropriate medical treatment to those in detention; failure to do so in cases involving the death of a detainee could result in the violation of the right to life.<sup>125</sup> However, in order for the positive obligations of the State regarding the provision of medical treatment to be triggered under this right, the State must have knowledge of the detainee's medical need. However, this does not entitle the State to turn a "blind-eye" to the detainee's condition. An obligation may arise on the part of the detainee to inform the State of his condition in order to procure adequate medical treatment.<sup>126</sup>

### Cases Relating to Infectious Diseases and the Right to Life

<sup>119</sup> ECtHR. *D v. The United Kingdom*. App. No. 30240/96. May 2, 1997. (issues under Article 2 were indistinguishable from those raised under Article 3).

<sup>120</sup> See ECtHR. *Koch v. Germany*. App. No. July 19, 2012; ECtHR. *Haas v. Switzerland*. App. No. 31322/07. January 20, 2011; ECtHR. *Pretty v. The United Kingdom*. App. No. 2346/02. April 29, 2002.

<sup>121</sup> ECtHR. *Keenan v. The United Kingdom*. App. No. 27229/95. April 3, 2001.

<sup>122</sup> ECtHR. *Keenan v. The United Kingdom*. App. No. 27229/95. April 3, 2001.

<sup>123</sup> ECtHR. *Çoşelav v. Turkey*. App. No. 1413/07. March 18, 2013.

<sup>124</sup> ECtHR. *Reynolds v. The United Kingdom*. App. No. 2694/08. June 13, 2012.

<sup>125</sup> ECtHR. *Salakhov and Islyamova v. Ukraine*. App. No. 28005/08. March 14, 2013.

<sup>126</sup> ECtHR. *Salakhov and Islyamova v. Ukraine*. App. No. 28005/08. March 14, 2013.

**Oyal v. Turkey (ECtHR)(2010).** An infant was infected with HIV during a blood transfusion at a public hospital. The Court found a violation of the right to life from the inadequate remedies provided by domestic law for the negligence of hospital staff, who had failed to test the blood properly and screen donors effectively.<sup>127</sup>

**Salakhov and Islyamova v. Ukraine (ECtHR)(2013).** The Court found a violation of the right to life where a detainee living with HIV was not provided with adequate medical treatment, which resulted in the death of the detainee.<sup>128</sup>

## . . . RIGHT TO LIFE IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH

The ECtHR has left the determination of when life begins, in the context of embryos, to the law of the States.<sup>129</sup> Additionally, because the ECtHR does not apply Article 2 of the ECHR to the unborn, the issue of abortion is typically addressed under the right to respect for private and family life under Article 8 of the ECHR. The Court has not interpreted Article 8 as conferring a right to abortion.<sup>130</sup> However, the Court has recognized that the government is responsible for providing a legal framework (including “accessible and effective procedure[s]”) to determine access to lawful abortion, including procedures to resolve disputes between women seeking abortion services and medical practitioners.<sup>131</sup>

### Cases Relating to Sexual and Reproductive Health and the Right to Life

**Byrzykowski v. Poland (ECtHR)(2006).** The Court found that the prolonged investigation into the death of woman following a cesarean was found to be a violation of the right to life, holding that a “prompt examination of cases concerning death in a hospital setting” is required under the procedural limb of this right, as such information can be disseminated to medical staff of the institution “to prevent the repetition of similar errors and thereby contribute to the safety of users of all health services.”<sup>132</sup>

**Evans v. United Kingdom (ECtHR)(2007).** The applicant was suffering from ovarian cancer and underwent in-vitro fertilization before her ovaries were removed. The applicant and her husband divorced, and her former husband withdrew his consent for the use of the embryos and requested that they be destroyed according to the contract with the clinic. The ECtHR found no violation of right to life, holding that the embryos created did not have a right to life.<sup>133</sup>

**Vo v. France (ECtHR)(2004).** Due to a mix-up with another patient with the same surname, the applicant’s amniotic sack was punctured, making a therapeutic abortion necessary. She maintained that the unintentional killing of her child should have been classified as manslaughter. The Court found no violation of the right to life, concluding that it was not desirable or possible at the moment to rule on whether an unborn child was a person under Article 2 of the ECHR.<sup>134</sup>

## RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

The ECHR does not contain an express right to health, but the ECtHR has interpreted this entitlement under various rights protected by the ECHR, most notably the right to freedom from torture and other cruel, inhuman or degrading treatment, freedom from discrimination, and the right to private and family life. States have a duty to protect the health of detainees and lack of treatment may amount to a violation of Article 3, which prohibits torture and cruel, inhuman, and degrading treatment or punishment.<sup>135</sup> Nevertheless, a right to health is expressly

<sup>127</sup> ECtHR. *Oyal v. Turkey*. App. No. 4864/05. June 23, 2010.

<sup>128</sup> ECtHR. *Salakhov and Islyamova v. Ukraine*. App. No. 28005/08. March 14, 2013.

<sup>129</sup> ECtHR. *Evans v. The United Kingdom*. App. No. 6339/05. April 10, 2007.

<sup>130</sup> ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

<sup>131</sup> ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

<sup>132</sup> ECtHR. *Byrzykowski v. Poland*. App. No. 11562/05. September 27, 2006.

<sup>133</sup> ECtHR. *Evans v. The United Kingdom*. App. No. 6339/05. April 10, 2007.

<sup>134</sup> ECtHR. *Vo v. France*. App. No. 53924/00. July 8, 2004.

<sup>135</sup> ECtHR. *Hurtado v. Switzerland*. App. No. 17549/90. January 28, 1994; ECtHR. *Ilhan v. Turkey*. App. No. 22277/93. June 27, 2000.

recognized under Article 11 of the ESC, and as stated above, the ECSR has issued seven judgments based on Article 11 to date<sup>136</sup>—only one of which falls into one of the contexts examined throughout this guide, namely sexual and reproductive health.<sup>137</sup> For this reason, the case law provided in this section is limited to this ECSR case.

According to the ECSR, Article 11 includes physical and mental well-being in accordance with the definition of health in the WHO Constitution.<sup>138</sup> Under this right, States must ensure the best possible state of health for the population according to existing knowledge, and health systems must respond appropriately to avoidable health risks, i.e., those controlled by human action.<sup>139</sup> The health care system must be accessible to everyone, and arrangements for access must not lead to unnecessary delays in provision. Access to treatment must be based on transparent criteria, agreed upon at the national level, taking into account the risk of deterioration in either clinical condition or quality of life.<sup>140</sup> Additionally, there must be adequate staffing and facilities - with a very low density of hospital beds, combined with waiting lists, amounting to potential obstacles to access for the largest number of people.<sup>141</sup> Accordingly, the conditions of stay in hospitals, including psychiatric hospitals, must be satisfactory and compatible with human dignity.<sup>142</sup>

In relation to advisory and educational facilities, the ECSR has identified two key obligations: 1) developing a sense of individual responsibility through awareness campaigns and 2) providing free and regular health screening, especially for serious diseases.<sup>143</sup>

## RELEVANT PROVISIONS

### ECHR, Art. 3:

Charter of Fundamental Rights of the European Union,<sup>144</sup> Art. 35: Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

### Declaration on the Promotion of Patients' Rights in Europe<sup>145</sup>

1.6 Everyone has the right to such protection of health as is afforded by appropriate measures for disease prevention and health care, and to the opportunity to pursue his or her own highest attainable level of health.

5.3 Patients have the right to a quality of care which is marked both by high technical standards and by a humane relationship between the patient and health care providers.

### ESC

**Art. 11 – The right to protection of health:** With a view to ensuring the effective exercise of the right to protection of

<sup>136</sup>ECSR.International Federation of Human Rights Leagues (FIDH) v. Greece.Collective Complaint No. 72/2011.January 23, 2013; ECSR.Defence for Children International (DCI) v. Belgium. Collective Complaint No. 69/2011.October 23, 2012; ECSR.Médecins du Monde - International v. France. Collective Complaint No. 67/2011.September 11/, 2012; ECSR.Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007.March 30, 2009; ECSR.European Roma Rights Centre (ERRC) v. Bulgaria. Collective Complaint No. 46/2007.December 3, 2008; ECSR.Marangopoulos Foundation for Human Rights (MFHR) v. Greece.Collective Complaint No. 30/2005.December 6, 2006; ECSR.Confédération Générale du Travail (CGT) v. France. Collective Complaint No. 22/2003. December 8, 2004.

<sup>137</sup>ECSR.International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, Collective Complaint No. 45/2007.March 30/, 2009.

<sup>138</sup>COE.Conclusions of the European Committee of Social Rights.(XVII -2); Conclusions 2005.Statement of interpretation of Article 11.

<sup>139</sup>COE. Conclusions: Denmark. (XV-2).

<sup>140</sup>COE. Conclusions: United Kingdom. (XV-2).

<sup>141</sup>COE. Conclusions: Denmark. (XV-2).

<sup>142</sup>COE.Conclusions of the European Committee of Social Rights.(XVII -2); Conclusions 2005. Statement of interpretation of Article 11; Conclusions 2005: Romania.

<sup>143</sup>COE.The Right to Health and the European Social Charter.

<sup>144</sup>Official Journal of the European Communities.Charter of Fundamental Rights of the European Union.OJ C 364/01. December 7, 2000.

<sup>145</sup>WHO.Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

health, the Parties undertake, either directly or in co-operation with public or private organizations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

**Art. 13– The right to social and medical assistance:**With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

#### European Charter of Patients' Rights<sup>146</sup>

**Art. 8 (Right to the Observance of Quality Standards):**Each individual has the right of access to high quality health services on the basis of the specification and observance of precise standards.

**Art. 9 (Right to Safety):** Each individual has the right to be free from harm caused by the poor functioning of health services, medical malpractice and errors, and the right of access to health services and treatments that meet high safety standards.

**Art. 10 (Right to Innovation):** Each individual has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations.

## **. . . RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH**

According to the ECSR, the right to health under Article 11 of the ESC requires that the State “provide education and aim to raise public awareness in respect of health-related matters,” including sexual and reproductive health.<sup>147</sup> This education should be available in schools throughout the school year.<sup>148</sup> The ECSR considers sexual and reproductive health education to constitute “a process aimed at developing the capacity of children and young people to understand their sexuality in its biological, psychological, socio-cultural and reproductive dimensions which will enable them to make responsible decisions with regard to sexual and reproductive health behaviour.”<sup>149</sup>

<sup>146</sup> Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

<sup>147</sup>ECSR.Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009). para. 43.

<sup>148</sup>ECSR.Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009). para .45.

<sup>149</sup>ECSR.Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009). para. 46.

## Case Relating to Sexual and Reproductive Health and the Right to the Highest Attainable Standard of Health

**International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia (ECSR)(2009).** The ECSR found a violation of the right to health where the State failed to provide adequate, sufficient, and non-discriminatory sexual and reproductive health education to students in public schools.<sup>150</sup>

## RIGHT TO FREEDOM FROM TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

The right to freedom from torture and other cruel, inhuman or degrading treatment requires the State to prevent and protect people from and punish acts of inhuman or degrading treatment and torture. This right has been interpreted under Article 3 (prohibition of torture) of the ECHR. The ECtHR considers this right to be "one of the most fundamental values of a democratic society."<sup>151</sup> It cannot be interpreted in absolute terms and the "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3."<sup>152</sup> According to the Court, "the assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim."<sup>153</sup> Examples of breaches of Article 3 in the context of patient care include: the continued detention of a cancer sufferer, causing "particularly acute hardship";<sup>154</sup> significant defects in the medical care provided to a mentally ill prisoner known to be a suicide risk;<sup>155</sup> and systematic failings in relation to the death of a heroin addict in prison.<sup>156</sup>

Medical care that causes severe suffering for no justifiable reason can be considered cruel, inhuman or degrading treatment or punishment, and if there is State involvement and specific intent, it is torture. The former European Commission on Human Rights stated that it "did not exclude that the lack of medical care in a case where someone is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3."<sup>157</sup> In fact, the ECtHR has held that the need for adequate medical assistance and treatment beyond that available in prison could, in exceptional cases, justify the inmate's release subject to appropriate restrictions in the public interest.<sup>158</sup> Moreover, the mere fact that a doctor saw the detainee and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate.<sup>159</sup> Additionally, the combined and cumulative impact on a detainee of both the conditions of detention and a lack of adequate medical assistance may also result in a breach of Article 3.<sup>160</sup>

However, the medical cases that the ECtHR has examined in relation to Article 3 have tended to involve those who are confined either (a) under the criminal law or (b) on mental health grounds.<sup>161</sup> With respect to both forms of detention, failure to provide adequate medical treatment to persons deprived of their liberty may violate Article 3

<sup>150</sup>ECSR.Decision on the merits: International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia. Collective Complaint No. 45/2007. March 30, 2009).

<sup>151</sup>ECtHR.Hagyó V. Hungary. App. No. 52624/10. April 23, 2013. para. 39.

<sup>152</sup>ECtHR.Hagyó V. Hungary. App. No. 52624/10. April 23, 2013. para. 40.

<sup>153</sup>ECtHR.Hagyó V. Hungary. App. No. 52624/10. April 23, 2013. para. 40.

<sup>154</sup>ECSR.Mouisel v. France.App. No. 67263/01. November 14, 2002. (finding the detention amounted to inhuman and degrading treatment).

<sup>155</sup>ECtHR.Keenan v.The United Kingdom. App. No. 27229/95. March 4, 2001. (finding failure to refer to psychiatrist and lack of medical notes).

<sup>156</sup>ECtHR.McGlinchey and Ors v.The United Kingdom.App. No. 50390/99. July 29, 2003. (finding inadequate facilities to record weight loss, gaps in monitoring, failure to take further steps including admission to hospital).

<sup>157</sup>ECtHR.Tanko v. Finland. App. No. 23634/94. May 19, 1994.

<sup>158</sup>ECtHR.Wedler v. Poland.App. No. 44115/98. April 16, 2007; see ECSR. Mouisel v. France. App. No. 67263/01. November 14, 2002.

<sup>159</sup>ECtHR.Hummatov v. Azerbaijan.App. No. 9852/03; 13413/04.November 29, 2007; ECtHR.Malenko v. Ukraine.App. No. 18660/03. February 19, 2009.

<sup>160</sup>ECtHR.Popov v. Russia. App. No. 26853/04. July 13, 2006; ECtHR.Lind v. Russia. App. No. 25664/05. December 6, 2007; ECtHR.Kalashnikov v. Russia.App. No. 47095/99. July 15, 2002.

<sup>161</sup> Some of these interpretations may also be relevant to the context of those in compulsory military service, as such persons are effectively under the control of the State.

in certain circumstances.<sup>162</sup> Breaches will tend to amount to inhuman and degrading treatment rather than torture. If an individual suffers from multiple illnesses, the risks associated with any illness she/he suffers during her/his detention may increase and her/his fear of those risks may also intensify. In these circumstances, the absence of qualified and timely medical assistance, coupled with the authorities' refusal to allow an independent medical examination of the applicant's state of health, leads to the person's strong feeling of insecurity, which, combined with physical suffering, can amount to degrading treatment.<sup>163</sup>

Nevertheless, Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. Instead, the ECtHR has reiterated the "right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention."<sup>164</sup>

Where detainees have preexisting conditions, it may not be possible to ascertain to what extent symptoms at the relevant time resulted from the conditions of the imposed detention. However, this uncertainty is not determinative as to whether the authorities have failed to fulfill their obligations under Article 3. Therefore, proof of the actual effects of the conditions of detention may not be a major factor.<sup>165</sup>

Experimental medical treatment may amount to inhuman treatment in the absence of consent,<sup>166</sup> and generally, compulsory medical intervention in the interests of the person's health, where it is of "therapeutic necessity from the point of view of established principles of medicine," will not breach Article 3.<sup>167</sup> In such cases, however, the necessity must be "convincingly shown," and appropriate procedural guarantees must be in place. Furthermore, the level of force used must not exceed the minimum level of suffering/humiliation that would amount to a breach of Article 3, including torture.<sup>168</sup>

This right also requires that authorities ensure that there is a comprehensive record concerning the detainee's state of health and the treatment she/he underwent while in detention<sup>169</sup> and that the diagnoses and care are prompt and accurate.<sup>170</sup> The medical record should contain sufficient information, specifying the kind of treatment the patient was prescribed, the treatment she/he actually received, who administered the treatment and when, and how the applicant's state of health was monitored, etc. In the absence of such information, the court may draw appropriate inferences.<sup>171</sup> Contradictions in medical records have been held to amount to a breach of Article 3.<sup>172</sup>

It is worth noting here the European Committee for the Prevention of Torture (CPT), established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and tasked with monitoring compliance with Article 3 of the ECHR through regular visits to places of detention and institutions. Its mandate includes prisons, juvenile detention centers, psychiatric hospitals, police holding centers, and immigration detention centers. The CPT has established detailed standards for implementing human rights-based

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<sup>162</sup>ECtHR.Hurtado v. Switzerland. App. No. 17549/90. January 28, 1994; ECtHR.Ilhan v. Turkey. App. No. 22277/93. June 27, 2000.

<sup>163</sup>ECtHR.Khudobin v. Russia. App. No. 59696/00. January 26, 2007.

<sup>164</sup>ECSR.Mouisel v. France. App. No. 67263/01. November 14, 2002.

<sup>165</sup>ECtHR.Keenan v.The United Kingdom. App. No. 27229/95. April 3, 2001. (the treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 with regard to the protection of fundamental human dignity, even though the person may not be able to point to any specific ill effects).

<sup>166</sup>ECtHR. X v. Denmark. App. No. 9974/82. March 2, 1983.

<sup>167</sup>ECtHR.Jalloh v. Germany. App. No. 54810/00. July 11, 2006.

<sup>168</sup>ECtHR.Nevmerzhitsky v. Ukraine. App. No. 54825/00. April 5, 2005. (finding that force feeding of prisoner on hunger strike was unacceptable and amounted to torture; see ECtHR. Herczegfalvy v. Austria. App. No. 10533/83. September 24, 1992. (finding that forcible administration of drugs and food to violent prisoner on hunger strike complied with established medical practice).

<sup>169</sup>ECtHR.Khudobin v. Russia. App. No. 59696/00. January 26, 2007.

<sup>170</sup>ECtHR.Aleksanyan v. Russia.App. No. 46468/06. June 5, 2009.

<sup>171</sup>ECtHR.Hummatov v. Azerbaijan.App. No. 9852/03; 13413/04.November 29, 2007; ECtHR.Melnik v. Ukraine. App. No. 72286/01. June 28, 2006; see ECtHR. Holomiov v. Moldova. App. No. 30649/05. November 7, 2006.

<sup>172</sup>ECtHR. Radu v. Romania. App. No. 34022/05. October 3, 2012.

policies in prisons and has also set monitoring benchmarks.<sup>173</sup> The CPT has emphasized the impact of overcrowding on prisoners' health.<sup>174</sup> It has also highlighted the frequent absence of sufficient natural light and fresh air in pretrial detention facilities and the impact of these conditions on detainees' health.<sup>175</sup>

## RELEVANT PROVISIONS

ECHR, Art. 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Declaration on the Promotion of Patients' Rights in Europe<sup>176</sup>

1.3 Everyone has the right to physical and mental integrity and to the security of his or her person.

5.10 Patients have the right to relief of their suffering according to the current state of knowledge.

5.11 Patients have the right to humane terminal care and to die in dignity.

European Charter of Patients' Rights,<sup>177</sup> Art. 11 (Right to Avoid Unnecessary Suffering and Pain): Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness.

## . . . FREEDOM FROM TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT IN THE CONTEXT OF MENTAL HEALTH

The ECtHR recognizes the special position of mental health patients in relation to Article 3, particularly when those suffering from mental illness are subject to detention: "the mentally ill are in a position of particular vulnerability, and clear issues of respect for their fundamental human dignity arise whenever such persons are detained by the authorities."<sup>178</sup> The Court has found that failure to provide psychiatric treatment to a person in need while subject to detention may constitute degrading treatment, thus amounting to a breach of Article 3.<sup>179</sup> The Court also recognizes that in addition to positive obligations that may arise in the context of those who are detained and suffer from mental illness (such as specialized psychiatric services), there are also negative obligations, where the State should avoid procedures that may aggravate the conditions of persons suffering from mental illness.<sup>180</sup> For example, the State should avoid placing detainees with mental illness in solitary confinement, which may aggravate the detainee's illness and/or present an increased risk of suicide.<sup>181</sup>

The State is also responsible for providing humane conditions in relation to detention, including adequate temperature control, food, and sanitary conditions.<sup>182</sup> The Court has found degrading treatment in violation of Article 3 in cases where living conditions in institutions housing mental health patients are insufficient.<sup>183</sup> Insufficient living conditions may include the failure on the part of the State to provide adequate food, heat,

<sup>173</sup> COE. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. [CPT]. The CPT Standards.: "Substantive" sections of the CPT's General Reports. (CPT/Inf/E [2002, rev. 2006]). October, 2006.

<sup>174</sup> COE. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. CPT. The CPT Standards.: "Substantive" sections of the CPT's General Reports. (CPT/Inf/E [2002, rev. 2006]). October, 2006.

<sup>175</sup> COE. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. CPT. The CPT Standards.: "Substantive" sections of the CPT's General Reports. (CPT/Inf/E [2002, rev. 2006]). October, 2006.

<sup>176</sup> WHO. Declaration on the Promotion of Patients' Rights in Europe. June 28, 1994.

<sup>177</sup> Active Citizenship Network (ACN). European Charter of Patients' Rights. November 2002.

<sup>178</sup> ECtHR. M.S. v. The United Kingdom. App. No. 24527/08. August 3, 2012.

<sup>179</sup> ECtHR. M.S. v. The United Kingdom. App. No. 24527/08. August 3, 2012.

<sup>180</sup> ECtHR. Renolde v. France. App. No. 5608/05. January 16, 2009.

<sup>181</sup> ECtHR. Renolde v. France. App. No. 5608/05. January 16, 2009.

<sup>182</sup> ECtHR. Stanev v. Bulgaria. App. No. 36760/06. January 17, 2012.

<sup>183</sup> ECtHR. Stanev v. Bulgaria. App. No. 36760/06. January 17, 2012.

clothing, sanitary conditions and health services.<sup>184</sup> Insufficient financial resources on the part of the State to provide adequate living conditions will not serve as a justification for failure to do so.<sup>185</sup>

### Cases Relating to Mental Health and the Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment

***Claes v. Belgium (ECtHR)(2013)***. The Court found the national authorities' failure to provide the applicant with adequate care during his detention for over 15 years in a prison psychiatric wing to constitute degrading treatment, and thus a violation of Article 3. The Court stressed that a structural problem existed on account of the inability to afford appropriate care for persons with mental disorders who were held in prison owing to the shortage of places in psychiatric facilities elsewhere.<sup>186</sup>

***Keenan v. United Kingdom (ECtHR)(2001)***. The applicant, who was suffering from paranoia, committed suicide in prison after being placed in the segregation unit as a punishment. The Court found that the lack of effective monitoring, lack of informed psychiatric input into his assessment, and significant defects in the medical care provided amounted to a violation of Article 3. Moreover, the imposition on him of a serious disciplinary punishment, which might well have threatened his physical and moral resistance, had not been compatible with the standard of treatment required in respect to a person suffering from mental illness.<sup>187</sup>

***M.S. v. United Kingdom (ECtHR)(2012)***. This case involved the detention of a man suffering from mental illness, held in police custody for more than three days. The Court found a violation of Article 3, holding that, although there had been no intentional neglect on the part of the police, the applicant's prolonged detention without appropriate psychiatric treatment had diminished his human dignity.<sup>188</sup>

### . . . FREEDOM FROM TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT IN THE CONTEXT OF INFECTIOUS DISEASES

Persons suffering from infectious diseases may be more vulnerable to ill treatment. Under Article 3 of the ECHR, the government has an obligation to ensure the health and wellbeing of the individual in detention, which includes providing the necessary medical assistance.<sup>189</sup> This right can be implicated when people living with HIV in prisons or detention centers are denied treatment.<sup>190</sup> Where the lack of such assistance gives rise to a medical emergency or otherwise exposes the victim to "severe or prolonged pain," the breach of Article 3 may amount to inhuman treatment.<sup>191</sup> However, even when these results do not occur, a finding of degrading treatment may still be made if humiliation was caused to the victim by the stress and anxiety that she/he suffers from a lack of medical assistance.<sup>192</sup> For example, the ECtHR has found that lack of medical treatment for a person's various illnesses (including TB) that were contracted in prison resulted in the individual's considerable mental suffering, thereby diminishing his human dignity.<sup>193</sup>

### Cases Relating to Infectious Diseases and the Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment

<sup>184</sup>ECtHR.Stanev v. Bulgaria.App. No. 36760/06. January 17, 2012.

<sup>185</sup>ECtHR.Stanev v. Bulgaria.App. No. 36760/06. January 17, 2012.

<sup>186</sup>ECtHR.Claes v. Belgium.App. No. 43418/09. April 10, 2013.

<sup>187</sup>ECtHR.Keenan v.The United Kingdom. App. No. 27229/95. April 3, 2001.

<sup>188</sup>ECtHR.M.S. v.The United Kingdom. App. No. 24527/08. August 3, 2012.

<sup>189</sup>ECtHR.Salakhov and Islyamova v. Ukraine. App. No. 28005/08. March 14, 2013. para. 126; see ECtHR. Kudla v. Poland. App. No. 30210/96. October 26, 2000.

<sup>190</sup>ECtHR.E.A. v. Russia.App. No. 44187/04. August 23, 2013. (violation of Article 3 due to lack to medical attention/treatment of applicant's HIV infection while in detention).

<sup>191</sup>ECtHR.McGlinchey and Ors v.The United Kingdom.App. No. 50390/99. July 29, 2003.

<sup>192</sup>ECtHR.Sarban v. Moldova.App. No. 3456/05. January 4, 2006.

<sup>193</sup>ECtHR.Hummatov v. Azerbaijan.App. No. 9852/03; 13413/04.Novemer 29, 2007.

**A.B. v. Russia (ECtHR)(2011).** The applicant, a person living with HIV and in prison, never received antiviral treatment for HIV; neither was he admitted to a hospital, due to a lack of beds. Medical staff rarely visited and provided no medication when they did. The Court found the lack of medical assistance to constitute a violation of Article 3.<sup>194</sup>

**Khudobin v. Russia (ECtHR)(2007).** Being HIV positive and suffering from several chronic diseases, including epilepsy, viral hepatitis and various mental illnesses, the applicant contracted a number of serious diseases during his detention on remand of more than one year, including measles, bronchitis and acute pneumonia. A request by his father for a thorough medical examination was refused. The Court found that the applicant had not been given the medical assistance he needed, in violation of Article 3. While the Court accepted that the medical assistance available in prison hospitals might not always be at the same level as in the best medical institutions for the general public, it underlined that the State had to ensure that the health and well-being of detainees were adequately secured by providing them with the requisite medical assistance.<sup>195</sup>

**Logvinenko v. Ukraine (ECtHR)(2011).** The Court concluded that the applicant, who was a person living with HIV and serving a life prison sentence, had suffered inhuman or degrading treatment as a result of the absence of comprehensive medical supervision and treatment for tuberculosis and HIV, as well as unsuitable prison conditions. The Court therefore found a breach of Article 3.<sup>196</sup>

**Vasyukov v. Russia (ECtHR)(2011).** The Court found the authorities' failure to duly diagnose the applicant with tuberculosis contracted during his detention and to provide adequate medical care to constitute a violation of Article 3.<sup>197</sup>

## . . . FREEDOM FROM TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH

The ECtHR has recognized that pregnant women occupy a position of particular vulnerability<sup>198</sup> and that delayed access to medical treatment such as genetic testing (of a fetus) or abortion services may constitute degrading treatment in violation of Article 3 of the ECHR.<sup>199</sup> Additionally, the Court has repeatedly recognized that forced sterilization constitutes humiliating and degrading treatment.<sup>200</sup> In the case of women refugees, the ECtHR has emphasized that States have an obligation under international law, including Article 3 of the ECHR, to protect them by guaranteeing them the authorization to remain in the State if returning to their home country could subject them to a real risk of being subjected to treatment contrary to Article 3 in the receiving country, including female genital mutilation.<sup>201</sup>

### Cases Relating to Sexual and Reproductive Health and the Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment

**Aden Ahmed v. Malta (ECtHR)(2013).** An asylum seeker was detained and suffered from episodes of depression, recurrent physical pain, a miscarriage, and an infection during detention. The Court found that the conditions of her detention, when coupled with her fragile health, amounted to a violation of Article 3.<sup>202</sup>

<sup>194</sup>ECtHR.A.B. v. Russia.App. No. 1439/06. January 14, 2011; see also ECtHR. E.A. v. Russia.App. No. 44187/04.August 23, 2013; ECtHR.Yakovenko v. Ukraine.App. No. 15825/06. January 25, 2008.

<sup>195</sup>ECtHR.Khudobin v. Russia. App. No. 59696/00. January 26, 2007.

<sup>196</sup>ECtHR.Logvinenko v. Ukraine.App. No. 13448/07. January 14, 2011.

<sup>197</sup>ECtHR.Vasyukov v. Russia.App. No. 2974/05.September 15, 2011.

<sup>198</sup>ECtHR.R.R. v. Poland.App. No. 27617/04. May 26, 2011.

<sup>199</sup>ECtHR.P. and S. v. Poland.App. No. 57375/08. January 30, 2013; see also ECtHR. R.R. v. Poland.App. No. 27617/04. May 26, 2011.

<sup>200</sup>ECtHR.V.C. v. Slovakia.App. No. 18968/07. February 8, 2012; ECtHR.N.B. v. Slovakia. App. No. 29518/10. June 12, 2012; ECtHR.I.G., M.K. and R.H. v. Slovakia. App. No. 15966/04. November 13, 2012.

<sup>201</sup>ECtHR.Collins and Akaziebie v. Sweden. App. No. 23944/05. March 8, 2007.

<sup>202</sup>ECtHR.Aden Ahmed v. Malta.App. No. 55352/12. July 23, 2013. paras. 97-100.

***I.G., M.K. and R.H. v. Slovakia (ECtHR)(2013).*** The Court found that the sterilization of two Roma women without their full and informed consent amounted to a violation of Article 3. The Court also considered the government's failure to conduct an effective official investigation into the sterilizations was a procedural violation of Article 3.<sup>203</sup>

***V.C. v. Slovakia (ECtHR)(2012).*** The Court found that the sterilization of a woman at a public hospital without her informed consent amounted to a violation of Article 3. The Court found that the applicant experienced fear, anguish and feelings of inferiority as a result of her sterilization. Although there was no proof that the medical staff concerned had intended to ill-treat her, they had acted with gross disregard to her right to autonomy and choice as a patient.<sup>204</sup>

## RIGHT TO PARTICIPATION IN PUBLIC POLICY

The right to participation in public policy has been treated as an underlying determinant of health;<sup>205</sup> and in the context of health services, it is the right and opportunity of every person to participate in political processes and policy decisions affecting her/his health and wellbeing at the community, national and international levels.<sup>206</sup> This opportunity must be meaningful, supported and provided to all citizens without discrimination. The right extends to participation in decisions about the planning and implementation of health care services, appropriate treatments, and public health strategies.

There is no explicit provision guaranteeing the right to participation in public policy in the ECHR; however, the European Charter of Patients' Rights contains a "right to participate in policy-making in the area of health" that fosters citizens' "rights to participate in the definition, implementation and evaluation of public policies relating to the protection of health care rights." In addition, the ECtHR has addressed the restriction of voting rights of discrete populations under the right to freedom from torture and cruel, inhuman and degrading treatment (ECHR 3).<sup>207</sup>

## RELEVANT PROVISIONS

### COE Recommendation No. R (2000) 5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care<sup>208</sup>

Recommends that the governments of member states:

- ensure that citizens' participation should apply to all aspects of health care systems, at national, regional and local levels and should be observed by all health care system operators, including professionals, insurers and the authorities;
- take steps to reflect in their law the guidelines contained in the appendix to this recommendation;
- create legal structures and policies that support the promotion of citizens' participation and patients' rights, if these do not already exist;
- adopt policies that create a supportive environment for the growth, in membership, orientation and tasks, of civic organizations of health care "users," if these do not already exist;
- support the widest possible dissemination of the recommendation and its explanatory memorandum, paying special attention to all individuals and organizations aiming at involvement in decision-making in health care.

The guidelines in this recommendation cover: citizen and patient participation as a democratic process; information;

<sup>203</sup>ECtHR.I.G., M.K. and R.H. v. Slovakia.App. No. 5966/04. April 29, 2013; see ECtHR. V.C. v. Slovakia.App. No. 18968/07. February 8, 2012; ECtHR.N.B. v. Slovakia.App. No. 29518/10. June 12, 2012.

<sup>204</sup>ECtHR.V.C. v. Slovakia.App. No. 18968/07.February 8, 2012.

<sup>205</sup>Halabi, Sam. Participation and the right to health: lessons from Indonesia. Health and Human Rights Journal, Vol. 11, No. 1.P, 2009. p. 51 .

<sup>206</sup>CECSR, GC 14, para. 11. CECSR. CECSR General Comment No. 14: The right to the highest attainable standard of health. U.N. Doc. E/C.12/2000/4. August 11, 2000. para. 11.

<sup>207</sup> See ECtHR. Hirst v.The United Kingdom (No. 2) App. No. 74025/01. October 6, 2005; see also ECtHR. Alajos Kiss v. Hungary.App. No. 38832/06. August 20, 2010.

<sup>208</sup>COE.Recommendation No.R (2000) 5. February 24, 2000. On the development of structures for citizen and patient participation in the decision-making process affecting health care.

supportive policies for active participation; and appropriate mechanisms.

**Committee of Ministers Recommendation No. R (2006) 18 to member states on health services in a multicultural society**<sup>209</sup>

5.1. Patient training programmes should be developed and implemented to increase their participation in the decision-making process regarding treatment and to improve outcomes of care in multicultural populations.

5.2. Culturally appropriate health promotion and disease prevention programmes have to be developed and implemented as they are indispensable to improve health literacy in ethnic minority groups in terms of health care.

5.3. Ethnic minority groups should be encouraged to participate actively in the planning of health care services (assessment of ethnic minorities' health needs, programme development), their implementation and evaluation.

**Ljubljana Charter on Reforming Health Care**,<sup>210</sup> Art. 5.3: Health care reforms must address citizens' needs, taking into account their expectations about health and health care. They should ensure that the citizen's voice and choice decisively influence the way in which health services are designed and operate. Citizens must also share responsibility for their own health.

## **. . . RIGHT TO PARTICIPATION IN PUBLIC POLICY IN THE CONTEXT OF MENTAL HEALTH**

Under the right to participation in public policy, people with mental disabilities have the right to participate in public life as long as the law allows them to do so, or through a representative.<sup>211</sup> The law can still prevent some with mental illness from participating in public life if their mental capacities are too low, but restrictions can be accepted only if legally justified, proportionate, and decided by the Courts.<sup>212</sup> The legal capacity of the patient is based upon official decisions.<sup>213</sup>

Under the right to free elections (ECHR 1) the Court has found that the complete removal of the voting rights of the mentally ill (those placed under partial or full guardianship) may breach Article 3, even if the guardianship status of such individuals is periodically subject to judicial review.<sup>214</sup> The Court has considered that "if a restriction on fundamental rights applies to a particularly vulnerable group in society, who has suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question."<sup>215</sup>

### **Case Relating to Mental Health and the Right to Participation in Public Policy**

***Alajos Kiss v. Hungary (ECtHR)(2010)***. Where the applicant was an individual with manic depression placed under partial guardianship, the Court found the domestic law prohibiting individuals under partial or full guardianship from participating in elections to be in violation of Article 3 (prohibition of degrading treatment) of the ECHR.<sup>216</sup>

## **. . . RIGHT TO PARTICIPATION IN PUBLIC POLICY IN THE CONTEXT OF INFECTIOUS DISEASES**

Persons living with infectious diseases, such as HIV/AIDS have the right to meaningful participation in designing and implementing policies that may impact them.<sup>217</sup> As individuals who are most affected by public policies aimed

<sup>209</sup>COE. Committee of Ministers Recommendation No. R (2006) 18. November 8, 2006.

<sup>210</sup>World Health Organization [WHO]. Ljubljana Charter on Reforming Health Care. June 19, 1996.

<sup>211</sup>European Union Agency for Fundamental Rights [FRA]. The right to political participation of persons with mental health problems and persons with intellectual disabilities. October 2010.

<sup>212</sup> European Commission for Democracy through Law (the Venice Commission), Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, adopted by the Venice Commission at 52nd session (18-19 October 2002). Opinion No. 190/2002, doc. CDL-AD (2002) 23 rev.

<sup>213</sup>ECtHR. *Alajos Kiss v. Hungary*. App. No. 38832/06. August 20, 2010.

<sup>214</sup>ECtHR. *Alajos Kiss v. Hungary*. App. No. 38832/06. August 20, 2010.

<sup>215</sup>ECtHR. *Alajos Kiss v. Hungary*. App. No. 38832/06. August 20, 2010.

<sup>216</sup>ECtHR. *Alajos Kiss v. Hungary*. App. No. 38832/06. August 20, 2010.

at protecting the public's health from infectious diseases, their engagement is crucial to creating comprehensive and successful public policy that not only protects the health of the larger community, but also respects the human rights of these individuals.

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## **. . . RIGHT TO PARTICIPATION IN PUBLIC POLICY IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH**

The right to participation in public policy is essential to protecting the sexual and reproductive health of women. The participation of the populations most affected by policies related to sexual and reproductive health helps to ensure that their needs are met, such as those related to family planning and access to contraceptives. In addition to granting them a sense of ownership, the involvement of affected individuals can make the policies and implementation efforts more culturally appropriate and thereby increasing access to individuals.<sup>218</sup>

### **Right to Equality and Freedom from Discrimination**

The rights to equality and to freedom from discrimination are important to patient care and are essential components of the right to health. The COE has recognized and emphasized “effective access to health care for all without discrimination” as a “basic human right.”<sup>219</sup> Article 14 of the ECHR prohibits discrimination based on “sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Importantly, unless states have ratified Protocol No. 12 to the ECHR (which prohibits discrimination and does not require that other rights be implicated),<sup>220</sup> Article 14 is not a stand-alone provision—it must be argued in conjunction with one of the substantive provisions of the ECHR.<sup>221</sup> For this reason, the Court has not always examined Article 14 claims in cases in which it has already found a violation of the main provision.

International discrimination law has distinguished direct discrimination from indirect discrimination. “Direct discrimination” refers to discriminatory measures that have intent to discriminate. “Indirect discrimination” refers to “a practice, rule, requirement or condition [that] is neutral on its face” but has a negative and disproportionate impact on a group of individuals without justification.<sup>222</sup> Under EU law, Directive 2000/43/EC of 29 June 2000 (which is applicable to the context of access to health care) establishes that “any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community.”<sup>223</sup> In this directive, Article 2(2) defines “direct discrimination” as “occur[ing] where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.” It defines “indirect discrimination” as “occur[ing] where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” Further, the directive understands both harassment and instruction to discriminate to constitute discrimination.

In contrast, the ECtHR has not made such a distinction. Rather, the Court has established a test for determining whether to analyze the claim under Article 14 of the ECHR. Because a violation of Article 14 requires the violation

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<sup>217</sup>See Declaration of the Paris AIDS Summit, December 1, 1994; UNAIDS. UNAIDS Policy Brief: The Greater Involvement of People Living with HIV (GIPA). March 2007. p. 1.

<sup>218</sup>CRF and UNFPA. Briefing Paper: The Right to Contraceptive Information and Services for Women and Adolescents. December 2010. p. 24.

<sup>219</sup>COE. Conclusions: Portugal. (XVII -2).

<sup>220</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177). Entered into force on April 1, 2005.

<sup>221</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177). Entered into force on April 1, 2005.

<sup>222</sup>Interights. Non-Discrimination in International Law: A Handbook for Practitioners. 2011. 18.

<sup>223</sup>Official Journal of the European Union. 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 of 19.7.2000. July 19, 2000. (13).

of another right protected under the ECHR (again, unless the state has ratified Protocol No. 12), the Court must first establish whether the alleged discrimination indeed constitutes a violation of another right under the Convention. Second, the Court must determine whether there has been a violation of a “substantive provision.” If so, the Court’s analysis of the discrimination is subsumed within the discussion of that provision. Third, the Court will determine whether the applicant demonstrated a difference in treatment from similarly-situated individuals, a step that requires that the applicant identify with a group of persons in “analogous situations” and show the differential treatment. In response, the State may demonstrate that the differential treatment is justified.

Although the Court has hesitated to draw distinctions between direct and indirect discrimination, as well as to rely on statistical evidence that supports arguments of indirect discrimination, the Court for the first time recognized indirect discrimination in 2001 in *Hugh Jordan v. the United Kingdom*, where it established that even when a measure does not have a discriminatory purpose, it could still be considered discriminatory.<sup>224</sup> For a more discussion on the issue, refer to Interights’ “Non-Discrimination in International Law: A Handbook for Practitioners.”<sup>225</sup>

With respect to Article 11 (right to protection of health) of the ESC, the ECSR has stated that the health care system must be accessible to everyone and that restrictions on the application of Article 11 must not be interpreted in such a way as to impede disadvantaged groups’ exercise of their rights to health.<sup>226</sup> With regard to Article 13 (right to social and medical assistance), the ECSR did find, based on a purposive interpretation of the ESC consistent with the principle of individual human dignity, that medical assistance protection should extend to illegal and to lawful foreign migrants (although this condition did not apply to all ESC rights). This finding is highly significant in relation to the protection afforded to such marginalized groups within Europe.

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## RELEVANT PROVISIONS

**ECHR, Art. 14:** The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### ESC

**Art. 11– The right to protection of health:** With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organizations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

**Art. 13– The right to social and medical assistance:** With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;

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<sup>224</sup>ECtHR. *Hugh Jordan v. The United Kingdom* App. No. 24726/94. May 4, 2001. para. 154.

<sup>225</sup>Interights. *Non-Discrimination in International Law: A Handbook for Practitioners*. 2011.

<sup>226</sup>ECSR. *Defence for Children International (DCI) v. Belgium*. Collective Complaint No. 69/2011. October 23, 2012.; COE. *Conclusions of the European Committee of Social Rights*. (XVII -2); *Conclusions 2005*. Statement of interpretation of Article 11.

4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

**Art. 15– The right of persons with disabilities to independence, social integration and participation in the life of the community:**With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialized bodies, public or private;
2. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialized placement and support services;
3. to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,<sup>227</sup> Art. 3:Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.

## . . . RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION IN THE CONTEXT OF MENTAL HEALTH

The ECtHR has recognized that persons with mental illness constitute a discreet population that suffers from particular vulnerabilities and that has been subject to discrimination.<sup>228</sup> As such, the State enjoys a lower margin of appreciation when restricting the rights of vulnerable populations that have been subject to discrimination, such as mental health patients.<sup>229</sup>

### Case Relating to Mental Health and the Right to Equality and Freedom from Discrimination

**X. and Y. v. Netherlands (ECtHR)(1985).** A 16 year-old girl suffering from mental disabilities was sexually assaulted while living in an institutional home for children with mental disabilities. Based on her age, the victim was considered competent to bring a complaint under domestic law; but because of her mental disability, the victim's father lodged a complaint on her behalf. The domestic courts provided no legal recourse for the sexual assault, stating that the victim should have brought the complaint herself. The ECtHR declined to examine the issue under Article 14 of the ECHR, even though the applicant argued that the lack of special protections for those with mental disabilities amounted to discriminatory treatment under the law.<sup>230</sup>

## . . . RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION IN THE CONTEXT OF INFECTIOUS DISEASES

<sup>227</sup>COE. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. April 4, 1997.

<sup>228</sup>ECtHR. Alajos Kiss v. Hungary.App. No. 38832/06. August 20, 2010.

<sup>229</sup>ECtHR. Alajos Kiss v. Hungary.App. No. 38832/06. August 20, 2010.

<sup>230</sup>ECtHR.X. and Y. v. The Netherlands.App. No. 8978/80.26 . March 26, 1985.

The right to equality and freedom from discrimination protects a person with an infectious disease, such as HIV/AIDS or tuberculosis, from discrimination. Citing Recommendation 1116 (1989) by the Parliamentary Assembly of the Council of Europe, the Court has held that health status falls under the “other status” category provided in Article 14 for the purposes of protecting individuals from discrimination.<sup>231</sup> Where States afford differential treatment based on health status, the state has the obligation to provide a “particularly compelling justification.”<sup>232</sup>

### Case Relating to Infectious Diseases and the Right to Equality and Freedom from Discrimination

**Kiyutin v. Russia (ECtHR)(2011).** In this case a man applied for residency status; however his application was denied because of his HIV positive status. The man lived in Russia, was married to a Russian woman and had fathered a child with her; however Russia had a policy of denying residency status to those living with HIV. The Court found that this policy constituted discrimination in violation of Article 14 and noted, for the first time, that persons living with HIV are protected as a distinct group against discrimination in relation to their fundamental rights, and that they are a “vulnerable group” and any restriction of their rights attracts a higher degree of scrutiny on the part of the ECtHR.<sup>233</sup>

### . . . RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH

Victims of forced sterilization have brought cases under Article 14, but the ECtHR has opted to analyze the issue under a different article, such as Article 3 (prohibition of torture)<sup>234</sup> and Article 8 (right to respect for private and family life).<sup>235</sup>

### Case Relating to Sexual and Reproductive Health and the Right to Equality and Freedom from Discrimination

**E.B. v. France (ECtHR)(2008).** The Court found that discriminatory treatment suffered by a homosexual woman who applied to adopt a child amounted to a violation of Article 8 (right to respect for private and family life) in conjunction with Article 14 (prohibition of discrimination). Although Article 8 does not guarantee a right to adoption, the Court held that discrimination on the basis of sexual orientation runs afoul of both Article 8 and Article 14.<sup>236</sup>

## Right to and Effective Remedy

The right to an effective remedy guarantees individuals the ability to have human rights violations addressed at the domestic level and have appropriate relief.<sup>237</sup> The ECHR enshrines the right to an effective remedy under both Articles 13 (right to an effective remedy) and 41 (just satisfaction). States are granted discretion on how they fulfill their obligations under this right, and the scope of their obligations depends on the nature of the case.<sup>238</sup> Nevertheless, the Court has stated that the right to an effective remedy consists of “a thorough and effective investigation” in order to identify and hold accountable those responsible for the violation, as well as granting “effective access for the complainant to the investigatory procedure”—in addition to payment of

<sup>231</sup> ECtHR. *Kiyutin v. Russia*. App. No. 2700/10. September 15, 2011. para. 57.

<sup>232</sup> ECtHR. *Kiyutin v. Russia*. App. No. 2700/10. September 15, 2011. para. 65.

<sup>233</sup> ECtHR. *Kiyutin v. Russia*. App. No. 2700/10. September 15, 2011.

<sup>234</sup> ECtHR. *I.G., M.K. and R.H. v. Slovakia*. App. No. 5966/04. April 29, 2013; see also ECtHR. *V.C. v. Slovakia*. App. No. 18968/07. February 8, 2012; ECtHR. *N.B. v. Slovakia*. App. No. 29518/10. June 12, 2012.

<sup>235</sup> ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010.

<sup>236</sup> ECtHR. *E.B. v. France*. App. No. 43546/02. January 22, 2008.

<sup>237</sup> ECtHR. *Hagyó V. Hungary*. App. No. 52624/10. April 23, 2013. para. 96.

<sup>238</sup> ECtHR. *Hagyó V. Hungary*. App. No. 52624/10. April 23, 2013. para. 96; ECtHR. *Garayev v. Azerbaijan*. App. No. 53688/08. September 10, 2010. para. 82.

compensation where appropriate.<sup>239</sup> The right to an effective remedy also requires that the availability of the remedy include the determination of the claim and the possibility of redress.<sup>240</sup>

Additionally, the ECtHR clarified that the right to an effective remedy is not absolute and that Article 13 must be read as requiring only that which is “as effective as can be” considering the limitations in scope that are set by the nature of the case.<sup>241</sup> The remedy must be effective both in practice and in law, meaning that there must not be undue interference by State authorities.<sup>242</sup> The Court has explained, however, that the effectiveness of the remedy cannot depend on “the certainty of a favorable outcome” for the victim.<sup>243</sup>

Victims’ ability to access courts is of critical importance to effectively exercise this right.<sup>244</sup> The ECtHR has clarified that Article 13 is intended to provide States with an opportunity to remedy victims of human rights violations within their own national courts before the victim can seek recourse at the Court, which according to the Court grants an additional guarantee to individuals to ensure the full enjoyment of her/his rights.<sup>245</sup>

## RELEVANT PROVISIONS

### ECHR

**Art. 6(1):** In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

**Art. 13:** Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

**Art. 41:** If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

### ESC

**Art. 11– The right to protection of health:** With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organizations, to take appropriate measures designed inter alia:

4. to remove as far as possible the causes of ill-health;
5. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
6. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

**Art. 13– The right to social and medical assistance:** With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:

5. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;

<sup>239</sup>ECtHR.Aksoy v. Turkey. App. No. 26211/06. January 12, 2011. para. 98.

<sup>240</sup>ECtHR.Klass v. Germany.App. No. 5029/71. September 6, 1978.

<sup>241</sup>ECtHR.Kudla v. Poland. App. No. 30210/96. para. 151.

<sup>242</sup>ECtHR.Hagyó v. Hungary.App. No. 52624/10. April 23, 2013. para. 96; ECtHR.Kudla v. Poland. App. No. 30210/96. October 26, 2000. para. 151; ECtHR.Aksoy v. Turkey. App. No. 21987/93. December 18, 1996. para. 95.

<sup>243</sup>ECtHR.Hagyó v. Hungary. 52624/10. April 23, 2013. para. 96; ECtHR.Garayev v. Azerbaijan. 53688/08. September 10, 2010. December 18, 1996. para. 82.

<sup>244</sup>ECtHR.Kudla v. Poland. App. No. 30210/96. October 26, 2000. paras. 147-148, 157.

<sup>245</sup>ECtHR.Kudla v. Poland. App. No. 30210/96. October 26, 2000. paras. 147-148, 152.

6. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
7. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
8. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

**Art. 15– The right of persons with disabilities to independence, social integration and participation in the life of the community:**With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

4. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialized bodies, public or private;
5. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialized placement and support services;
6. to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

**Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,**<sup>246</sup> **Art. 3:** Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.

## . . . RIGHT TO AN EFFECTIVE REMEDY IN THE CONTEXT OF MENTAL HEALTH

In highlighting the difficulties that mental health patients could face in challenging violations of their rights, the ECtHR has underscored that an assessment of whether an individual with mental disabilities has exhausted domestic remedies requires taking into consideration her/his “vulnerability, and in particular [her/his] inability in some cases to plead her/his case coherently.”<sup>247</sup>

### Case Relating to Mental Health and the Right to an Effective Remedy

**B. v. Romania (No. 2)(ECtHR)(2013).** The applicant diagnosed with paranoid schizophrenia was subjected to psychiatric confinement and lost guardianship of her three children. The Court found that the State had violated Article 8 of the ECHR when failing to ensure “adequate legal protection for the applicant during her successive admissions to psychiatric institutions and during the proceedings that resulted in her children remaining in care.” It ordered the State to provide the applicant with the necessary legal protection as required by ECHR.<sup>248</sup>

**Lashin v. Russia (ECtHR)(2013).** The Court found a violation of the right to privacy where the applicant, a person with schizophrenia, was committed by the domestic courts to a psychiatric hospital against his will and without possibility of review, which prevented him from getting married.<sup>249</sup>

<sup>246</sup>COE. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. April 4, 1997.

<sup>247</sup>ECtHR.B. v. Romania (No. 2).App. No. 1285/03. February 19, 2013. para. 79.

<sup>248</sup>ECtHR.B. v. Romania (No. 2).App. No. 1285/03. February 19, 2013.

<sup>249</sup>ECtHR.Lashin v. Russia.App. No. 33117/02. April 22, 2013.

**Kudla v. Poland (ECtHR)(2000).** The applicant suffered from chronic depression and was held in detention for fraud charges. He attempted to commit suicide twice while in prison. The applicant repeatedly requested his release and appealed decisions to hold him in detention. The Court held that the State failed to provide the applicant with the necessary means for challenging the length of the proceedings for determining the charges held against him, and therefore, the State was in violation of Article 13 of the ECHR.<sup>250</sup>

### . . . RIGHT TO AN EFFECTIVE REMEDY IN THE CONTEXT OF INFECTIOUS DISEASES

The right to effective remedy has been invoked to protect individuals with infectious diseases as marginalized populations that are stigmatized based on their health status. The Court has analyzed the importance of this right with respect to the lack of medical treatment provided to detainees who suffer from infectious diseases and the failure to provide detention conditions sensitive to the detainees' state of health.<sup>251</sup>

#### Case Relating to Infectious Diseases and the Right to Remedy

**Kozhokar V. Russia (ECtHR)(2010).** The applicant was a detainee living with HIV and Hepatitis C. The Court joined the applicants' allegations under Article 3 with Article 13 and found that the State had violated Article 13 by not providing the applicant "effective and accessible" means through which he could challenge the prison conditions, including inadequate medical assistance.<sup>252</sup>

**Logvinenko v. Ukraine (ECtHR)(2010).** The applicant was a detainee who suffered from HIV and tuberculosis. The Court found the State in violation of Article 3 when failing to provide adequate medical treatment and to ensure that the "physical arrangements" of his detention were compatible with his state of health. Because the State did not provide appropriate redress or effective remedies through which the applicant could bring complaints, the Court held that the State had violated Article 13.<sup>253</sup>

### . . . RIGHT TO AN EFFECTIVE REMEDY IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH

In the context of sexual and reproductive health, the ECtHR has treated issues of effective remedy within its analysis of other rights, such as the right to privacy, to avoid overlap. This is not to say that the right to an effective remedy, as protected under Article 13 of the ECHR, is not imperative to issues of sexual and reproductive health. On the contrary, as shown in the cases provided in this sub-section, the ECtHR considers this right essential. For example, with respect to abortion, the Court has read Article 8 to require States that permit abortion to provide the legal framework to determine entitlements to lawful abortion and procedures to resolve disputes between women seeking abortion services and medical practitioners.<sup>254</sup>

#### Case Relating to Sexual and Reproductive Health and the Right to an Effective Remedy

**R.R. v. Poland (ECtHR)(2011).** A mother of two was pregnant with a child thought to be suffering from a severe genetic abnormality and was deliberately denied timely access to the genetic tests to which she was entitled by doctors who were opposed to abortion. The Court found a violation of Article 8 because Polish law did not include any effective mechanisms which would have enabled the applicant to have access to the available diagnostic services and to make, in the light of their results, an informed decision as to whether or not to seek an abortion.<sup>255</sup>

<sup>250</sup> ECtHR. *Kudla v. Poland*. App. No. 30210/96. October 26, 2000. paras. 147-148, 157.

<sup>251</sup> See ECtHR. *Logvinenko v. Ukraine*. App. No. 13448/07. October 14, 2010; ECtHR. *Kozhokar V. Russia*. App. No. 33099/08. December 16, 2010.

<sup>252</sup> ECtHR. *Kozhokar v. Russia*. App. No. 33099/08. December 16, 2010.

<sup>253</sup> ECtHR. *Logvinenko v. Ukraine*. App. No. 13448/07. October 14, 2010.

<sup>254</sup> ECtHR. *A, B and C v. Ireland*. App. No. 25579/05. December 16, 2010; see also ECtHR. *P. and S. v. Poland*. App. No. 57375/08. January 30, 2013.

<sup>255</sup> ECtHR. *R.R. v. Poland*. App. No. 27617/04. November 28, 2011.

***Tysic v. Poland (ECtHR)(2007)***. The applicant was refused a therapeutic abortion, after being warned that her already severe myopia could worsen if she carried her pregnancy to term. Following the birth of her child, she had a retinal hemorrhage, which resulted in a disability. The Court found that denying her access to an effective mechanism that would determine her eligibility for a legal abortion was a violation of her right to privacy.<sup>256</sup>

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<sup>256</sup>ECtHR.*Tysic v. Poland*.App. No. 5410/03. September 24, 2007.