

Access to the Covid-19 Vaccination for Beneficiaries and Applicants of International Protection: Legal Considerations and Information on Policy and Practice

May 2021¹
Information Note

Background

At a very early stage in the pandemic, it became apparent that vaccines were essential to bringing about an end to it. While vaccines are vital to the end of the pandemic, it is equally important that everyone in the world can access the vaccine including and in particular, marginalised groups such as refugees, asylum applicants and undocumented migrants as “none of us will be safe, until everyone is safe.”² The fair and equitable distribution of the vaccine presents considerable public health and human rights challenges. Given the scarcity of the doses at present, it has been impossible to guarantee that everyone who wishes to be vaccinated will have immediate access to a COVID-19 vaccine and as a result, strategies of prioritisation for specific groups at a national level have been adopted.

Access to vaccines and medicines is already disturbingly uneven in many places across the world, generally with poorer health outcomes for women and girls, national, ethnic, religious, racial and linguistic minorities, indigenous populations, persons living in poverty, LGBTI people, persons with disabilities, migrants, particularly undocumented migrants, stateless persons, and others experiencing marginalisation.³ COVID-19 infection rates and outcomes for minorities and people in vulnerable groups have mirrored these even patterns, in part due to structural inequalities and discrimination, and raise a substantial risk that these populations and groups will fall behind in vaccination rates relative to others.⁴ The Fundamental Rights Agency (FRA) has already indicated that the pandemic has disproportionately affected migrants, asylum applicants and refugees in Europe who are often living in overcrowded accommodation with poor hygiene conditions and who continue to face an increased risk of infection and barriers to accessing health services.⁵

With this in mind, the content of this note examines publicly available information on the current vaccination strategy policy and practice in countries across Europe, with respect to international protection beneficiaries and asylum applicants. This note also capitalises on the knowledge and helpful contributions of the national coordinators of the European Legal Network on Asylum (ELENA). Indeed, given the scarcity of the vaccine and slow rollout in many European countries, the situation for international protection beneficiaries’ and applicants’ access to the COVID-19 vaccine remains unclear at present, particularly in practice. As such, this note is a working document aimed at legal practitioners dealing with cases concerning access to vaccination. The note also examines the legal obligations on states with respect to the right to health and the legal entitlement of international protection applicants

¹ Up-to-date as of 5 May 2021

² WHO, A global pandemic requires a world effort to end it – none of us will be safe until everyone is safe, 20 Sept 2020, <https://www.who.int/news-room/commentaries/detail/a-global-pandemic-requires-a-world-effort-to-end-it-none-of-us-will-be-safe-until-everyone-is-safe>

³ OHCHR, Human Rights and Access to Covid-19 Vaccines https://www.ohchr.org/Documents/Events/COVID-19_AccessVaccines_Guidance.pdf

⁴ *Ibid*

⁵ FRA, Coronavirus Pandemic in the EU – Fundamental Rights Implications: Focus on Social Rights, p.31 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-november_en.pdf

and beneficiaries to receive the Covid-19 vaccination. It emphasises the implementation of accessible and non-discriminatory vaccine strategies that will allow these rights to be realised.

It is also salient to note some additional issues that will not be dealt with in detail but are nevertheless pertinent to the provision of and access to the Covid-19 vaccination;

- (1) Many of the international and regional legal instruments consider the obligation on states to engage in international cooperation and provide assistance to protect rights, particularly in the time of pandemic. These obligations should be recalled when considering the notion of ‘vaccine hoarding’, the COVAX initiative and the ongoing negotiations to waive certain provisions of the Trade Related Aspects of Intellectual Property Rights. (TRIPS) Agreement. The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires States to achieve the progressive realisation of the rights protected by that Covenant, including the right to health, both individually and through international assistance and co-operation.⁶ The Committee on Economic, Social and Cultural (CESCR) Rights has emphasised that States must strengthen their international cooperation to guarantee affordable vaccines against COVID-19 globally, including for developing and least developed countries.⁷ It has also acknowledged that States which are able to do so, should provide assistance, especially economic, scientific and technical, to developing countries for immunisation against major infectious diseases and for the prevention, treatment and control of epidemic and endemic diseases.⁸ Similarly, the European Social Charter (ESC), under Article 11, also obliges Contracting States to cooperate either directly or in cooperation with public or private organisations to *inter alia* prevent epidemic, endemic and other diseases as far as possible. Likewise, Article 168(3) TFEU provides that the EU and its Member States shall foster cooperation with third countries in the area of public health.
- (2) Another emerging issue relates to the vaccination or immunity passport. The WHO has not endorsed the idea of a Covid-19 vaccination passport as of yet, stating that it may not be an effective strategy and highlighting that “not everyone has access to vaccines and there are groups in society who are excluded.”⁹ The EU Commission has nevertheless proposed a ‘Digital Green Certificate’ to facilitate safe and free movement within the EU.¹⁰ The Commission has proposed that the certificate system would not be discriminatory against non-vaccinated people exercising their right to free movement as it will also include COVID-19 test certificates. However, the issue may not be as straight forward and consideration should be given to other potentially discriminatory factors such as the preventative cost of PCR tests, and ‘digital divide’ or inequity in requiring smart phones or devices to demonstrate this ‘Green Certificate.’¹¹

⁶ Article 2(1), ICESCR <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

⁷ CESCR, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, para 3, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4sIQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vFPMKseJUC1Ci6FclakFK95v85g4Ik7k7QBI8EdfqmCITMrneFvtX1I0IL8hktDGNgWJc7FBC2uG%2b%2fdxsnIN1jrczo>

⁸ CESCR, General Comment No. 14 (2000), “*The Right to the Highest Attainable Standard of Health (Article 12)*”, para 43-45, available at <https://www.refworld.org/pdfid/4538838d0.pdf>.

⁹ <https://news.un.org/en/story/2021/04/1089082>

¹⁰ https://ec.europa.eu/commission/presscorner/detail/en/ganda_21_1187

¹¹ For more information on the Digital Green Certificate: Rather add info https://www.europarl.europa.eu/doceo/document/TA-9-2021-0145_EN.html

- (3) The WHO has indicated that setting up or expanding immunisation information systems to monitor vaccination coverage,¹² interlinking national immunisation registers and data sharing along migratory routes can contribute to monitoring and planning of vaccination of refugees and migrants.¹³ A lack of systematic data collection concerning cases, immunization coverage, and determinants of non-immunization in migrants and refugees, along with the lack of harmonized indicators across different European countries has been highlighted as problematic by public health experts.¹⁴ While the improvement of data collection regarding the immunisation of refugees and migrants is encouraged by the WHO, other organisations warn that firewalls between immigration enforcement and the provision of COVID-19 vaccination need to be enacted in order to prevent further practical barriers to immunisation due to fears or risks of reporting, detention, deportation and other penalties resulting from irregular migration status.¹⁵ Not to mention, the legal considerations that arise relating to privacy and the collection or sharing of data under *inter alia* Article 8 ECHR and Articles 7 and 8 CFREU.

Inclusion in the Covid-19 Vaccine Strategy

A number of key international organisations have called on states should ensure that everyone, without discrimination and irrespective of migration status, is offered a fair opportunity to receive a safe and effective vaccine.¹⁶ It is widely accepted that strategies of prioritisation are essential to upholding the right to life and the right to the protection of health.¹⁷

In that context, attention should be given to those who are most exposed and vulnerable to contracting the virus due to social determinants of health, such as refugees, asylum applicants and migrants living in camps or unsafe conditions, in collective accommodation or in immigration detention, migrants in irregular situations and low-income migrants. The Special Rapporteur on the human rights of migrants noted that “a number of reports indicate that migrants may be more vulnerable to poor health by virtue of their often low socio-economic status, the process of migration and their vulnerability as non-nationals in the new country.”¹⁸ The grant of special attention to groups such as, *inter alia*, low-income migrant workers, refugees, asylum applicants, internally displaced persons and vulnerable migrants in irregular situations is also endorsed by both Committee on Economic, Social and Cultural Rights

¹² <https://www.who.int/bulletin/volumes/99/1/20-267690/en/>

¹³ *Ibid*

¹⁴ Daniele Mipatrini, Paola Stefanelli, Santino Severoni & Giovanni Rezza (2017) Vaccinations in migrants and refugees: a challenge for European health systems. A systematic review of current scientific evidence, *Pathogens and Global Health*, 111:2, 59-68, DOI: 10.1080/20477724.2017.1281374, available at: <https://europepmc.org/article/PMC/5375618>

¹⁵ <https://www.ohchr.org/Documents/Issues/Migration/JointGuidanceNoteCOVID-19-Vaccines-for-Migrants.pdf>

¹⁶ Key resolutions and guidance notes on Covid-19 vaccine prioritisation and equity: <https://www.ohchr.org/Documents/Issues/Migration/JointGuidanceNoteCOVID-19-Vaccines-for-Migrants.pdf>, <https://rm.coe.int/dh-bio-statement-vaccines-e/1680a12785>, <https://www.who.int/publications/i/item/who-sage-values-framework-for-the-allocation-and-prioritization-of-covid-19-vaccination>, <https://www.ecdc.europa.eu/en/publications-data/covid-19-vaccination-and-prioritisation-strategies-eueea>, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en#:~:text=On%2019%20January%202021%2C%20the,Member%20State%20should%20get%20vaccinated

¹⁷ The Committee on Bioethics, Covid-19 and Vaccines Ensuring Equitable Access to Vaccination During the Current and Future Pandemics, <https://rm.coe.int/dh-bio-statement-vaccines-e/1680a12785>, para 4

¹⁸ Special Rapporteur on the human rights of migrants, A/HRC/14/30, 16 April 2010, para. 23. <https://undocs.org/A/HRC/14/30>

(CESCR)¹⁹ and the Strategic Advisory Group of Experts on Immunization (SAGE) of the World Health Organization.²⁰ The European Commission has also recommended that consideration should be given to priority groups such as, *inter alia*, vulnerable socioeconomic groups and other groups at higher risk.²¹

UNHCR has stressed that including refugees in vaccination programmes is ‘key to ending the pandemic.’²² According to UNHCR 153 states across the world have adopted vaccination strategies that include refugees.²³ The vaccination strategies and practices of various European countries are outlined below. This information is not exhaustive and is based on publicly available information or information provided by the ELENA Network.

Practices in selected European countries

The Italian vaccination plan makes no mention of applicants or beneficiaries of international protection. It was reported that the Italian Commissioner for the Covid-19 declared that “It’s important that everybody, unless they’re here [in Italy] irregularly, gets vaccinated”. Despite this, the Italian Medicines Agency has indicated in an FAQ that according to the priority scheme set out in vaccination strategy and pursuant to Italian law,²⁴ everyone present on the Italian territory with or without a residence permit will be vaccinated.²⁵

In Portugal, priority is established on the basis of a combination of age and pre-existing conditions, along with prioritisation for healthcare professionals. Applicants for international protection living in reception centres have been designated as a priority group and vaccination has been conducted in relevant facilities. According to the currently available information, applicants and beneficiaries of international protection who are not living in reception centres will be subject to the general criteria and vaccinated accordingly. For general vaccinations, local health teams work together with CPR’s reception centre to ensure that applicants for international protection in accommodation receive vaccines programmed at a national level for their age and or/specific health conditions.²⁶

In Switzerland, according to the COVID-19 vaccination strategy, vaccination is prioritised for persons at particular risk. International protection applicants who are living in reception centres are defined as a priority in Group 4 which includes persons living or working in congregate facilities, such as

¹⁹ CESCR, “Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19)”, E/C.12/2020/2, 15 December 2020, para. 5. See also CESCR, General Comment No. 25 (2019), para. 16 - “States parties should direct their own resources and coordinate actions of others to ensure that scientific progress happens and that its applications and benefits are distributed and are available, especially to vulnerable and marginalized groups.

²⁰ WHO, “Roadmap for prioritizing uses of COVID-19 vaccines in the context of limited supply. An approach to inform planning and subsequent recommendations based upon epidemiologic setting and vaccine supply scenarios”, 13 November 2020.

²¹ https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en#possible-priority-groups

²² <https://www.unhcr.org/en-au/news/latest/2021/1/5fff1afe4/qa-including-refugees-vaccine-rollout-key-ending-pandemic.html>

²³ <https://www.unhcr.org/news/press/2021/4/606d56564/unhcr-calls-equitable-access-covid-19-vaccines-refugees.html>

²⁴ Article 35 of the Consolidated Immigration Act

²⁵ Italian Medicines Agency, FAQ, <https://www.aifa.gov.it/domande-e-risposte-su-vaccini-covid-19> [last accessed 15 March 2021]

²⁶ Information provided by ELENA Coordinator on 26 March 2021.

psychiatric hospitals or reception centres.²⁷ Asylum applicants and refugees who do not reside in reception centres and who are not considered to be at particular risk will have access to vaccination in line with rest of the population.²⁸

In Norway, according to laws on the national vaccination programme, anyone who is present in the territory permanently or temporarily is covered by the programme, including the COVID-19 vaccination. However, while the legal provision is well defined, the practice remains unclear. It remains unclear whether applicants for international protection staying in reception centres will, in practice, get the vaccine according to the national priorities. This is due to the fact general practitioners in each commune or borough are tasked with identifying, organizing and administering the vaccines to the general public, however, individuals living in reception centres are not registered in a commune and would also not be registered with a general practitioner.²⁹

In Ireland, the COVID-19 Vaccine Allocation Strategy sets out a provisional priority list of groups for vaccination. The government has confirmed that those living in direct provision centres will be vaccinated in group 9 of the Provisional Vaccine Allocation Groups³⁰ (i.e. persons aged 18-64 years living or working in crowded accommodation where self-isolation and social distancing is difficult to maintain). However, it also emphasised that persons living in direct provision may be vaccinated in an earlier group due to their age or medical condition.³¹ The government has confirmed that once the most vulnerable people have been vaccinated, the vaccination rollout will move to an age-based system.

In Germany, the priorities of the vaccination campaign include population groups at particular risk, including three categories: “highest”, “high” and “heightened.”³² Asylum applicants and refugees living in initial reception centres and collective accommodation facilities belong to the second group (“high priority”). All asylum applicants and refugees who are not living in such a centre will be granted access to vaccination according to the general criteria. Accordingly, if they fall among one of the priority groups they can be vaccinated as part of that group. Otherwise, they can be vaccinated as part of the remainder of the population after vaccination of the third priority group has been finished.³³ The Berlin State Office for Refugee Affairs (LAF) began vaccinating residents in communal accommodation centres against COVID-19 April 2021.³⁴ The Office of Refugee Affairs has released information videos about vaccination in 15 languages.³⁵

It was confirmed by the Greek Ministry of Health that refugees and asylum applicants will be included in the national COVID-19 response.³⁶ According to the vaccination programme, persons in hotspots, hosting sites and pre-removal centres will have access to the vaccine.³⁷ The Migration Minister, Notis

²⁷ https://easo.europa.eu/sites/default/files/publications/EASO_Situational_Update_Vaccination31March..pdf

²⁸ <https://www.unhcr.org/dach/ch-de/impfung-coronavirus-fluchtlingen-asylsuchende-schweiz-liechtenstein#comment-va-sorganiser-la-vaccination>

²⁹ <https://www.fhi.no/en/id/vaccines/coronavirus-immunisation-programme/who-will-get-coronavirus-vaccine-first/>

³⁰ https://www.oireachtas.ie/en/debates/question/2021-01-20/505/#pq_505

³¹ *Ibid*

³² Vaccinations Regulation [CoronaImpfV](#)

³³ <https://help.unhcr.org/germany/coronavirus-disease-covid-19/>

³⁴ <https://www.infomigrants.net/fr/post/31344/asylum-seekers-in-berlin-to-start-receiving-covid-vaccine-this-month>

³⁵ *Ibid*

³⁶ <https://www.unhcr.org/neu/51787-unhcr-calls-for-inclusion-of-refugees-in-vaccination-plans.html>

³⁷ https://elenaforum.org/wp-content/uploads/wpforo/default_attachments/1612470378-COVID-19-VACCINATION_NATIONAL-PROGRAM.pdf p.13

Mitarakis, said that asylum applicants in camps, will begin to be vaccinated in May.³⁸ Both employees and residents in the camps will be vaccinated with the rest of the population.³⁹ When national vaccinations started for the 80-85 age group, authorities registered eleven residents in camps across Greece who qualified for the vaccine,⁴⁰ with the assistance of UNHCR Greece. Practical issues in accessing healthcare remain for individuals who haven't yet been registered or received a social security number.⁴¹ It is unclear whether these challenges will also persist in relation to access to the Covid-19 vaccination.

Belgium's Ministry for Health has said it would vaccinate everyone present on the Belgian territory, including refugees and asylum applicants. However, the national strategy does not expressly mention these groups and so it remains unclear whether it will do so as part of an official national strategy.⁴² In any case, the national strategy includes that special attention shall be given to the protection of vulnerable and socially disadvantaged people.⁴³ The Minister has previously discussed vaccinating undocumented migrants via mobile medical teams, who would also ensure the vaccination for homeless people.⁴⁴

The French Ministry of Health indicated that it would vaccinate all people living in France, regardless of their residence status. It has also indicated that, in practice, vaccinations will be free of charge and no health insurance card will be required.⁴⁵ The vaccination strategy also refers to individuals living in collective accommodation.⁴⁶

Similarly, Spain has said it would vaccinate all those residing in its territory, regardless of their migration status. The national strategy also refers to 15 priority groups which include people living or working in closed communities or environments and people belonging to vulnerable populations because of their socio-economic situation.⁴⁷

Information on vaccinations in the Netherlands can be found on the website of the Dutch National Institute of Public Health and Environment (RIVM).⁴⁸ There is a specific document entitled 'Infectious diseases in reception centres for asylum applicants'⁴⁹ which includes some information on vaccinations, however this pertains vaccinations in general and is not specific to the COVID-19 vaccine. COVID-19 vaccinations are provided by age group, and some specific groups are prioritised (such as health care workers).⁵⁰ All persons living in the Netherlands and registered with the municipality are eligible for a COVID-19 vaccination. In addition, undocumented persons, persons in detention centres, persons who

³⁸ <https://www.infomigrants.net/en/post/31199/greece-migrants-in-camps-to-be-vaccinated-in-may>

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_gr_2019update.pdf p.168

⁴² <https://www.infomigrants.net/en/post/30483/refugees-and-undocumented-migrants-must-be-vaccinated-ngos-warn>

⁴³ https://d34j62pglfm3rr.cloudfront.net/downloads/Note_TF_Strategy_Vaccination_FR_0312_post_press.pdf

⁴⁴ <https://picum.org/covid-19-vaccines-undocumented-migrants-europe/>

⁴⁵ <https://picum.org/covid-19-vaccines-undocumented-migrants-europe/>

⁴⁶ https://www.has-sante.fr/upload/docs/application/pdf/2020-07/rapport_strategie_vaccination_covid_19_vf.pdf

⁴⁷ <https://www.mscbs.gob.es/gabinete/notasPrensa.do?metodo=detalle&id=5148>

⁴⁸ <https://lci.rivm.nl/>

⁴⁹ <https://lci.rivm.nl/draaiboeken/asielzoekers#6-vaccinatie>

⁵⁰ more information on which groups have received the vaccine can be found at:

<https://www.rivm.nl/en/covid-19-vaccination/figures-on-covid-19-vaccination-programme> see also, <https://www.rivm.nl/en/covid-19-vaccination>

do not live or have not been registered in the Netherlands but who have been in the Netherlands for more than 1 month and asylum applicants are also eligible. International protection applicants and beneficiaries are not prioritised but will receive the vaccination with the rest of the population.

The UK has expressly stated that the COVID-19 vaccination will be free and available to everyone regardless of immigration status.⁵¹ However, organisations supporting migrants' rights have said that the longstanding "hostile environment" policy and fears of data sharing with immigration enforcement will affect the uptake of the COVID-19 vaccine in migrant populations.

Many of the updated [AIDA](#) reports for the year 2020 mention the access to vaccination for international protection beneficiaries and applicants. For example, in Sweden all persons who want to get vaccinated against COVID-19 will be offered access to vaccines including international protection beneficiaries and applicants, and undocumented migrants.⁵² In Romania, asylum applicants and migrants detained in public custody centres are included in phase III of vaccination, along with the wider public, which started in March 2021.⁵³ In the Austrian vaccination strategy, asylum applicants accommodated in larger facilities are categorised as Priority group number 3 together with persons over 70 years old.⁵⁴ The AIDA report for Hungary indicates that there is currently no publicly available information on the vaccination of asylum applicants. Since the vaccination strategy is not mandatory, pursuant to the Asylum Decree, Hungarian asylum authorities have no obligation to provide access the COVID-19 vaccination.⁵⁵ In recent developments, foreigners with no Hungarian social security can also get the vaccine. This suggests that asylum seekers could also be able to access the vaccine but the practice remains unclear.⁵⁶ Similarly in Poland, as the situation remains unclear, the Commissioner for Human Rights has sought guidance from the government on the matter, but the AIDA report indicates that there had been no response at the time of publication.⁵⁷

EASO, has compiled a [situational update](#) in relation to vaccination strategies across the EU and neighbouring countries. It highlighted that in all countries surveyed vaccination is provided free of charge and on voluntary basis with beneficiaries of international protection having access to it on an equal footing as a general population and asylum applicants residing in a collective setting may be prioritised.

Having monitored news and exchanged with members and followers, PICUM has compiled a very [useful map](#) indicating which countries are explicitly including undocumented migrants in their vaccination strategies such as Belgium, Finland, France, Netherlands, Portugal and Spain and which ones are explicitly excluding them including, Poland.

The Right to Health under EU, European and International Law

⁵¹ <https://www.london.gov.uk/what-we-do/european-londoners-hub/information-coronavirus-covid-19-non-uk-nationals>, see also: <https://www.gov.uk/government/publications/priority-groups-for-coronavirus-covid-19-vaccination-advice-from-the-jcvi-25-september-2020/jcvi-updated-interim-advice-on-priority-groups-for-covid-19-vaccination>

⁵² https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-SE_2020update.pdf, p.78

⁵³ https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-RO_2020update.pdf, p.115

⁵⁴ https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-AT_2020update.pdf, p.105

⁵⁵ https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf

⁵⁶ Information provided by ELENA Coordinator on 27 May 2021

⁵⁷ https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-PL_2020update.pdf,

The right to the highest attainable standard of health is a human right recognized in international human rights law. The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁸, widely considered as the central instrument of protection for the right to health, recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” under Article 12. More particularly, in Article 12.2(c) the ICESCR expressly acknowledges, *inter alia*, the obligation on States to take the steps necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases in order to realise this right. The Committee on Economic, Social and Cultural Rights (CESCR) has recognised a core obligation on States to adopt a national public health strategy and plan of action on the basis of epidemiological evidence to address the health concerns of the whole population and in that context, give particular attention to, *inter alia*, all vulnerable or marginalized groups⁵⁹. Further, the CESCR has interpreted Art 12.2(c), the provision that concerns immunisation as part of the obligation to take measures to prevent, treat and control epidemic and endemic diseases, as being of “comparable priority” to the core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to health.⁶⁰ The CESCR has also stated the need to guarantee access to vaccines to all persons without discrimination at a national level.⁶¹

Various other international human rights treaties recognise the right to health. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁶² recognizes the obligation on States to guarantee the right of everyone, without distinction as to race, colour, or nationality or ethnic origin, to equality before the law. Notably, the CERD expressly acknowledges this obligation in the context of the enjoyment of public health in Art. 5 (e)(iv). The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶³ stipulates under Article 12 that States shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services. The Convention on the Rights of the Child (CRC)⁶⁴ recognises right of enjoyment of the highest attainable standard of health for children under Article 24. The right to the highest attainable standard of health is similarly guaranteed under Article 25 of the Convention on the Rights of Persons with Disabilities (CRPD) and also iterates, *inter alia*, an obligation to ensure access to population based public health programmes.⁶⁵ The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families also provides an obligation under Article 28 to ensure migrant workers and members of their families have the right to receive medical care that is urgently required for the preservation of life or avoidance of irreparable harm to their health on the bases of equality of treatment with nationals of the State.⁶⁶ It further requires that emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

⁵⁸ International Covenant on Economic and Social Rights,
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

⁵⁹ CESCR, General Comment No. 14 (2000), “*The Right to the Highest Attainable Standard of Health (Article 12)*”, para 43 (f), available at <https://www.refworld.org/pdfid/4538838d0.pdf>

⁶⁰ *Ibid*, para. 44 (b) and (c)

⁶¹ CESCR, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, para 3
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2021/1&Lang=en

⁶² ICERD <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

⁶³ ICEDAW <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

⁶⁴ Convention on the Rights of the Child <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁶⁵ Article 25(a) CRPD https://treaties.un.org/doc/Publication/CTC/Ch_IV_15.pdf

⁶⁶ Covention on the Protection of Migrant Workers and Members of their Families
<https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx>

Under the ECHR, there is no express right to healthcare, although this is arguably an aspect of ‘moral and physical integrity’ and may fall within the scope of Article 8 guaranteeing the right to respect for private life.⁶⁷ Under certain circumstances, however, a state’s responsibility under the ECHR may be engaged where it is shown that the state’s authorities have put an individual’s life at risk through acts or omissions that denied the individual healthcare that has otherwise been made available to the general population⁶⁸. In that regard, it appears there is a positive obligation⁶⁹ to provide access to a vaccine, such as the Covid-19 vaccine, to applicants and beneficiaries of international protection where it is available to the general population.

The Convention on Human Rights and Biomedicine (‘the Oviedo Convention’) also guarantees equitable access to health care of appropriate quality under Article 3. The Committee on Bioethics (DH-BIO) also advised that procedures developed for vaccine distribution must be non-discriminatory in design and impact.⁷⁰ The Committee stated that every person who is eligible to receive it should be able to do so, regardless of socioeconomic status, geographical location, age, physical abilities, health, gender identity, sexual orientation, educational and literacy levels, language, nationality, ethnic background, religious or philosophical affiliation, political opinion, or other socially determined circumstances.⁷¹ The Committee advised that access to vaccination services should be tailored to the needs of persons in vulnerable situations who may have difficulty accessing health services, including, *inter alia*, persons without residence or with insecure legal status (such as refugees, asylum seekers and undocumented migrants).⁷²

The European Social Charter (ESC) guarantees the right to protection of health under Article 11 and as mentioned earlier, obliges Contracting States to take appropriate measures designed to, *inter alia*, prevent epidemic, endemic and other diseases as far as possible, either directly or in cooperation with public or private organisations. The European Committee on Social Rights (ECSR) has also recalled that the right to protection of health includes the right of access to healthcare, and that access to healthcare must be ensured to everyone without discrimination.⁷³ It implies that healthcare in a pandemic must be effective and affordable to everyone, and that groups at particularly high risk, such as homeless persons, persons living in poverty, older persons, persons with disabilities, persons living in institutions, persons detained in prisons, and persons with an irregular migration status must be adequately protected by the healthcare measures put in place.⁷⁴ Further to this, the Article 11(3) provides

⁶⁷ *Bensaid v. the United Kingdom*, No. [44599/98](#), 6 February 2001

⁶⁸ *Powell v. the United Kingdom* (dec.), No. [45305/99](#), 4 May 2000

⁶⁹ Guide on Article 8 of the European Convention on Human Rights, paras 5-7
https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

⁷⁰ The Committee on Bioethics, Covid-19 and Vaccines Ensuring Equitable Access to Vaccination During the Current and Future Pandemics, <https://rm.coe.int/dh-bio-statement-vaccines-e/1680a12785>, para 6

⁷¹ *Ibid*, para 6

⁷² *Ibid*, para 9

⁷³ ECSR, Statement of interpretation on the right to protection of health in times of pandemic, p.4,
<https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640>

⁷⁴ *Ibid*, p.4. In relation to the extension of the right to health to migrants in an irregular situation, see also European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands (decision on the merits), Complaint No. 86/2012, Council of Europe: European Committee of Social Rights, 10 November 2014, para 51, available at: <https://www.refworld.org/cases,COEECSR,54e353f24.html>, Conference of European Churches (CEC) v. the Netherlands (decisions on the merits), Complaint No. 90/2013, Council of Europe: European Committee of Social Rights, 10 November 2014, available at: <https://www.refworld.org/cases,COEECSR,54e363534.html> para 71

that States must operate a widely accessible immunisation programme and ensure that the right to health is protected not just theoretically, but also in fact.⁷⁵

European Union law does not expressly guarantee a right to health and healthcare governance is largely a competence of Member States. However, the European Union does have a mandate in respect to public health under Article 168 TFEU and includes *inter alia* that a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.⁷⁶ The EU Charter of Fundamental Rights' ('the Charter') application is limited to matters that fall within the scope of EU law and does not expressly include a right to health. It does, however, recognise related rights such as the protection of human dignity (Article 1) and the right to physical integrity (Article 3). Additionally, the Charter includes the right to healthcare under Article 35, which states that '[e]veryone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices'. While the Charter does not make any distinction on the ground of nationality; it does make the exercise of the right to healthcare subject to national laws and practices.

Under the EU asylum acquis, where a Member State of the EU has recognised a person's refugee's or subsidiary protection status, they are entitled to equal access to the same level of healthcare as nationals of that EU Member State under Article 30 of the Qualification Directive (2011/95/EU). Moreover, Article 30(2) guarantees adequate healthcare to persons granted international protection who have special needs.⁷⁷ In that regard, it is clear that under EU law persons who have been granted international protection in a Member State should be able to access a COVID-19 vaccination via the same strategy for prioritisation as nationals of that Member State, if provision is not already expressly made for beneficiaries of international protection in national vaccination strategies.

Likewise, under Article 19 of the Reception Conditions Directive (2013/33/EU), asylum applicants are entitled to necessary healthcare, which must include at least emergency care and essential treatment for illness, as well as necessary medical or other assistance for those who have special needs. As the control of vaccine preventable diseases is a public health priority for EU/EEA countries,⁷⁸ it follows that vaccinations in general should fall within the definition of 'necessary healthcare'. Indeed, it is well established in most national strategic plans for vaccination and ECDC recommendations on vaccination strategies⁷⁹ that certain groups such as older persons and individuals with pre-existing illness are considered groups with special needs for vaccination against COVID-19. Asylum applicants who are in these vulnerable categories should also be considered as having special needs for the purposes of the COVID-19 vaccine and therefore, should also be included in the priority groups relevant based on age and underlying illness.

⁷⁵ *Ibid*, p.5

⁷⁶ Article 168(1) TFEU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

⁷⁷ Article 30(2) Qualification Directive 2011/95/EU: "Such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict."

⁷⁸ ECDC, Public health guidance on screening and vaccination for infectious diseases in newly arrived migrants within the EU/EEA, December 2018, available at <https://www.ecdc.europa.eu/en/publications-data/public-health-guidance-screening-and-vaccination-infectious-diseases-newly>

⁷⁹ COVID-19 vaccination and prioritisation strategies in the EU/EEA, available at <https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-vaccination-and-prioritisation-strategies.pdf>

The principle of non-discrimination is a key consideration relating to fair and equitable access to the COVID-19 vaccination. European Union law observes the principle of non-discrimination enshrined in Article 21 of the Charter. Likewise, Article 14 of the ECHR enshrines the protection against discrimination in the enjoyment of the rights set out in the Convention. That protection is further consolidated into the Convention by Article 1 Protocol 12 to the ECHR. The positive obligations previously highlighted relating to Article 8 ECHR should be interpreted in conjunction with the principle of non-discrimination.⁸⁰

Additionally, States must observe the principle of effectiveness established by the ECHR and guarantee that the right to health is not merely theoretical or illusory but can be practical and effective.⁸¹ Similarly, Article 11(3) of the ESC obliges States to operate a widely accessible immunisation programme and ensure that the right to health is protected not just theoretically, but also in fact.⁸² These obligations should be recalled when considering the provision of information and practical access to the Covid-19 vaccination to ensure no one is left behind. Without the ability to access information in readily understandable languages and formats, an international protection applicant or beneficiary's ability to fully realise his or her right to health may be hindered. The Committee on Bioethics (DH-BIO) also highlighted the need for clear, accurate, reliable information about available vaccines and how to access them. It further emphasised that attention should be paid to adapting information to different target groups including persons who may have low literacy levels or special communication needs such as a need for translation.⁸³ In addition, the Reception Conditions Directive sets out that Member States shall ensure that applicants for international protection are provided with information on, *inter alia*, organisations that might be able to help or inform them concerning available reception conditions, including healthcare. It also stipulates that this information must be in writing and, in a language that the applicant understands or is reasonably supposed to understand.⁸⁴

While most countries have launched information campaigns for the general public, countries including Belgium, Finland, France, Ireland, Netherlands, Poland, Portugal and Switzerland have also translated information materials into various languages and/or developed specific communication tools for asylum applicants.⁸⁵ According to the latest AIDA report, the Austrian Integration Fonds (Integrationsfonds) established an Online Counselling service for persons with low German skills. It aims to inform interested persons about the possibility to get tested and/or vaccinated.⁸⁶

Conclusion

The provision of COVID-19 vaccinations to international protection beneficiaries and applicants should be done without discrimination and with regard to the special vulnerability of various members of these groups. The vulnerability of those living in collective accommodation settings should also be particularly recognised and incorporated into vaccination strategies. International, Council of Europe and EU human rights instruments suggest legal obligations on States to ensure that these rights are

⁸⁰ See for example: *Hode and Abdi v. the United Kingdom*, *Bah v United Kingdom*, *Novruk v Russia*, *Ibrogimov v. Russia* and *Kiyutin v. Russia*

⁸¹ *Airey v. Ireland*, No. 6289/73, para. 24 Oct. 9, 1979

⁸² ECSR, Statement of interpretation on the right to protection of health in times of pandemic, p.5, <https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640>

⁸³ The Committee on Bioethics, Covid-19 and Vaccines Ensuring Equitable Access to Vaccination During the Current and Future Pandemics, <https://rm.coe.int/dh-bio-statement-vaccines-e/1680a12785>, para 18-19

⁸⁴ Article 5, Reception Conditions Directive

⁸⁵ https://www.easo.europa.eu/sites/default/files/publications/EASO_Situational_Update_Vaccination31March..pdf

⁸⁶ https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-AT_2020update.pdf

accessible and not merely illusory. Focused efforts are essential to remove barriers, pre-empt potential discrimination, and monitor distribution to ensure equality. The collection of data and establishment of immunisation passports should be done so only when proportionally balanced against fundamental rights. If States fail to comply with their EU, European and international obligations to allow access to the vaccination for international protection beneficiaries and applicants, migrants and other marginalised groups, the risk of upsurges in the pandemic remains, not only for those States but for the world population in general.