

Committee on the Rights of the Child

2012 Day of General Discussion

The Rights of All Children in the Context of International Migration

BACKGROUND PAPER

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I. Introduction

It is estimated that 214 million people – 3 percent of the world’s population – live outside their country of origin. Of these, around 33 million – 16 percent – are under 20 years of age.¹ Approximately 60 percent of international migrants under the age of 20 live in the least developed and developing countries. There are, however, important regional differences. In Africa, child and adolescent migrants account for 28 percent of the total migrant population, and in Asia 21 percent, while in Europe and the Americas, this age group represents only 11 and 10 percent of the total international migrant population, respectively. Among international migrants under 20 years of age, boy migrants outnumber girl migrants in most areas of the world. Globally, there are 95 female migrants for every 100 male migrants under the age of 20.² Again, there are significant regional differences that arise due to distinct and unique intra- and inter-regional migratory patterns.³

An increasing number of children are migrating in search of survival, security, improved standards of living, education, protection from exploitation and abuse, or a combination of these factors.⁴ Until recently, migration has been discussed in terms of adult male movement, with the exception of trafficked, refugee, unaccompanied and separated children having received some attention by researchers and policy-makers. These categories of children on the move have often been presented in the literature as “passive, vulnerable, and exploited”,⁵ an approach that has led to “inadequate assumptions” about the motivations, lives and needs of child migrants.⁶ For the most part, the discourse on child migration has not yet fully taken into account the fact that human mobility not only affects the millions of migrant children who leave their countries of origin, but also countless children left behind, as well as children born to migrant parents* in countries of destination.

The situation of all children in the context of migration is of major concern, given their greater vulnerability to human rights violations. This is a diverse group including both children with regular and irregular migration status. Although children in an irregular migration situation are the most at risk of human rights violations across law, policy and practice, children with regular migration status⁷ are also vulnerable to discrimination and exclusion from basic rights and services. In addition, they also face practical challenges, such as, inter alia, language barriers and a lack of awareness on the rights that migrants are entitled to – both on the part of service providers and migrant families. Even with regular status, migrant families often do not have equal access to social protection measures, and are at risk of poverty, marginalization, and social exclusion.

Furthermore, migration status is transient, and it is common for children to experience both regular and irregular migration statuses at different times. Children with regular migration status are at risk of becoming irregular at a later date, because, inter alia, their or their parents’ visa expires or application for international protection is refused. Many also face irregularity (and thus suffer the immediate threat of deportation) on turning 18, and may face difficulties in renewing or accessing residence permits at this time.⁸ On the other hand, irregular migrant children may also have opportunities to regularize their

* Throughout this Note, reference to “parents” refers to parent(s) or other primary caregiver(s).

status, for example by qualifying for regularization after residing in the destination country for a number of years. Whatever their pathway into irregularity, children in such situations are particularly vulnerable to human rights violations (see Section II.b).

As noted by the former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, there are two major gaps regarding the protection of the rights of children affected by migration, regardless of their status. The first gap “relates to the lack of specific provisions on children in migration laws, policies and programmes”.⁹ The second gap concerns public policies aimed at protecting child rights in general (most of them based on the Convention on the Rights of the Child), which have not yet taken into account the specific condition and needs of migrant children.¹⁰

Against this background, the Committee on the Rights of the Child (CRC Committee) has chosen the theme ***The Rights of All Children in the Context of International Migration*** for its 2012 Day of General Discussion (DGD) on 28 September 2012. The DGD’s overall objective is to promote the rights of all children affected by international migration through consultation with, and participation of, a wide range of relevant actors. Specific objectives of the DGD include facilitating the CRC Committee’s dialogue with States Parties and developing more comprehensive guidance for the fulfillment of children’s rights in the context of migration, regardless of their, or their parents’, migration status.¹¹

The purpose of this Background Note is to provide a reference for the key issues that will be discussed at the DGD. This will include addressing the main lines of concern mentioned in the Committee’s *Outline for Participants in the 2012 CRC DGD*¹² under two major topics: 1) *international legal framework on the rights of children in the context of international migration*; and 2) *measures to implement the rights of children in international migration situations at the national level*. The Note focuses on: the international movement of children, including children migrating with their parents, legal guardians or other caregivers; unaccompanied and separated children; children left behind in countries of origin; and children born to migrant parents in destination countries. It does not address children in the context of internal migration, nor children who qualify as internally displaced persons (IDPs) or refugees.[†] The scope of the Note is on the “rights of the child” as per article 1 of the Convention on the Rights of the Child (CRC).[‡]

II. Structural Causes of International Migration of Children

a. Why children migrate

Children migrate for diverse reasons and in a variety of ways. The causes of their movement are not very different to those of adult migration, and it is in this context that they have usually been considered.¹³ The extremely unequal distribution of income and

[†] The complexity of migration dynamics has led to the conceptualization of different categories of migrants and the use of specific terminology in the literature (e.g. voluntary migrants, involuntary or forced migrants, children left behind, etc.). Some of these terms appear in this Note to explain that throughout the migration process the same children may fall within several different categories. However, migrants rarely think of themselves under these analytical terms. It is therefore recommended that caution be used before putting children in the context of migration into “boxes”, which can prevent a comprehensive analysis of their situation, including an assessment of the extent to which they enjoy all their rights.

[‡] “A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (Article 1 CRC).

opportunities within and between sending and receiving areas is one of the key factors that drives human movement,¹⁴ with people migrating from situations of economic crisis, unemployment, and financial vulnerability.¹⁵ Migration represents an increasingly important livelihood diversification strategy for many households in the world's poorest nations, for example, where one member migrates in order to guarantee support for the whole family.¹⁶ For instance, in rural Guatemala, migration is a survival strategy to cope with extreme poverty. Parents send adolescents between 13 and 17 years old to Chiapas (Mexico), where they have better chances to find jobs. These adolescents are expected to send remittances to support their parents and other family members.¹⁷ According to a UNICEF report, poverty or socio-economic inequalities in Uzbekistan, compared to neighboring Kazakhstan, compel many Uzbek children to migrate to Kazakhstan for work. The majority of children interviewed for the report were living and working on the streets of small towns and stated that their move was motivated by the absence of income-generating activities in their countries of origin.¹⁸ However, it should be noted that very poor households lack resources, and have reduced possibilities, to migrate.

Yet it is necessary to go beyond economic factors and consider the often complex social phenomena that are at the basis of unequal opportunities when analysing the structural causes of international migration. These phenomena include, inter alia: poverty and lack of human development; gender inequalities and discrimination; conflict and violence; political instability, socio-ethnic tensions; bad governance; food insecurity, environmental degradation, and climate change. As underscored by the Office of the High Commissioner for Human Rights (OHCHR), human rights abuses (civil, political, economic, social, and cultural) play a crucial role in the decisions to migrate of both adults and children.¹⁹ Indeed, "the vast majority of migrants have all suffered some kind of constraint on their rights in their country of origin".²⁰ South-South migrants,[§] including children, are particularly likely to be compelled to migrate because of conflict and natural disasters.²¹

Whether the focus is on lack of opportunities, conflict or human rights violations, it is a reality that many children, just like adults, migrate out of necessity. For example, a study on patterns of international migration within sub-Saharan Africa highlights that factors such as rapid population and labour force growth, unstable politics, escalating ethnic conflict, breakdowns of governments rooted in precarious democratization processes, persistent economic decline, retrenchment of public sector workers in response to structural adjustment measures, poverty, environmental deterioration and landlessness all contribute to migration within the region.²² A study on mobility of children in West Africa shows that their migration was motivated by the need to search for economic, educational or professional opportunities, and concludes that if local living conditions were better and migration did not represent real prospects for improving their lives, children and adults would not choose to migrate.²³

Between 2000 and 2010, the number of international migrants under the age of 20 increased by almost 2 million.²⁴ Family reunification is deemed to be one of the main causes of the increasing number of both regular and irregular international child migrants, including unaccompanied and separated migrant children.²⁵ A UNICEF study on Central American and Ecuadorian children in transit through Mexico to the United

[§] The term "South-South migration" is commonly used to refer to migration from one developing country to another developing country.

States found that, besides employment, the main reason for migrating was to join their parents abroad.²⁶ There is also evidence that a great number of migrant children accompany their parents or caregivers to destination countries in search of better opportunities.²⁷

Most decisions to migrate are made by individuals based on a complex combination of free choice and compulsion. Migration is not, per se, a negative experience, nor it is always associated with vulnerability. The fundamental human right to leave one's country can indeed represent an empowering choice for both children and adults when they move in the right circumstances and are protected throughout their migratory journeys.

b) Pathways into irregularity

In addition to the factors mentioned above, irregular migration is also largely a result of institutional aspects, including migration policies and practices. Migrants become irregular in different ways: by entering the country of destination in an irregular manner; by staying in the country after their application for international protection is rejected or their temporary status expires; by losing their job; by facing obstacles to renew or keep a regular residence permit, etc. Therefore, while some people decide to migrate irregularly because of a lack of regular migration channels, others find themselves in an irregular situation due to administrative barriers or a lack of information. As a child's status is usually linked to those of their parents, children find themselves in an irregular situation along with them. A number of children are also born in the country of destination to irregular migrant parents, and inherit their irregular migration status.

Increasingly restrictive migration control mechanisms are gradually limiting opportunities for regular migration. Selective migration laws and policies (reduction of available visas, more strict entry and departure regulations) have impeded potential migrants and their freedom of movement, affecting those with fewer resources disproportionately.

Similarly, especially within the context of the global economic financial crisis, many countries of origin and destination are enforcing migration laws more severely,²⁸ including heightening restrictions on legal avenues for migration and employing more harsh deportation and detention policies.²⁹ In various countries, family reunification regulations have become more severe, imposing new restrictions that make reunification more difficult and inaccessible for many.³⁰ Irregular migration, particularly of children migrating alone, has increased in part due to these obstacles preventing family reunification.³¹ Further restrictions on accessing existing regularization mechanisms, long-term residence status, and citizenship are also being imposed, further increasing the number of children in an irregular migration situation.³²

At the same time, literature on South-South migration notes the likelihood that a high proportion of South-South migration occurs irregularly. This is due to a combination of several factors, including, inter alia, strict requirements for regular migration, unclear immigration rules, the level of bureaucracy and high costs associated with regular migration applications, weak enforcement of border controls, difficulties in obtaining travel documents, and large informal employment sectors.³³

In sum, in light of the current economic crisis, it must be stressed that irregular migration may increase, particularly due to the existence of increasingly restrictive controls and limited legal avenues for migration (including family reunification) in some countries of destination, and a rise in unemployment and social exclusion in some countries of origin.

c. Gender factor in international migration

Over the past few years, issues of gender and migration have received increased attention by researchers and policy-makers. However, the majority of State migration policies remain inadequate in addressing gender-specific vulnerabilities.

Research by feminist scholars on international migration³⁴ has elaborated on how gender roles, relations, and inequalities affect the composition of international migration, as well as its impacts on countries of origin and destination. Gender is closely intertwined with migration decisions affecting adult and child migrants. Prevailing gender patterns and family systems in societies of origin significantly influence the decision to migrate of men, women, boys, and girls.³⁵ Gender-specific factors also influence migrants' social and economic integration in countries of destination. For migrant children, gender affects migration choices, trajectories and outcomes, including the ages at which adolescent boys and girls migrate, and whether they choose to do so autonomously, alone, accompanied by an adult, or in groups.³⁶

Recent work on child migration from a gender perspective has focused on gender-related impacts and vulnerabilities throughout the migration process, in countries of origin, destination, and during migration journeys (for example in relation to culturally-determined gender roles, education, work, etc.).³⁷ These studies acknowledge the role of social and cultural structures in shaping gender norms (e.g. the patterns according to which gender-specific roles are defined in the family, community, and society at large) and examine the different impacts these can have on the trajectories of boys and girls who migrate, as well as on those left behind.³⁸ Furthermore, migration of a parent often entails changes in the previous arrangements concerning the division of care and other domestic responsibilities within the household.³⁹ Children left behind often face greater responsibilities, depending on whether the father or the mother has migrated, fulfilling the corresponding roles. For example, children, particularly boys, may leave school in order to look for work and support the household. While remittances generally have a positive impact on girls' schooling, migration of a parent can also affect their school performance when they are expected to take on household chores or care for younger siblings.⁴⁰

Work on migration and gender has also focused on the increased feminization of migration⁴¹ and the specific vulnerabilities and risks facing women and girls.⁴² Gender norms and violence affect both boys and girls. Many adolescent children migrate to escape sexual abuse, social stigma, or pressure to marry.⁴³ However, women and girls often have limited access to information regarding work opportunities and labor-market conditions in destination countries,⁴⁴ as well as necessary steps for safe and regular migration,⁴⁵ which contributes to a greater vulnerability of female migrants at all stages of the migration process.⁴⁶ Furthermore, migration policies that are discriminatory often have the effect of limiting regular migration channels for women and girls, resulting in their marginalization to the most vulnerable labour sectors or as dependents of male

migrants. These circumstances contribute to the compulsion to resort to migration through smuggling and trafficking,⁴⁷ exposing women and girls to violence and abuse during their migration journey, as well as in countries of destination.⁴⁸

While for a large percentage of female migrants a primary motivating factor is to join their parents or spouse,⁴⁹ a significant number of women and girls migrate on their own or as heads of households in search of work. Women and girls often migrate as agricultural workers, domestic workers, carers of the elderly, sex workers, entertainers, and other occupations that are generally undervalued and characterized by the worst working conditions regarding remuneration and legal protection. The Committee on Migrant Workers has noted that the vast majority of domestic workers are women and girls who are reportedly at greater risk of certain forms of exploitation and abuse.⁵⁰ According to the Committee on the Elimination of Discrimination against Women, “gendered notions of appropriate work for women result in job opportunities that reflect familial and service functions ascribed to women or that are in the informal sector. Under such circumstances, occupations in which women dominate are, in particular, domestic work or certain forms of entertainment. In addition, in countries of destination, such occupations may be excluded from legal definitions of work, thereby depriving women of a variety of legal protections.”⁵¹ Working predominantly in largely unregulated occupations, women and girls are particularly vulnerable to exploitation and abuse by employers. For example, it can be difficult to obtain binding contracts concerning terms and conditions of work in such occupations, often resulting in long hours being worked without overtime payment.

It is necessary to take into account the different experiences of boys and girls throughout the migration process, as well as the multi-faceted impacts of migration on social and gender structures. Analyzing experiences of gender is imperative to understanding the different situations and motivations that drive boys and girls to migrate, as well as their migration trajectories. A gender perspective is key to assessing the impact of migration on children and their rights, and developing policy accordingly, since gender roles, relations, and inequalities influence the reasons as well as the outcomes of their migration.

III. International Framework on the Rights of Children in International Migration

a. International human rights framework, including regional and other pertinent instruments

Although States have the sovereign power to control their borders and formulate migration policies, they also have a duty to respect and ensure the human rights of migrants while enacting and implementing immigration policies and laws. States are bound to comply with the international treaties that they have ratified or acceded to. There is a large body of international law that obligates States to protect children’s rights in the context of international migration.

International human rights instruments with provisions relevant to the protection of migrants
▪ Universal Declaration of Human Rights (UDHR) (1948) ▪ International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) ▪ International Covenant on Civil and Political Rights (ICCPR) (1966) ▪ Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1966) ▪ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and

its Optional Protocol (1979)

- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984)
- Convention on the Rights of the Child (CRC) (1989) and its three Optional Protocols (2000; 2000; 2011)
- International Convention on the Rights of All Migrant Workers and Members of Their Families (CMW) (1990)
- Convention against Transnational Organized Crime (UNTOC) (2000) and two of its three supplementing Protocols (2000)

Regional human rights instruments with provisions relevant to the protection of migrants

- European Convention on Human Rights with its Protocols (1950)
- American Convention on Human Rights with its Protocols (1969)
- African Charter on Human and Peoples' Rights (1981)
- African Charter on the Rights and Welfare of the Child (1990)

ILO Conventions and Recommendations⁵²

- Migration for Employment Convention, 1949 (No.97)
- Migration for Employment Recommendation, 1949 (No.86)
- Minimum Age Convention, 1973 (No.138)
- Migrant Workers Convention, 1975 (No.143)
- Migrant Workers Recommendation, 1975 (No.151)
- Worst Forms of Child Labor Convention, 1999 (No.182)
- Convention on Decent Work for Domestic Workers, 2011 (No. 189)

Particularly relevant to the situation of children in the context of migration are: the Convention on the Rights of the Child (CRC) and its three Optional Protocols; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol; and the Convention on the Rights of All Migrant Workers and Members of Their Families (CMW).

The **Convention on the Rights of the Child** (CRC) with its three Optional Protocols⁵³ is the most comprehensive and widely ratified⁵⁴ international instrument on the rights of the child. The treaty enshrines a set of universal rights that constitute the minimum standards that States must ensure for every child within their jurisdiction. These rights must be guaranteed without discrimination of any kind, including, but not limited to, on the grounds of age, sex, birth, social origin, nationality, or status of the child's parents or legal guardians. In its General Comment No. 6 *Treatment of unaccompanied and separated children outside their country of origin*, the CRC Committee stated, "the enjoyment of rights stipulated in the Convention is not limited to children who are nationals of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness".⁵⁵ Other treaty bodies and regional human rights courts have made similar statements.⁵⁶

States Parties to the CRC have a duty to ensure that the treaty's principles and standards are fully reflected and given legal effect in relevant domestic legislation (article 4). In all actions concerning children, States are to be guided by the overarching principles of non-discrimination (article 2); the best interests of the child (article 3); the right to life, survival and development (article 6); and the right of the child to express his or her views in all matters affecting him or her, and to have these views taken into account (article 12). Respecting the key CRC principles outlined below is critical for the protection and fulfillment of the rights of children in the context of migration.

Non-discrimination (article 2 (1)):

The principle of non-discrimination provides that all rights contained in the Convention are applicable “to each child within their [States Parties’] jurisdiction without discrimination of any kind”.⁵⁷ This principle thus, “prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant”.⁵⁸ It must be fully applied and adhered to in any policy, decision, or action related to migrant children throughout the migration process, irrespective of the child’s migration status. The meaning of this article has been clarified by the CRC Committee in its General Comment No. 6 *Treatment of unaccompanied and separated children outside their country of origin*, where the Committee affirmed that:

State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State Party. If not explicitly stated otherwise in the Convention, the rights must be guaranteed to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.⁵⁹

The CRC Committee has also noted that the principle of non-discrimination requires measures

to address possible misperceptions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible when they comply with certain conditions. The measures should be: based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.⁶⁰

Best Interests of the Child (article 3 (1)):

This principle recognizes that in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. The CRC Committee has stated that

a determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age- and gender-sensitive interviewing techniques.⁶¹

Age assessment procedures should be carried out in a child-friendly manner and in accordance with the best interests of the child. A best interests determination must be documented at every stage of the process in preparation for any decision that impacts the child’s life.⁶² In decisions regarding matters of family unity, the child’s best interests

must be a paramount consideration.⁶³ Furthermore, immigration and border control justifications should not override the child's best interests.⁶⁴

Right to life, survival and development (article 6):

The right to life, survival and development has been interpreted to encompass and go beyond physical survival, to include the development of the child "to the maximum extent possible" (article 6 (2)). In regard to migrant children, this right must be respected and ensured in migration procedures that could lead to, for example, the repatriation of children to their countries of origin. Decisions to repatriate or provide residence in the destination country can significantly impact a child's life and development. Moreover, issues raised in regard to the best interests of the child, such as the health conditions in the country of origin, are often linked to the child's right to survival and development.

Right to express views, respect for the views of the child, and right to be heard (article 12):

Article 12 of the CRC recognizes the fundamental right of every child to be heard. This principle is key to due process safeguards (see chapter VI). The CRC Committee has adopted General Comment 12 *The right of the child to be heard* (2009) which provides further guidance on the interpretation of this principle. Accordingly, the views expressed by children should be considered in decision-making processes, particularly with regard to assessing what is in the child's best interests. Efforts must also be made to recognize the right of children affected by migration to understand proceedings and to express their views. This implies the need for competent and child-friendly interpretation in migration proceedings. Furthermore, this right requires that the child be informed about the matters, options and possible decisions to be taken as well as the consequences of these decisions. Such information should be provided by those who are responsible for hearing the child and by the child's parents or guardian.⁶⁵

Since its entry into force in 1990, the CRC has served as catalyst for legislative reform, constitutional amendments, and policies aimed at protecting children's rights. It has also helped to eliminate diverse forms of *de jure* and *de facto* discrimination, to promote gender equality, and to establish more effective child protection systems and institutions.⁶⁶ Despite the significant impact of the CRC to date, the treaty has not yet been sufficiently applied or promoted amongst policy-makers with regard to protecting the rights of children in the context of migration. Some States Parties also continue to have declarations or reservations regarding the principle of non-discrimination, with the interpretation that it does not confer the same rights to foreign children as citizen children.⁶⁷ On the contrary, the CRC provides both a comprehensive catalogue of civil, political, social, economic and cultural rights, and clear principles regarding their application to all children, regardless of migration status. Thus, as a legally-binding instrument with virtually universal ratification, the CRC, as the most relevant international child rights instrument, has the potential to play a key role in the protection of children's rights in the context of migration. This potential should be fully explored by policy-makers and stakeholders in the future, particularly in view of the absence of systemic coherence in the existing international framework applicable to children in the context of migration.

The **International Covenant on Economic, Social and Cultural Rights** (ICESCR) underlines States' obligations to take steps to progressively realize the full enjoyment of economic, social and cultural rights for every person within the State's jurisdiction.⁶⁸

The **Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW) and its Optional Protocol apply to all women, including migrant girls and women, as well as those left behind in countries of origin. CEDAW recognizes that all women, including migrants, should have equal access to employment, as well as fair and equitable remuneration and benefits (see CEDAW articles 10, 11 and 16).⁶⁹ The CRC and CEDAW are mutually reinforcing and complementary. Together they oblige States to maintain a child and gender perspective in migration laws and policies in countries of origin, transit and destination.

In addition to these instruments, the **International Convention on the Rights of All Migrant Workers and Members of Their Families** (CMW) is the only international human rights treaty that specifically protects the rights of all migrant workers and members of their families, including migrant children. It affirms that due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural, and other needs of migrant workers and members of their families and their communities. Several provisions of the CMW protect specific rights of the children of migrant workers. Article 29, for example, provides for the right of all children of migrant workers to a name, to birth registration, and to a nationality. Article 30 protects the basic right of children of migrant workers to access education on the basis of equality of treatment with nationals of the State concerned.

This international normative framework is complemented by regional instruments. These include, inter alia, the **European Convention on Human Rights**, the **American Convention on Human Rights** (and other basic documents pertaining to human rights in the American system),⁷⁰ the **African Charter on Human and Peoples' Rights**, and the **African Charter on the Rights and Welfare of the Child**. Their respective mechanisms are: **the European Court of Human Rights**, the **European Committee on Social Rights**, the **Inter-American Court and Commission on Human Rights**, and the **African Court of Justice and Human Rights**. These mechanisms have developed an important body of jurisprudence and case law (see below Section III.b and Annex 2), based on the rights and obligations recognized in the above regional instruments.

The European Convention on Human Rights entered into force in 1953 and all Council of Europe Member States are party to the treaty, with any new Members expected to ratify it promptly. The treaty established the European Court of Human Rights, where both individuals and States can file their claims of rights violations. Some fifteen protocols to this Convention have been opened for signature on a wide range of issues, including civil imprisonment, free movement, and expulsion of foreigners.

The American Convention, also known as the Pact of San José, Costa Rica, entered into force in 1978. It establishes the general obligation of States Parties to uphold the human rights set forth in the treaty to all persons under their jurisdiction, and to adapt their domestic laws in accordance with its provisions. The majority of States members of the Organization of American States have ratified this Convention. An additional Protocol to the American Convention, which deals with Economic, Social, and Cultural Rights (more commonly known as the Protocol of San Salvador) came into effect in 1999. The Protocol's provisions cover such areas as the right to work, the right to health, the right to food, and the right to education. Individuals can bring their cases of human rights violations under the Convention and its Protocols to the Inter-American Human Rights System.

As noted above, several instruments on human rights were adopted in Africa to reflect the continent's history, values and traditions. The African Charter on Human and Peoples' Rights came into effect on 21 October 1986 under the aegis of the Organization of African Unity (now African Union). The Charter recognizes most of the universally accepted civil and political rights, as well as certain economic, social and cultural rights. It is unique in that it recognizes both the rights of individuals and collective rights. Furthermore, it also recognizes duties incumbent on individuals, such as those towards the family and State security. The African Charter on the Rights and Welfare of the Child (Children's Charter) was also adopted under the OAU. It entered into force in 1999, and has been ratified by most African States. The Children's Charter is a comprehensive document similar to the CRC that sets out rights and defines universal principles and norms regarding children. It reflects African cultural values and experiences, and further recognizes children's responsibilities.

A number of specific international instruments further complement the international normative framework. For example, maritime law is also applicable in cases of the interception and rescue of migrant children at sea, and should be applied in line with international human rights, as well as humanitarian and refugee law obligations.

b. Role and jurisprudence of treaty bodies and regional human rights systems

International human rights treaty bodies and regional human rights mechanisms play an important role in developing the jurisprudence on the rights of children, including those in the context of migration. The treaty bodies are developing a set of relevant recommendations and standards through their General Comments and Concluding Observations issued upon the periodic review of States Parties' reports.⁷¹

The CRC Committee adopted General Comment No. 6 (2005) *Treatment of unaccompanied and separated children outside their country of origin*. Other General Comments (G.C.) on topics relevant to children's rights in the context of migration include: *The aims of education* (G.C. 1, 2001); *Adolescent health* (G.C. 4, 2003); *Implementing child rights in early childhood* (G.C. 7, 2005); *Children's rights in juvenile justice* (G.C. 10, 2007); *The right of the child to be heard* (G.C. 12, 2009); and *The right of the child to freedom from all forms of violence* (G.C. 13, 2011).

There are several pertinent General Comments issued by other human rights treaty bodies, including: *Migrant domestic workers* (G.C. 1 issued by CMW); *The right to education and the right to the highest attainable standard of health* (G.C. 13, 14 and 20 issued by CESCR, as well as General Recommendation (G.R.) 30 issued by CERD); and *Women migrant workers* (G.R. 26 issued by CEDAW).

At the regional level, both the European and Inter-American Courts of Human Rights assist States in identifying implementation gaps and necessary measures at the national level. The case law helps to establish the normative content of human rights and gives concrete meaning to individual rights and States' obligations.

Significant cases have been decided by the European Court of Human Rights (ECtHR) in relation to children in the context of migration, for the most part in relation to article 3 (the prohibition of torture and inhuman and degrading treatment) and article 8 (the right to respect for private and family life) of the European Convention on Human Rights. For

example, the “Tabitha case”, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (Application No. 13178/03, 12 October 2006), involved a five-year-old Congolese girl, who travelled with her uncle, a Dutch citizen, via Belgium, to join her mother in Canada. The girl was detained on arrival on Belgium, alone and without someone assigned to look after her, for almost two months in a center that had initially been intended for adults. No measures were taken to ensure that she received proper counseling and educational assistance from a qualified person. She was then deported to Congo, again without suitable accompaniment. The Court held that Tabitha’s rights under article 3 and article 8 had been violated by her detention and by her deportation, and that Belgium was under an obligation to facilitate the reunification of the family. A number of recent cases have also found detention of families with young children in closed centres to amount to a violation of Article 3 (see Annex 2 for further details). Other ECtHR judgments relating to violations of article 8 include Rodriguez Da Silva and Hoogkamer v. the Netherlands (Application No. 50435/99, 31 January 2006), where the Court granted an irregular migrant mother (of a Dutch citizen child) the right to regularize her status while taking into consideration the right to respect for private and family life and the child’s best interests to remain in the Netherlands with her Dutch father. In Osman v. Denmark (Application No. 38058/09, 14 June 2011), the Court ruled that the Danish authorities were in violation of article 8 by denying a residence permit to a non-resident child who had spent many years regularly residing in Denmark and whose family was still resident. The Court awarded damages as it found that the best interests of the child had not been sufficiently taken into account, and indicated that her residence status should be reinstated.⁷² The Court has also issued important judgments in relation to extra-territorial application of ECHR obligations. For example, in Hirsi Jamaa and Others v. Italy (Application no. 27765/09, 23 February 2012), the Court considered the question of whether the prohibition of collective expulsion, “applies to a case involving the removal of aliens to a third State carried out outside national territory”, (article 4, Protocol 4 to the European Convention on Human Rights). Hereby the Court extended the prohibition of collective expulsion to extra-territorial actions. In this regard, it condemned Italy’s practice of “pushing back” boats of migrants intercepted in the open sea to the shores of North Africa. The Court also affirmed the duty of States to uphold human rights aboard ships flying their flag in international waters. and States’ duty to protect migrants from being disembarked in countries where they risk suffering serious harm.

In addition to the case law (see Annex 2 for further details), the Inter-American Court of Human Rights provides good legal analyses on specific issues with regard to children’s rights in the context of migration through Advisory Opinions. The Inter-American Court stated in its Advisory Opinion on the Juridical Condition and Human Rights of the Child (OC-17/2002) that, inter alia, children are subjects entitled to rights, not only objects of protection. Also, according to the Court, the phrase “best interests of the child”, set forth in CRC article 3, entails that children’s development and full enjoyment of their rights must be considered the guiding principle to establish and apply provisions pertaining to all aspects of children’s lives. The family is furthermore the primary context for children’s development and exercise of their rights, and the State must support and strengthen the family through the various measures it requires to best fulfill its natural function. Lastly, in judicial or administrative procedures where decisions on the rights of children are adopted, the principles and rules of due process must be respected.

In its Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants (OC-18/03), the Inter-American Court stated that, inter alia, the general obligation to

respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migration status of a person. The right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of migration status. Also, the broad scope of the preservation of due process encompasses all matters and all persons, without discrimination. Additionally, the migration status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. This Advisory Opinion constitutes a significant development in international law. The Court further found that the principles of equality and non-discrimination are widely recognized in international and regional human rights instruments and enjoy the status of *jus cogens*, or peremptory human rights norms. As clarified by the Court, “the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person’s migratory status in a State.”

On 6 July 2011, the governments of MERCOSUR requested an Advisory Opinion of the Inter-American Court of Human Rights on the protection of the rights of migrant children in the Inter-American Human Rights System. This unprecedented initiative has been supported by the Institute for Public Policies in Human Rights, and taken because the human rights situation of children is of utmost importance for the effective fulfillment of human rights in this region.⁷³ The Advisory Opinion is currently pending.

The African Court of Justice and Human Rights, established in 2008, has not yet developed any case law.⁷⁴ The African Commission on Human and Peoples’ Rights receives communications submitted by States Parties to the African Charter, as well as individuals or groups of people, regarding violations of the human rights that are guaranteed by the Charter. The Commission has developed its jurisprudence on the protection of human rights in Africa, including with regard to African migrants. For example, it has declared that mass expulsions constitute a specific threat to human rights, and that conditions in migration-related detention, as well as the varied degrading and inhuman treatments suffered by detainees, constitute a violation of article 5 of the African Charter.⁷⁵

Jurisprudence at the national level also plays an important role in evaluating the implementation of international, regional and domestic legislation to protect migrant children’s rights. While there is not yet case law from the African Court of Justice and Human Rights, nor a regional court for the Asian region, national courts in these regions have ruled on cases relating to irregular migrants, for example, on the right to associate in trade unions in South Korea. In South Africa, the regional High Court for Pretoria ruled in 2005 that the legal mechanisms for the protection of South African children found in the Constitution and the Child Care Act of 1983 apply equally to unaccompanied foreign children within South Africa’s borders (see Annex 2 for further details and examples).

c. International cooperation

By its very nature, international migration has an impact on the relations between countries of origin, transit, and destination. To date, there is no comprehensive global framework for managing international migration. However, there are numerous bilateral, regional, and multilateral agreements and fora dealing with migration-related issues, including the rights of migrants and their families. There are also a number of authoritative reference points that can serve as a basis for a comprehensive discussion

about global migration management. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families calls, in article 64, for cooperation and consultation between States Parties with a view to promoting sound, equitable and humane conditions in connection with international migration.

The Program of Action of the International Conference on Population and Development (ICPD), held in 1994 in Cairo, devotes chapter X to international migration, providing a comprehensive set of objectives in relation to documented and undocumented migrants. The Program of Action emphasizes the basic rights of migrants, irrespective of their legal status, and recognizes the benefits of international migration for the host country. A major goal of the ICPD Program of Action is to encourage cooperation and dialogue between countries of origin and destination in order to maximize the benefits of migration and increase development opportunities. The particular vulnerabilities and special needs of children, women, and the elderly in the context of international migration are also mentioned in this document. All Governments, particularly those of receiving countries, are reminded that “special efforts should be made to enhance the integration of the children of long-term migrants by providing them with educational and training opportunities equal to those of nationals”.⁷⁶ They should also be allowed to exercise an economic activity, and the naturalization of those who have been raised in the receiving country should be facilitated. Also, “[c]onsistent with article 10 of the Convention on the Rights of the Child and all other relevant universally recognized human rights instruments, [States] must recognize the vital importance of family reunification and promote its integration into their national legislation in order to ensure the protection of the unity of the families of *documented* migrants”[emphasis added].⁷⁷ However, apart from a mention of effective sanctions against, “those who engage in any form of international traffic in women, youth and children”,⁷⁸ the situation and rights of *undocumented* migrant children are absent in the Cairo Program of Action.

Bilateral arrangements on international migration are a useful means of responding to specific issues. These arrangements can also ensure that international migration takes place in accordance with established rules and conditions that are mutually beneficial to both States. For instance, bilateral agreements may deal with the return and readmission of persons without authorization to stay in countries of destination or transit. It is important to note that article 67 of the CMW requests States Parties to the Convention to cooperate, “in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation”.

The drive towards economic and political integration has led to formal *regional agreements* promoting the free movement of citizens and the harmonization of migration management policies. Such agreements facilitate human movement under specific conditions, and have been part of the regulatory framework of common market or free trade agreements. For instance, MERCOSUR Member States have signed a series of agreements based on the principles of equal treatment and non-discrimination that also address the status of irregular migrants from this sub-region. These agreements explicitly recognize the right of all children to education, regardless of their or their parents’ migration status (see Annex 2 for more details on MERCOSUR).

Regional Consultative Processes (RCPs) are emerging as a useful mechanism to carry forward cooperative efforts in migration management. RCPs offer participating States

the opportunity to share experiences with other States of the same geographic region, and typically revolve around specific issues, such as irregular migration, asylum, or trafficking in persons. Each process brings together relevant governments, international organizations, and some civil society partners. Organizations such as International Centre for Migration Policy Development (ICMPD), International Organization for Migration (IOM), UNITAR⁷⁹ and UNHCR have provided substantive technical support to some RCPs.

Multilateral cooperation has also increased over the past few years. The 2010 Secretary-General Report on International Migration and Development indicates that “since 2006, as a result of the High-Level Dialogue on International Migration and Development, there has been growing engagement by the United Nations System and other international organizations”⁸⁰ in this field. The *Global Migration Group* (GMG) is an inter-agency mechanism bringing together 15 United Nations entities and the International Organization for Migration (IOM) to promote the wider application of all relevant international and regional instruments and norms relating to migration.⁸¹ The GMG has undertaken a number of initiatives to show Member States to what extent “the benefits of international migration hinge on respect for the human rights of migrants”. The Group has furthermore identified the challenges faced by different groups of migrants, including migrant children.⁸² There are numerous multilateral projects relevant to the situation of children in the context of migration. For instance, the Joint Migration and Development Initiative is being implemented by the United Nations Development Programme in partnership with UNHCR, the United Nations Population Fund, ILO, and IOM. This Initiative supports civil society organizations and local authorities in implementing projects that maximize the development impacts of international migration. Among the objectives of the projects funded by this Initiative are providing support to families that are separated through migration and raising awareness about the dangers of trafficking in persons and irregular migration, while promoting the protection of migrants. Furthermore, as part of the Millennium Development Goals Achievement Fund, there are 14 projects on youth, employment and migration being implemented by various GMG Member Agencies and other organizations. Project activities include generating decent work for youth and creating sustainable livelihoods as an alternative to migration.⁸³

The *Global Forum on Migration and Development* (GFMD) is the largest and most comprehensive global platform for dialogue and cooperation on international migration and development.⁸⁴ When the GFMD was first established, children affected by migration and the protection of their rights were not a priority concern. However, the rights of migrants and their families, as well as irregular migration, figured among the topics discussed by both government representatives and civil society stakeholders at recent GFMDs (especially at the GFMD 2010 held in Puerto Vallarta, Mexico).⁸⁵ Furthermore, it is worth noting that the notion of “shared responsibility” was first introduced at the GFMD held in Manila in 2008 in a Joint Civil Society Declaration on *Migration, Development and Human Rights*. This declaration calls on governments to institute a functioning international system based on migration and development policies that guarantee the human rights of migrants. It also calls on States to ensure that governments in developing countries refrain from adopting policies or enter into agreements, such as free trade agreements, with countries in more developed States that increase forced migration of their populations. Additionally, States are called upon to prohibit multilateral or bilateral agreements that do not fully respect and protect the

human rights of migrants.⁸⁶ The literature reveals diverse views on this conceptualization of “shared responsibility” and this term has not yet been formally endorsed nor fully implemented by governments. However, the key message to be retained from the above paragraphs is that, at present, there are numerous opportunities for States to engage in dialogue in regard to their shared responsibility to realize the human rights of children in the context of international migration.

IV. Human Rights Challenges Affecting Children in the Context of International Migration

The vast majority of States have ratified or acceded to the core international and regional human rights treaties. Nevertheless, in practice there are large discrepancies between human rights norms and their implementation, as States Parties fail to comply with their obligations. Furthermore, children in the context of migration face a double invisibility. On the one hand, there is a general absence of a child-rights perspective, including the best interests principle as per article 3 of the CRC, in migration laws, policies and actions concerning children. On the other hand, children affected by migration are invisible within policies and systems for protecting children.⁸⁷ In many countries of origin, transit and destination, social policies and programs do not take into account the conditions and needs of children affected by migration. This contributes to the denial of their rights, enables discrimination, family separation and exploitation, and makes boys and girls in the content of migration virtually invisible to policy-makers and other duty-bearers.

This section provides a broad, although non-exhaustive, overview of the main human rights challenges affecting children in the context of international migration that should be addressed further at the CRC DGD 2012. As pointed out in the introduction, many of these challenges affect both children with regular and irregular migration status (see in particular Section IV.h and IV.i below).

a. Criminalization of irregular migration

In 2010, Jorge Bustamante (the former Special Rapporteur on the Human Rights of Migrants), Abdelhamid El Jamri (Chair of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families), and Raquel Rolnik (Special Rapporteur on Adequate Housing Third Committee) appeared before the UN General Assembly Third Committee. Here, they stated that, “over the past two years the trend towards the *increasing criminalization* of irregular migration had continued, with migrants facing racist attacks, abuse and *appalling* housing conditions throughout the world”[emphasis added].⁸⁸ Evidence shows that deportation and detention policies have become harsher in recent times, which is partly due to exacerbated fears about migration in the context of the economic crisis. Raids on migrants and abuses at borders are not uncommon.⁸⁹ A particularly worrying practice is the deportation of migrant parents of children born in destination countries, who are subsequently placed in foster care.⁹⁰ This atmosphere of suspicion and hostility towards migrants in an irregular situation has serious implications for the protection of their human rights. Hostile terminology, for example where irregular migrants are referred to as “illegal”, can lead to discriminatory behaviour, hinder public acceptance of migrants, and exacerbate their social exclusion.

In some destination countries, an increase has been noted in racist and xenophobic behavior and acts against migrants, including in the form of physical violence and hate speech by political groups and officials.⁹¹ Xenophobia and violence directed at migrants severely exacerbate the vulnerability of children affected by migration in transit and destination countries and are detrimental to their well-being. Addressing negative perceptions of migrants within host communities, including in the media, is essential for promoting integration.

Human rights authorities have repeatedly emphasized that irregular migration should not be criminalized.⁹² The Working Group on Arbitrary Detention has expressed the view that “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration”.⁹³ The Special Rapporteur on the Human Rights of Migrants, Francois Crépeau, in his 2012 report to the Human Rights Council, noted that, “it is important to emphasize that irregular migrants are not criminals per se, and should not be treated as such”.⁹⁴ The High Commissioner for Human Rights has stated that, “crossing a border or residing in a country without the legal permission to do so should at most be considered an administrative offence”.⁹⁵ Criminalizing irregular migration tends to have a disproportionately negative effect on the rights and well-being of the migrants involved. Additionally, most policies of criminalization fail to reach their objective of deterrence. In May 2011, a Global Roundtable organised by OHCHR and UNHCR on the issue of alternatives to migration-related detention concluded that there is no empirical evidence that detention deters irregular migration, despite the often significant cost to States of maintaining such a detention infrastructure.⁹⁶

Criminalization of irregular migration is evident in many countries where migration management is framed around issues of risk and border control, law enforcement, security threats, and an expulsion paradigm. The High Commissioner for Human Rights has expressed concern regarding the trend to penalize those who engage with irregular migrants, which sends the unacceptable message that contact with migrants is a risk to be avoided.⁹⁷ Another major concern is that public officials and service providers such as healthcare personnel, teachers, or the police, who perform key functions in relation to protecting the human rights of migrant children, are increasingly placed under a “duty to denounce” the presence of irregular migrants, including children, to immigration enforcement authorities. Private individuals such as landlords can be at risk of criminal penalties for renting housing to irregular migrants. Also, non-governmental organisations can be subject to punitive fines and even criminal charges for providing humanitarian or legal assistance to such migrants.

b. Lack of human rights focus in international cooperation

As described in Section III.c, international cooperation through bilateral, regional, or multilateral agreements can contribute to the management of international migration according to established rules and for the mutual benefit of States concerned. However, despite the existence of these agreements, many governments are still developing migration strategies in isolation and based upon domestic needs. Currently there is no global consensus on how to address the complex dynamics of international migration.

Further, much of the existing international cooperation is characterised by a focus on migration control, rather than on protecting and promoting human rights. Rights-based bilateral cooperation can be useful in ensuring the welfare of migrants abroad, including

migrant children. For example, the Government of the Philippines has been very active in securing the rights of Filipino workers abroad and has concluded bilateral agreements with the most common destination countries to protect their rights and those of their families (see Annex 2 for more details on the case of the Philippines). However, concerns have often been raised by civil society and other stakeholders that bilateral agreements, particularly readmission agreements, can operate without sufficient human rights safeguards. The lack of safeguards can lead to serious protection gaps, for instance in the case of irregular and unaccompanied or separated migrant children.

Similarly, concerns have been raised that the primary or even sole objective of many Regional Consultative Processes is deterrence and containment of migration, rather than concern for the protection of human rights, including the rights of the child. Children affected by migration have not been at the centre of these processes, and only two RCPs have addressed child-related issues. In the Bali Process,⁹⁸ children are referred to exclusively as victims of trafficking; in the Puebla Process,⁹⁹ children are mentioned in relation to the need to “strengthen respect for the human rights of migrants regardless of status with special attention to vulnerable groups such as women and children”.¹⁰⁰

c. Absence of consideration of best interests of the child in migration situations

To be in compliance with the CRC, migration policies must first meet two essential prerequisites. First, all policies, practices, and decisions adopted in relation to the entry, stay, or return of a child and/or of his or her parents must be determined by the principle of the best interests of the child, as per article 3 CRC. Second, with regard to unaccompanied and separated migrant children, there must be a procedure for determining the best interests of the child, to be routinely applied in every one of those cases.

Yet, the best interests of the child are largely absent from migration decision-making. In migration-related decisions, including review of migration and international protection applications, as well as implementation of migration control policies, such as arrest, detention, deportation and restrictions on access to basic rights, the best interests of the child are rarely considered, and even at times disregarded. Even in decisions regarding family unity, when according to the CRC the best interests of the child should be paramount,¹⁰¹ these are not systematically assessed, if at all.

It is also important to note that while reference is sometimes made to the best interests of the child in migration-related decision-making, this does not always reflect a proper evaluation of the best interests of the child or a formal Best Interests Determination (BID) Procedure. For example, detention of children is sometimes justified by the best interests of the child, stating that it is best for them to be with their parents, without properly considering alternative measures of detention or what would truly be best for the child.¹⁰²

To date, most States do not have in place a BID Procedure. The BID is a formal process with specific procedural safeguards and documentation requirements, whereby a decision-maker is required to weigh and balance all relevant factors of a particular case. Appropriate weight should be given to the rights and obligations enshrined in the CRC and other human rights instruments. All relevant authorities and professionals that come into contact with children in the context of migration should apply the best interests principle as a primary consideration in all their actions.¹⁰³ The objective is to reach a comprehensive decision that best protects the rights of the child in question.¹⁰⁴ The BID is

therefore the most important method for ensuring respect, protection, and fulfilment of the rights of migrant children,¹⁰⁵ and should be applied in the formulation of migration laws and policies, as well as during migration procedures.

The CRC Committee has suggested that States should set up a clear process at the national level to consider and determine what constitutes the best interests of the child on an individual and case-by-case basis, particularly in instances of unaccompanied and separated children and repatriation procedures.¹⁰⁶ The CRC Committee has affirmed that a BID requires a clear and comprehensive assessment of the child's identity, including: nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities, and protection needs. Allowing the child access to the territory is a prerequisite to this initial assessment process. Qualified professionals, who are trained in age- and gender-sensitive interviewing techniques, should carry out the assessment process in a child-friendly and safe environment.¹⁰⁷

Finally, a durable solution should be determined for every unaccompanied and separated child on the basis of an individual assessment of the best interests of the child.¹⁰⁸ This assessment should address all protection concerns, take into account the child's views, and, wherever possible, lead to overcoming the situation of a child being unaccompanied or separated.

d. Restrictions on the right to family life and restrictive family reunification policies

The right to family, which includes family life and the principle of family unity, is protected by international human rights law and humanitarian law. There is universal consensus that, as the fundamental unit of society, the family is entitled to respect, protection, assistance, and support. A child's right to family life is established in the CRC (preamble and articles 3, 7, 8, 9, 10, 16, and 18). Article 9 obliges States to ensure that children are not separated from their parents against their will, except where competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. The right to family has an important protective function for children in the context of migration, particularly for unaccompanied and separated children, and is relevant in admission, detention, and expulsion procedures.¹⁰⁹ It should be noted, however, that the CMW grants the right to protection of the family and to family reunification only in relation to migrant workers in a *regular* situation (article 44).

The right to family may be severely affected in the context of international migration. Children born in destination countries to irregular migrant parents may be denied their right to family life due to the deportation of one or both parents. At the same time, children and adolescents often migrate in precarious and irregular circumstances in order to reunite with their parents, often being prevented from doing so by immigration control policies. The former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, has recommended that countries of origin and destination develop strategies to ensure family reunification within a reasonable time frame.¹¹⁰

Some States seek to fulfill their duties towards children by separating families, when it is not in the child's best interests (see Section IV.c above). For example, in Italy, according to the law, children cannot be deported.¹¹¹ However, in many cases, deportation of individual parents is pursued nonetheless, leading to separation of the family or the child in effect being forced to leave the country with their parents. In the UK, there have been

cases where authorities have fulfilled their duty to provide housing to children in need in their area by separating children from their parents and accommodating only the children.¹¹² In this context, families in an irregular situation are at greater risk of separation within the framework of child protection authorities, when the concerns revolve around material living conditions and poverty, or cultural prejudice, rather than protection of the child from neglect or from physical, sexual or psychological abuse.¹¹³

Furthermore, a growing number of countries are reportedly restricting family reunification policies. The interpretation by administrative and judicial bodies of the right to family life within the context of migration is also becoming more restrictive. The prevailing view among migration experts is that such restrictions are likely to contribute to the irregular entry of children seeking to reunite with their parents, or that they may extend the length of irregular residence by the child in destination countries. Regional human rights courts have repeatedly encouraged State authorities to abstain from making decisions that result in separating children from their families, unless it is in the child's best interests as determined by a comprehensive assessment, and have also urged authorities to facilitate family reunification.¹¹⁴

e. Lack of due process in migration procedures

In many countries of destination, migration procedures and decisions are not conducted in accordance with the CRC and other due process standards required by international law.¹¹⁵ Due process of law guarantees should be respected at all times, irrespective of the child's migration status (see box below):

Minimum due process guarantees that States must respect in all migration proceedings involving migrant children

- **Right to a hearing** without delay with due guarantees before a competent, independent, and impartial court. (ICCPR Art. 14; CMW Art. 18.1; CRC Art. 37.d)
- **Right to a translator** and / or interpreter free of charge. (ICCPR Art. 14.3.f; CCPR General Comment No. 15 par. 7; CMW Art. 16.7, Art. 18.3.f)
- **Right to defense and competent legal representation.** (ICCPR Art. 14.2 b; CMW Art. 18.3.d; CRC Art. 37.d)
- **Right to appeal** any decisions before a superior authority or court. (ICCPR Art.13 & 14.5; CCPR General Comment No. 15, Para. 10)
- **Right to speak, to be heard, and be taken duly into account** in the framework of age-sensitive mechanisms that factor the evolution and development of the migrant child or adolescent. (CRC Art. 12; CMW Art 18.4)
- **Right to consular assistance** (Vienna Convention on Consular Relations 1963; CMW Art. 16.7 & 23)
- **Right to a guardian and a legal representative** who has the required specific knowledge on children's rights, so that the interests of the migrant child or adolescent are well protected (this is particularly relevant in cases of unaccompanied and separated migrant children) (CRC General Comment No. 6 (2005) Para. 21, 24, 33-38)

Due process guarantees in all migration proceedings that may affect migrant children's parents

- **Right to be heard and participate:** Grant children the right to be heard within their parent's deportation processes. Children should be heard in proceedings concerning admission, residence and expulsion of their parents in order to make sure that decisions adopted against their parents do not affect children's best interests. (CRC Art. 3, 9, 10 & 12; CRC General Comment No. 6 (2005) Para. 82 & 83)
- **Right to be informed:** Children should be informed of all matters concerning their rights and migration procedures and decisions that may affect their parents (CRC Art 3, 9 & 10; CRC General Comment No. 6 (2005) Para. 82 & 83)
- **Access to justice and effective remedies:** Children should have a guaranteed avenue for administrative and judicial review of their parent's detention and immigration decisions (in cases of repatriations, expulsions, *refoulement*, non-admittance, etc.). (CRC General Comment No. 6 (2005) Para. 82 & 83)

f. Migration-related detention

There is a growing trend in different parts of the world to recognize that detention of children in the context of migration should be avoided. Experts agree that such detention can have permanent negative effects on children, including in terms of mental health. Nevertheless, this increasing awareness has not yet translated into legislation and policies that prohibit migration-related detention of children, and many States continue to detain children. For example, although a study commissioned by the European Parliament Committee on Civil Liberties, Justice and Home Affairs in 2007 noted that children and adolescents were the worst affected by their stay in detention centers,¹¹⁶ the *Returns* EU Directive, adopted in June 2008, still allows for children to be detained.¹¹⁷

Deprivation of liberty means any form of detention or imprisonment, or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at his or her free will, by order of any judicial, administrative, or other public authority.¹¹⁸ International law provides that the detention of children, including children in the context of migration, should be avoided (article 37 CRC). Article 37(b) of the CRC allows the detention of children in the context of juvenile justice, exclusively as a last resort and for the shortest appropriate period of time.¹¹⁹ However, the detention of children on the sole basis of migration status is not in accordance with the CRC. The CRC Committee has affirmed that “unaccompanied or separated children should not, as a general rule, be detained”, and “detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof”.¹²⁰ Human rights mechanisms have stressed that the deprivation of liberty is never in the best interests of the child and that it is a punitive measure rather than a protection measure.¹²¹ The Working Group on Arbitrary Detention has affirmed that mandatory or automatic detention must be considered arbitrary in all cases.

Depriving children of their liberty is a violation of their human rights. As was mentioned previously, there is no empirical evidence to support the view that detention deters irregular migrants. In addition, using detention as a punitive measure is a violation of the principle of the best interests of the child. However, detention of migrant children has been justified by States under certain specific circumstances, such as for the preservation of family unity in cases where parents are detained. In the context of migration proceedings, the fundamental principles of the CRC and the right not to be separated from parents (article 9) must be duly taken into consideration and guide authorities' decisions at all times. When it is in the best interests of the child to remain with his or her parents,

States should abstain from depriving the parents of their liberty¹²² and should consider, “the adoption of alternative measures for the whole family” to avoid its separation.¹²³ Thus, from both a normative and instrumental perspective, the immigration detention of children should be avoided.

There are a wide range of possible alternative measures of detention, including registration requirements, deposit of documents, bond/bail or surety/guarantor, reporting requirements, case management/supervised release, designated residence, electronic monitoring, home curfew/house arrest, and voluntary return.¹²⁴ Alternative measures of detention should be very carefully designed and developed in keeping with the UN Guidelines for the Alternative Care of Children.¹²⁵ Nonetheless, alternative *measures of* detention are not, and should not be characterized as, alternatives *to* detention. States should always use the least restrictive means necessary as alternative measures of detention. Particularly in the case of children, it is important to examine the effect that applying an alternative model will have on the rights and dignity of the individual. Children released from detention centers should, for example, be provided with appropriate alternative care, and not be left destitute on the streets.

For instance, in 2008, Belgium effectively stopped detaining families with children in closed centers. Instead ‘open return houses’ (maisons de retour) were established with coaches to help families find a solution to their situation. This initiative was found to be largely successful, in terms of most families being able to regularize their stay or cooperate in a return process within the envisaged two months (the maximum duration of stay). However, these positive developments were never formalized into law, and a 2011 amendment to the relevant law indicates a return to child detention.¹²⁶ “Alternative” measures taken in other States are considered by observers to “retain the defining features of detention”.¹²⁷

Further, in countries around the world, the conditions in migration-related detention are frequently below the minimum standards set out in international law.¹²⁸ The Special Rapporteur on the Human Rights of Migrants, Francois Crépeau, has received reports that “migrants in detention, both men, women and children, suffer violence, including sexual violence and abuse. The behavior of the guards is not always adequately monitored, especially if they are employed by private security companies. Proper instruction and training of the personnel who have authority over migrants in detention is therefore of utmost importance.”¹²⁹

In cases where children are detained, the applicable basic human rights standards should be respected at all times, irrespective of the child’s migration status (see box below):

Minimum standards that States must respect in cases where migrant children are detained¹³⁰

- The deprivation of liberty of migrant children, accompanied or not, should be temporary and for the shortest period possible. All efforts, including acceleration of relevant processes, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.¹³¹
- Migration-related detention centers should be separate from prisons and should not bear similarities to prison-like conditions. The authorities in charge of these facilities should not be security forces (military, police, etc.), but professionals competent in child protection.¹³²

- Centers where child detention takes place should have child protection officials specifically trained in the care and protection of children.
- Children and adolescents should be separated from adults unless it is otherwise considered to be in their best interests (article 37(c) CRC). Migrants should not be detained with convicted criminals.
- Centers should ensure the opportunity for regular contact with family and friends.
- Centers must ensure regular and confidential contact with legal and consular representatives.
- Facilities should not be located in isolated areas where culturally-appropriate community resources and access to legal aid are unavailable.
- While staying in a center, even temporarily, children should be guaranteed the full enjoyment of economic and social rights such as education, health care, recreation, food, water, and clothing.
- States must guarantee the existence and operation of independent mechanisms for monitoring the conditions in detention facilities. The entry and performance of monitoring tasks should be facilitated, including for both non-State (ombudsperson, etc.) and civil society organizations.
- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative. These inspectors should place special emphasis on holding confidential conversations with children in the facilities.

g. Repatriation of migrant children in disregard of their best interests

Under international law, States should only repatriate children as a measure of protection, for instance to ensure family reunification in cases where it is in the child's best interests. However, repatriation of child migrants in an irregular situation is currently used as a punitive measure. As a primary consideration, the well-established principle of *non-refoulement* should be scrupulously respected in the context of any return.¹³³

The importance of respecting the principle of the best interests of the child in such procedures is underscored by numerous studies and affirmed by human rights entities.¹³⁴ Making a child's best interests the primary consideration implies that every decision for repatriation must pay close attention to a child's health and psychosocial needs.¹³⁵ Other related factors that need to be considered are whether a child's right to education, health care, and adequate living conditions can be ensured upon his or her return to the country of origin.

A recent UNICEF study on boys and girls repatriated from Germany to Kosovo points to an alarming situation: one out of two children described their return as the worst experience of their lives. The experience of the repatriation of foreign-born and minority children was particularly traumatic. Every third repatriated child was suffering from post-traumatic stress syndrome, nearly one in two teenagers was suffering from depression, and one in four children reported suicidal ideation. The study concluded that determination of what constitutes a child's 'best interests' can only be reached by "reviewing the personal circumstances of each child individually on a case-by-case basis, and by respecting the child's views, identity, and sense of belonging".¹³⁶ Guarantees of due process of the law, the right to be heard, and the right to a guardian and legal representative must also be ensured to migrant children throughout the repatriation process.

h. Exclusion from systems for protecting child rights

Children affected by migration are invisible within policies and systems for protecting and promoting children's rights.¹³⁷ In many countries of origin, transit and destination, social policies and programs do not take into account the conditions and needs of migrant children. As a recent study of young migrants in secondary education has pointed out, migrant boys and girls are left out of most policy frameworks, since they are either perceived as accompanying "luggage" for migrating adults or as offspring born to migrant parents.¹³⁸

This absence is particularly evident in the case of children in an irregular situation: national action plans and strategies on social exclusion, child poverty, early school leaving, or health inequalities do not identify irregular migrant children as a target group. The former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, has identified this gap in policies regarding, inter alia, education (such as access, dropping out and language barriers), health care, birth registration, and adolescent professional training. The Special Rapporteur also pointed out that while some migrant children may be nationals of the destination country, they may still face obstacles in accessing basic services such as health care or education, especially if their parents are in an irregular situation.¹³⁹

i. Denial of access to economic, social and cultural rights and basic services, including using such access as a migration management tool

Economic, social and cultural rights (such as the right to work, education, health, housing, social security, food, water, healthy environment, and culture) are essential to enabling a life of dignity and freedom. These rights are recognized in the CRC, the ICESCR, and other major treaties. The CESCR Committee has stated that Covenant rights also apply to non-nationals such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation. The Committee has further affirmed that the ground of nationality is a prohibited basis of discrimination and therefore should not be used to bar access to these rights. Thus, all migrant children within a State, including those in an irregular situation, have the right, inter alia, to education, adequate food, and health on the same basis as citizen children.¹⁴⁰

Reports point to many obstacles faced by children in the context of migration in accessing basic services in destination countries.¹⁴¹ Children in an irregular situation, including those accompanied by their parents or born to migrant parents in an irregular situation in countries of destination, are particularly vulnerable to discrimination and are often denied access to essential public services. As described in OHCHR's 2010 Annual Report to the Human Rights Council in regard to health services:

Migrant children can be prevented from gaining effective access to health care in a number of ways beyond express prohibition. High costs can make access unaffordable and the requirement of immediate payment or proof of payment can also impede access to the health service. Also, health care and services can be used as an instrument of immigration control policies for instance where there is a duty to report undocumented migrants by health professionals.¹⁴² There may be fear of deportation or detention of themselves

or their families or a lack of information about migrant's entitlements and guarantees in relation to health services and goods. A particular area of concern lies in the area of childhood immunization. Many migrant children are unable to gain access to vaccinations in a timely manner, with long-term effects on their health.¹⁴³

Migrant children in an irregular situation often find their rights inadequately defined in the legislation of destination countries. Constraints in the enjoyment of fundamental rights are often linked to migration control mechanisms that prevent migrants in irregular situations from accessing the right to health, to education, and to adequate housing. This is often related to lack of specific guidelines clarifying that health and education professionals are not obliged, or are prohibited, to share migrants' data with immigration enforcement authorities, and that a child's right to education and healthcare should never be impeded by migration status.

j. Lack of birth registration and statelessness

Children born in destination countries have the right to be registered immediately after birth and to acquire a name and nationality (article 7 CRC, article 24 ICCPR, article 29 CMW). International standards obligate all States to guarantee these rights to all children, regardless of their or their parents' migration status, "in particular when the child would otherwise be stateless" (article 7 CRC).

Birth registration is closely linked to the right to a legal identity and protection, and serves to safeguard children against violations of their rights. Birth registration is normally required in order to access education and health services, and birth registration data are essential for State planning regarding the provision of social services. A copy of the birth certificate is routinely required for school enrolment in most developed countries.¹⁴⁴ Birth registration also facilitates family reunification in migration proceedings.

Children facing barriers to birth registration are frequently denied the enjoyment of other rights, including the right to be recognized as a person before the law. In some cases, it can result in a situation of statelessness, which the State has a duty to prevent.¹⁴⁵ Children who are denied their civil right to birth registration are also more likely to face barriers to access other civil, political, economic, social and cultural rights throughout their life.

Many parents in irregular situations fail to register their children due to their fear of imprisonment and/or deportation, which leads them to avoid all contact with local authorities. There is a clear need for guidelines for civil registries clarifying that they are not obliged, or are prohibited, to share migrants' data with immigration enforcement authorities and that a child's right to birth registration should never be impeded by the parents' lack of documentation or irregular migration status.¹⁴⁶ States should make greater efforts to adopt measures to regularize the situation of irregular migrant parents and avoid their deportation when their children are born in destination countries.

k. Lack of opportunities for regularization

The former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, has described regularization policies as a good example of practices aimed at strengthening

social integration and cohesion, ensuring the human rights of migrants, and attaining State goals concerning social security, public healthcare coverage, and social inclusion.¹⁴⁷ Thus, regularization mechanisms are a valuable policy tool, as they can contribute to preventing human rights violations and to meeting social policy goals. As well as improving access to basic rights and services, regularization facilitates the full economic and social integration of migrant children and their families in countries of destination.

Nevertheless, there are a concerning lack of stable and long-term regularization possibilities for children in an irregular situation. In some countries, children may qualify for regularization based on years of residence and ties to the destination country, and family reasons are often central considerations in both permanent and temporary regularization measures. For example, in France, more than 85,000 people were regularised due to personal and family reasons between 2002 and 2006.¹⁴⁸ In Belgium, additional criteria for regularization were introduced temporarily, between 9 July and 9 December 2009. One of the criteria related to local ties, demonstrated primarily by five years of continuous residence.¹⁴⁹ In the United States, President Barak Obama recently instituted an executive order to provide work permits to young migrants (no more than 30 years old) who entered the US before age 16, and who have lived there for at least five years, are in school, or are high-school graduates or military veterans in good standing, and have clean criminal records. The measure does not provide a permanent residence status, but grants a suspension of deportation proceedings and issues renewable temporary permits of residence.¹⁵⁰

However, the length of the residence permit granted through regularization procedures varies considerably, and does not necessarily constitute a long-term solution. Further, before qualifying for regularization procedures, children in an irregular situation face long periods of uncertainty, fear, and restricted access to basic rights and services. The long-term negative consequences for both the individual child, as well as society as whole, need to be considered. In addition, access to such procedures can also be difficult, due to, inter alia, application fees, complex procedures and requirements, lack of quality free legal representation, and lack of awareness on the part of both families and advocates of available regularization procedures.

l. Lack of awareness and training of pertinent authorities

As State Party reports and Concluding Observations show, duty-bearers can lack capacity at all levels to fulfill their international obligations. Many of the key actors that come into contact with children at all stages of the migration process, including border control authorities and persons working in migration centers in transit and destination countries, lack knowledge of child rights and protection standards. Overall, a range of measures need to be put in place, including the development of special structures and monitoring mechanisms, effective systems for protecting children's rights, and capacity-building of duty-bearers. These include immigration officials, civil servants, parliamentarians, and members of the judiciary.

m. Vulnerability to exploitation, abuse and trafficking

A further human rights issue that affects children in the context of migration is trafficking in persons. Although the figures vary, according to the ILO, nearly 2.5 million people are in forced labor as a result of trafficking – of whom 22 to 50 percent are children.¹⁵¹ It is

estimated that globally 1 in 5 victims of trafficking are children, and these numbers may be much higher in States where there are weak child protection regimes.¹⁵² The clandestine nature and the varying interpretations of the crime of trafficking make it particularly difficult to come up with a solid uncontested figure. While some countries focus entirely on cross-border trafficking, others address jointly both internal and international trafficking. Furthermore, some States define trafficking exclusively as sexual exploitation, while others look at broader trafficking outcomes in their definitions. Moreover, child trafficking is frequently hidden, denied or ignored. All these factors make it difficult to obtain comprehensive data. While many migrant children are often mistakenly treated as victims of trafficking, there are many actual child victims of trafficking who go unidentified for numerous reasons, not least because children do not feel empowered to report crimes committed against them.

In very general terms, children are often trafficked for work in sectors that have been associated with the worst forms of child labor. These activities include, but are not limited to, the commercial sex industry, domestic service, agricultural work, construction work, sweatshops, and organized begging and soliciting.¹⁵³ Within these sectors and during the trafficking process, children are particularly vulnerable to violence, sexual abuse, exploitation, and other human rights violations. Some children affected by migration can be more susceptible to trafficking: many children left behind in countries of origin seek to be reunited with their parents in countries of transit and destination; since they have no means to migrate through regular channels, they are forced to use smugglers and other irregular channels to travel to their destination. The irregular nature of their movement makes them more vulnerable. For example, in South-East Asia child trafficking and labor migration are frequently interlinked, and traffickers are said to “fish in the stream of migration”.¹⁵⁴

The ILO reports that child migrants often experience other forms of maltreatment, such as sub-standard working conditions, non-payment of wages, and the threat of being reported to State authorities.¹⁵⁵ Girls are known to be at particular risk of being trafficked, including for purposes of sexual exploitation.¹⁵⁶ Many of the children who are forced into sexual exploitation were promised legitimate jobs in the country of destination.

Articles 34, 35 and 36 of the CRC stipulate that States should protect children from all forms of exploitation and abuse, and take all measures possible to ensure that they are not abducted, sold, or trafficked. Furthermore, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, pays particular attention to women and children (article 2 (a)), and offers additional protection to children: unlike in the case of adults, the elements under the “means” of trafficking (such as threat and coercion) need not be taken into account when identifying incidents of child trafficking. States Parties are also obligated to “ensure that trafficked children are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons”.¹⁵⁷ Furthermore, the Protocol calls on States to provide protection to the victims of trafficking, including relevant legal and social services (article 6), and to give particular consideration to the special needs of children with regards to housing, education, and care (article 6(2)).

There are significant obstacles to ending child trafficking. Underlying socio-economic factors play an important role in increasing the vulnerability of children affected by migration to becoming potential victims of trafficking. There is also concern that stricter migration controls and efforts to curb and punish irregular migration without addressing its root causes will result in greater incidence of human smuggling and trafficking in persons. Many countries repatriate trafficking victims to their countries of origin, which further exacerbates their situation. This is particularly true for child victims of trafficking being returned, who are at high risk of being re-trafficked.

The issue of children being sold for the purpose of sexual exploitation, forced labor, or any other reason must also be considered within the context of international migration. Although trafficking and sale of children are similar concepts and may overlap, they are not identical. Even though children can be sold at each stage of the trafficking process, a child can be trafficked without any element of sale occurring throughout the entire process. Further, the sale of a child is not necessarily linked to the purpose of exploitation by those who pay for the child, as is the case for child trafficking, and the sale of a child can take place without physical movement of the child, a defining element of child trafficking.¹⁵⁸ Article 35 of the Convention on the Rights of the Child (CRC) obliges States Parties to take measures to prevent both child trafficking and the sale of children, and the Convention's Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography supplements the treaty by providing States with detailed requirements to end the sexual exploitation, abuse, and sale of children in all its forms. The Protocol obliges governments to criminalize and punish the activities related to these offences. It requires punishment not only for those offering or delivering children for the purposes of sexual exploitation, transfer of organs, profit, or forced labour, but also for anyone accepting the child for these activities. The Optional Protocol also protects the rights and interests of child victims. However, adequate differentiation between trafficking and the sale of children is currently lacking, though it is essential with regard to the prosecution of perpetrators, creating indicators and systems for identification and determining the best interests of the child, including with regard to the child's repatriation to his or her family.

To address the complex processes and situations whereby children affected by migration become victims of exploitation, abuse and trafficking, a multidisciplinary approach is needed. This should involve applying the Best Interests Determination Procedure and engaging child protection services in order to provide the child with adequate support and assistance, including medical, social, legal, and psychological care, as well as further integration or reintegration support.

n. Vulnerability of children left behind

"Children left behind" refers to those who remain in their country of origin when parents, other family caregivers, or legal guardians migrate abroad. Migration can improve the standard of living for those who are left behind through remittances, which often represent a considerable share of household income and increase household capacity to invest in children's education, health, and nutrition. However, poor households may face short-term losses when an income-earner decides to migrate. For example, assets may be sold to fund migration, and the migrant's departure can leave a family without social protection, for instance in cases where insurance is linked to the individual's employment. Further challenges faced by these children include psychosocial trauma, family

instability, and social stigma,¹⁵⁹ which can result in violent and delinquent behavior, drug abuse, and teenage pregnancy.¹⁶⁰

Gender must be carefully taken into account when assessing the situation of children left behind.¹⁶¹ The impact of a mother's migration on children is likely to be greater than in the case of a father's migration.¹⁶² When women migrate, especially migrant mothers leaving their children behind, traditional roles, family relations, and responsibilities in the home environment are affected, such as those related to the care of children and the elderly.¹⁶³ In many cases, the care responsibility is transferred to the eldest daughter.¹⁶⁴ As highlighted with concern by the CRC Committee, the education of many children left behind, particularly girls, is often jeopardized by their obligations to fulfill household duties and care for younger siblings and other family members.¹⁶⁵

The CRC Committee has pointed out that States do not always account for the special situation of children left behind, nor ensure that public policies address their particular needs and vulnerabilities.¹⁶⁶ These children are often invisible to State authorities because they are considered more privileged than those who do not receive remittances, and thus, are typically excluded from the priority groups of social and child protection policies. States should adopt specific programs for children left behind that include benefits for single-parent households and non-traditional caregivers such as grandmothers or other relatives.¹⁶⁷ Regulations on child labor should also be strengthened so that these children, particularly girls, do not drop out of school to work and help support the family. At the same time, countries of transit and destination should lift current restrictions that impede or delay family reunification. Wherever possible, and after applying the principle of the best interests of the child, States should enable children left behind to join their parents, regardless of their migration status.

o. Insufficient data on international migrant children

A holistic picture of the numerous ways migration affects the well-being of children is hindered by lack of reliable data. In order to analyze the situation of migrant children and formulate effective laws, policies and programs, accurate and disaggregated data is an imperative. The former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, has noted the lack of accurate statistical information on the number of children involved in international migration, which is related to the general absence of an 'age' approach in migration policies.¹⁶⁸ This hinders the design, implementation, and monitoring of public policies that protect the economic and social rights of children in the context of migration. There are, for instance, no reliable figures on the number of children in an irregular situation in developed countries.¹⁶⁹ Many destination countries also fail to collect the kind of data necessary for an evaluation of the impact of immigration controls on children.¹⁷⁰

In light of this, UNICEF and UNDESA have joined forces in order to produce reliable national-level estimates of the global stock of international migrant children and adolescents based on countries' population censuses or administrative sources that report data collection on persons under 20 years of age who were born outside the country of enumeration, and who may or may not be a citizen of that country or migrated through regular channels (see Annex 1 for further details).¹⁷¹ There remain, however, limited statistics on children affected by migration, including children who migrate unaccompanied or who are left behind by one or both parents. Addressing the absence of

national figures and estimates on irregular migrants, particularly irregular migrant children, should be made a higher priority by all pertinent duty-bearers.

The CRC Committee regularly reminds States Parties that data collection needs to extend over the whole period of childhood (up to the age of 18 years) and should be coordinated throughout their jurisdiction, ensuring nationally-applicable indicators. The reporting guidelines for States Parties to the CRC call for detailed disaggregated statistical and other data, as well as information covering all areas of the Convention. To this end, government agencies should collaborate with appropriate research institutes and strengthen national data collection systems through the allocation of adequate resources.¹⁷²

It is also necessary to put in place a system enabling the collection of sex- and age-disaggregated data on international irregular migration flows, ensuring that these data are not used for immigration control purposes. The collection of comparable data on access to basic social rights by irregular migrant children should be promoted by States with the active participation of civil society and relevant stakeholders. National action plans on social exclusion, child poverty, early school leaving, health inequalities, etc. should identify children in an irregular situation as a target group, as currently they are almost entirely absent from these strategies. Furthermore, relevant actors should be adequately trained to be fully aware of their duties and responsibilities (i.e. non-obligation or prohibition to share personal data of irregular migrant children with immigration enforcement authorities), in keeping with the principles and standards of the CRC (e.g. child's rights to family, privacy, birth registration, health, and education) and international data protection standards.

V. Policy Proposals for Consideration

The following issues and recommendations, among others, may be considered by the Committee on the Rights of the Child at its 2012 Day of General Discussion:

Measures for ensuring migrant children are treated first and foremost as children, including in relation to:

- (a) Comprehensive normative and institutional frameworks for protecting child rights that effectively take priority over migration laws and policies, regardless of migration status;
- (b) Ensuring migrant children benefit from the most protective legal framework available and relevant authorities adequately consider the situation of migrant children;
- (c) Ensuring the due consideration of the particular vulnerabilities of migrant children in existing child-specific policies and programs; and,
- (d) Implementing specific protection measures for unaccompanied or separated children, including to achieve a durable solution according to their best interests. Depending on the specific circumstances of each case, a durable solution can vary substantially, with the main options being:
 - (i) family reunification in the country of origin (immediate or delayed);
 - (ii) family reunification and integration in the country of transit or destination;¹⁷³
 - (iii) integration in the country of transit or destination (either independently, with foster family or in child-care institutions);¹⁷⁴ and
 - (iv) resettlement in a third country.

Adopt a rights-based approach to migration, including on:

- (a) Ensuring all State legislation, administrative regulations, policies, and interventions that affect children in the context of migration comply with all State obligations under international human rights law; and,
- (b) Ensuring States' compliance with international labor, refugee and humanitarian law obligations in a manner that is guided by the principle of the best interests of the child.

Measures to promote the rights of children in the context of migration in international cooperation mechanisms, including:

- (a) Ensuring bilateral, regional and international agreements and action plans adhere to human rights obligations and contain adequate safeguards, particularly in relation to readmission agreements;
- (b) Developing cooperation agreements transparently and on the basis of a participatory approach, including social partners (labour unions, employers) as well as other civil society actors (NGOs and migrants' associations);
- (c) Highlighting migrant children as a target group within existing Regional Consultative Processes and multilateral initiatives.

Principle of family unity and family reunification policies, including on:

- (a) Designing and implementing migration policies to facilitate State compliance with the principle of family unity, including ensuring that families are not separated by State action or left separated by State inaction (unless this is in accordance with the principle of the best interest of the child);
- (b) Ensuring due regard to the principle of preserving family unity, including refraining from the deportation of parents where children are nationals or remaining in the country of destination; and,
- (c) Measures to enable children left behind to join their parents, thus avoiding the need to access irregular and unsafe channels in countries of origin and/or transit.

Best interests principle and determination procedure, including on:

- (a) Measures for ensuring State legislation, policy and practice systematically consider and accord priority to the principle of the best interests of the child over immigration considerations and other administrative matters;
- (b) Discontinuing policies and practices that separate families in an irregular migration situation in disregard of the best interests of the child;
- (c) Developing options and good practices for establishing Best Interests Determination (BID) Procedures at the national level to determine what constitutes the best interests of the child and provide for durable solutions where relevant, particularly in cases of unaccompanied and separated children and repatriation processes; and,
- (c) Ensuring children's rights and best interests determination procedures are applied, observed, and respected throughout the entire migration process, from the child's first contact with migration authorities through to the implementation of any measures affecting the child.

Measures for ensuring due process guarantees in migration proceedings, including:

- (a) Applying and respecting international standards related to due process guarantees and ensuring they are applied in all migration proceedings affecting migrant children or their parents;

- (b) Ensuring the right of the child to speak, to be heard, and to have his or her views duly taken into account and complemented by age-sensitive mechanisms that respect the evolving capacities, maturity, and development of the migrant child; and,
- (c) Where relevant, ensuring migrant children have access to a guardian and legal representative with the required competence in children's rights.

Promoting the principle of non-detention, including dissemination and compliance:

- (a) Ensuring the principle of non-detention of children in the context of migration is a core standard, and any measure implying deprivation of liberty constitutes a violation of children's rights;
- (b) Prohibiting the detention of children for the purpose of maintaining family unity within a detention center; and,
- (c) Applying alternatives to detention which are in compliance with the UN Guidelines for the Alternative Care of Children and other relevant human rights standards, including community-based and non-custodial measures, should be put in place.

Ensuring minimum standards in case of custodial measures, in accordance with international law, including:

- (a) Restricting custodial measures to the shortest period of time possible, and with the purpose of providing comprehensive attention and protection, immediately, and in the medium and long term, for the prompt transfer to adequate alternatives to detention;
- (b) Staffing detention centers with qualified personnel competent in child care and protection, and putting detention centers which house migrant children under the responsibility of child institutions and not migration control authorities and/or security forces;
- (c) Ensuring migrant children in detention have the opportunity for regular contact with their family and confidential contact with their legal guardian, as well as with legal and consular representatives;
- (d) Guaranteeing social and economic rights in temporary detention; and,
- (e) Ensuring compliance with the Rules for the Protection of Juveniles Deprived of their Liberty.

Measures addressing the participation of children, in accordance with their age and maturity, in all migratory proceedings and those of their parents, including:

- (a) Guaranteeing children's right to be heard in all proceedings concerning their admission, residence, and expulsion in order to ensure that all such decisions are not contrary to their best interests;
- (b) Granting children the right to be heard in proceedings concerning admission, residence, and expulsion of their parents in order to ensure that decisions are not contrary to their best interests;
- (c) Informing children of all matters concerning their rights and migration procedures and decisions involving their parents; and,
- (d) Guaranteeing children's access to administrative and judicial review of their parents' detention and immigration decisions.

Measures addressing the rights of children born in destination countries, including:

- (a) Ensuring children's birth registration is not impeded by the legal status of their parents;
- (b) Ensuring the interpretation and application of nationality laws in destination countries does not render children stateless;

- (c) Good practices in applying residual clauses providing for the immediate acquisition of the nationality by birth in nationality laws of the destination country (in cases where the joint operation of the nationality laws of both the country of origin and destination might result in statelessness); and,
- (d) Ensuring safeguards for civil registries respecting migrants' right to privacy, including from immigration enforcement authorities.

Measures addressing access to social, economic and cultural rights, including:

- (a) Ensuring all children in the context of migration have access to social, economic and cultural rights and basic services, regardless of their or their parents' migration status;
- (b) Eliminating any legislation and policy requiring civil servants or individuals to report irregular migrants to immigration law enforcement authorities. Schools, medical facilities and civil registries should be prohibited from sharing migrants' personal data for the purpose of immigration control;
- (c) Strengthening the key role of social services (school, health care, day care personnel) in guaranteeing effective access to economic and social rights, as well as ensuring such children are treated first and foremost as children, including by training relevant actors and making them fully aware of the exclusively social nature of their role and lack of obligation to help enforce immigration laws and policies; and,
- (d) Ensuring that national action plans and strategies on social exclusion, child poverty, early school leaving, or health inequalities identify migrant children or children born to migrant parents, in particular irregular migrant children or children born to irregular migrant parents, as a target group.

Measures promoting access to secure residence status, including:

- (a) Designing and implementing permanent and long-term mechanisms for children, both unaccompanied and separated and with their families, to regularize their status;
- (b) Promoting access to existing regularization mechanisms, by removing onerous administrative requirements and fees and providing quality free legal representation and information;
- (c) Removing requirements for regular residence in order to access permanent residence status and citizenship, when other criteria, such as years of residence and school attendance, have been met.

Measures addressing the situation of children left behind, including:

- (a) Good practices in awareness-raising in countries of origin, particularly among policy-makers, about the specific vulnerabilities of children from migrant homes, including gender-specific vulnerabilities; and,
- (b) Social protection policies in countries of origin which address the situation of children left behind, including through the adoption of specific programs (e.g. benefits to single-parent households and non-traditional caregivers), as well as strengthened regulations to prevent child labor.

Measures for combatting racism, xenophobia and discrimination, including:

- (a) Good practices on addressing negative perceptions of migrants, including those in an irregular situation, including by raising awareness of the positive contributions of migrants to countries of transit and destination; and,
- (b) Measures countering xenophobic violence, hate crimes, and hate speech, including on effective reporting and enforcement mechanisms.

Measures strengthening data collection, including:

- (a) Ensuring the collection of comparable data on children in the context of migration disaggregated by age and gender according to international practices and guidelines;¹⁷⁵
- (b) Encouraging States to collaborate with international organizations and relevant research organizations to strengthen the institutional capacity of national data collection systems, increase transparency, and enhance dissemination practices to make statistics and data available to the public;
- (c) Establishing a system to collect sex- and age-disaggregated data on international irregular migration flows, though always ensuring that these data are not used for immigration control purposes;
- (d) Promoting the role of social services in the collection of comparable data on children in an irregular situation and their access to economic and social rights; and,
- (e) Training relevant actors about their duties and responsibilities (i.e. non-obligation or prohibition to share personal data of irregular migrant children with immigration enforcement authorities), in keeping with the principles and standards of the CRC and with international data protection standards.

Measures with regard to the role of civil society, including:

- (a) Strengthening the work and participation of civil society to protect the rights of all children in the context of migration at the local, regional, and global levels;
- (b) Avoiding the criminalization of individuals and organizations providing legal, humanitarian, and social assistance to irregular migrant children or children born to irregular migrant parents;
- (c) Allowing monitoring by civil society organizations of the situation of migrant children in countries of transit and destination, including conditions in detention centers; and,
- (d) Encouraging civil society to present alternative reports and individual complaints to treaty bodies, in particular to the CRC Committee, to denounce violations of children's rights in the context of migration.

VI. Conclusion

The situation of children in the context of international migration is a compelling human rights challenge for policy-makers. A key message in this Background Note is that special attention is required in countries of origin, transit and destination, and in terms of cooperation and coordination among them, to ensure that the rights and principles laid out in the Convention on the Rights of the Child apply to *all* children in the context of international migration, without exception. Migrant children, regardless of their or their parents' status, are an integral part of the future of societies of destination. Significant evidence indicates that child migrants in an irregular situation are a high-risk group whose rights are most commonly violated, including by State authorities who fail to comply with their obligations pursuant to the CRC and other human rights instruments. It is also clear that detention of children in the context of migration should be prohibited, as it constitutes a human rights violation.

In order to comply with obligations under the CRC, States Parties must treat children in the context of international migration as children, first and foremost, regardless of their or their parents' migration status. Migrant children constitute a particularly vulnerable group considering that, both as children and as migrants, they are more likely to face poverty, social exclusion, exploitation, and multiple risks, including to their survival and development. Protecting their civil, political, economic, social, and cultural rights is

fundamental for their overall development, and closely linked to their social inclusion and integration in society. Among other things, States must strongly condemn all manifestations and acts of racism, discrimination and xenophobia against migrants, as well as the stereotypes that are often applied to them.

The Note further emphasizes that the principle of the best interests of the child should be the primary consideration that guides decisions by policy-makers and other duty-bearers whenever children are involved in migration, irrespective of their status or that of their parents. Decision-makers should assess the impact of all actions concerning migrant children beforehand. In all migration proceedings, decisions should only be made after conducting a Best Interests Determination. Not putting the best interests of the child as a first and foremost consideration when deciding State actions regarding migrant children means not only that their rights will be at risk, but also that the country of destination is squandering an irredeemable opportunity to invest in the well-being and social cohesion of its population.

The 2012 Day of General Discussion of the Committee on the Rights of the Child provides a timely opportunity to remind States Parties that, as signatories to the CRC, their responsibility to protect children's rights applies to all children, regardless of status, and to push forward discussions on some of the issues outlined in this Note. It is hoped that broad consultations at the 2012 CRC DGD will help to increase awareness of the situation of children in the context of international migration, guide States in the implementation of the CRC with regard to this vulnerable group, and reaffirm the imperative of respecting, protecting, and fulfilling all their rights. As a legally-binding instrument with virtually universal ratification, the CRC has a key role in protecting the rights of children in the context of migration.

It is hoped that the 2012 CRC DGD will be just the first step in a growing international dialogue regarding the significant human rights challenges around children in the context of international migration, and raise awareness of the urgent need for change. This dialogue should be inclusive and based on a comprehensive and holistic human rights-based approach. Crucially, ahead of the 2013 High-Level Dialogue on International Migration and Development, and building on General Comment 6 *Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005), outcomes and recommendations from the DGD should provide a strong and broad basis for further initiatives with a view to developing standards to protect all children in the context of international migration that are based on the universality of human rights norms, rather than protection frameworks that are based on categorization and exclusion.

The Committee could consider collaborating with external stakeholders on the development of operational guidelines for respecting child rights in the context of international migration policies and practices. Such guidelines could include, inter alia, clear elaboration and examples of how migration policies and practices can be made compatible with CRC obligations, as well as incorporating systematic consideration of the best interests of the child. Another possible outcome could be a guide on the practical application of the best interests of the child in migration decisions, as well as an evaluation of contexts when the best interests of the child are currently invoked by States.

Further studies, carried out by the Committee, Special Rapporteurs, the Office of the High Commissioner for Human Rights, other United Nations entities and/or external

stakeholders, would be particularly valuable initiatives that follow on from the DGD. For example, a global study could be undertaken on the current gaps in the human rights protection of all children affected by international migration, including in relation to their civil, political, economic, social and cultural rights, and at particularly vulnerable situations in the migratory cycle (E.g. detention, in relation to access to public services, international borders). Thus, outcomes from the 2012 CRC DGD could address, on the one hand, guidelines on practical measures to assist States in implementing migration and social policies to respect the rights of all children in accordance with the CRC, and on the other hand, the prevailing lack of information and data on the impact of migration policies on children and their rights, with a view to improving evidence-based policy-making.

ENDNOTES

¹ Many countries collect data on persons under 20 years of age by five-year age groups, following international standards. These groups comprise 0-4 years, 5-9 years, 10-14 years and 15-19 years of age. Specific data solely on children under 18 years of age is not widely available and only collected through specialized surveys. See Annex 1: *International Migrant Children and Adolescents. Facts and Figures* (May 2012).

² See Annex 1.

³ In Northern America there are 89 female migrants for every 100 male migrants, while in Latin America and the Caribbean there are 95 female migrants for every 100 male migrants under 20. In Asia and Oceania the female-male ratio is of order of 91 and 97 female migrants for every 100 male migrants under 20, respectively. In Europe there is practically no difference in terms of sex ratios, that is, there are 99 female migrants for every 100 male migrants. In Africa, however, the sex ratio is reversed. For every 100 male migrants there are 108 female migrants under the age of 20. Regarding age, the age group 15-19 years are the most numerous age group of migrants under the age of 20 in all areas of the world, while the group 0 to 4 years of age represent the least numerous (see Annex 1 for breakdown by region).

⁴ *The Rights of Children, Youth and Women in the Context of Migration*, UNICEF Policy and Practice, 2011. UNICEF Regional Office for Latin America and the Caribbean has increased its attention on the ways in which the migration phenomenon affects indigenous children. UNICEF, in collaboration with the Latin American Faculty of Social Sciences (FLACSO) in Ecuador, carried out a study on migration and indigenous children in Latin America. The study focuses on indigenous child migratory flows from Bolivia to Argentina, from Ecuador to Colombia and from Guatemala to Mexico. It deals with three different situations that affect children: children that migrate alone (long- and short-term, even daily, migration); children that migrate with their families; and children remaining in the country of origin with other family members.

⁵ Ibid.

⁶ Ibid.

⁷ Regular migrant children can include children born to irregular migrant parents. Children with regular migration status whose parent(s) are in an irregular situation are affected by the migration status of their parents, and are particularly vulnerable to human rights violations.

⁸ For example, most countries with State systems for the care of separated migrant children provide regular migration status only until the age of 18. Despite having lived regularly for a number of years in the destination country with state support and protection, many young migrants are at risk of enforcement proceedings, detention and deportation, from the day of their 18th birthday. In some countries, such as Ireland and France, there is no requirement to have a residence permit until the age of 16 and 18 respectively. Therefore in these countries, a child cannot be in an irregular situation until this age. Nevertheless, these young migrants become irregular on reaching the age of majority.

⁹ Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante (2009), A/64/213. 3 August 2009, para. 28.

¹⁰ Ibid., para. 31.

¹¹ See: Committee of the Rights of the Child, *Outline for Participants in the 2012 CRC DGD*, pages 1-2. Available at: <http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/DGD2012Outline.pdf>

¹² Ibid, pages 4-5.

¹³ *Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration*, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, A/HRC/15/29, 5 July 2010.

¹⁴ As the Global Migration Group (GMG) has stressed: “Models of economic development which create structural inequality promote irregular migration and place the human rights of millions of people at risk.” See: GMG (2008), *International Migration and Human Rights. Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, Geneva.2008, para.79. See also: *Overcoming barriers: Human mobility and development*, Human Development Report 2009, UNDP.

¹⁵ Solimano, A., *Migration and Democracy: Issues for Latin America and Europe at a time of Global Recession*. IDEA. 2009.

¹⁶ *The impact of international migration: what happens to children left behind in selected countries of Latin America and the Caribbean*, UNICEF/ DPP Working Papers, May 2007.

¹⁷ See, supra *The Rights of Children, Youth and Women in the Context of Migration*, UNICEF Policy and Practice, 2011.

¹⁸ UNICEF, *Risks and realities of child trafficking and exploitation in Central Asia*. UNICEF Regional Office for CEE/CIS, Geneva 2009.

¹⁹ “The Cairo World Conference urged governments to make the option of not migrating – ‘remaining in one’s country’ – a viable one for ‘all people’. To this end, it called on governments to respect the rights of minorities and indigenous people, and the rule of law, to promote human rights and good governance, and to strengthen democracy; it urged greater support for food security, education, nutrition and health.

Endorsing this approach, the Global Commission on International Migration urged that “Women, men and children should be able to realize their potential, meet their needs, exercise their human rights and fulfill their aspirations in their country of origin and hence migrate out of choice, rather than necessity.”

OHCHR, *Migration and Development: a Human Rights Approach*, Geneva, 2008.

²⁰ See, supra *The Rights of Children, Youth and Women in the Context of Migration*, UNICEF Policy and Practice, 2011, p. 4.

²¹ Kofman, E. and Raghuram, P., *The Implications of Migration for Gender and Care Regimes in the South*. Social Policy and Development Programme Paper Number 41, United Nations Research Institute for Social Development, July 2009.

²² Adepoju, A., *Migration in Sub-Saharan Africa: A background paper commissioned by the Nordic Africa Institute for the Swedish Government White Paper on Africa*. Human Resources Development Centre, Lagos, Nigeria, 28 July 2007, Revised 14 September 2007.

²³ ILO, IOM and UNICEF/ WCARO, *Which Protection for Children involved in Mobility in West Africa?* Project of Joint Regional Study on the Mobility of Children and Youths in West Africa, 2011.

²⁴ *Adolescents, Youth, and International Migration: Figures and Facts*, 2011. Available at:

[http://www.unicef.org/socialpolicy/files/GMG - Factsheet_UNICEF-FINAL.pdf](http://www.unicef.org/socialpolicy/files/GMG_-_Factsheet_UNICEF-FINAL.pdf).

²⁵ UNICEF, OHCHR and National University of Lanús, *Children and Adolescent in the Context of Irregular Migration*, Working Paper, Internal Draft, Nov. 2011.

²⁶ Cortés, R., *Adolescents’ Rights, Gender and Migration: Challenges for Policy-Makers*, ADAP Learning Series, UNICEF April 2011.

²⁷ Ibid.

²⁸ Migration control initiatives by destination countries may have the effect of some transit countries also increasing their restrictions, leading to criminalization of irregular migration. See: Belguendouz, A., *Expansion et sous-traitance des logiques d’enfermement de l’Union européenne : l’exemple du Maroc*, Cultures & Conflits, 57, printemps 2005. See: <http://conflits.revues.org/index1754.html>. See also: De Haas, *The myth of invasion. Irregular migration from West Africa to the Maghreb and the European Union*, IMI research report, University of Oxford, October 2007.

²⁹ Human Rights Watch, *US: Immigration Policy Harms Women, Families*, Press Release. 2009.

³⁰ De Lucas, J., *Reforma del marco jurídico de la inmigración: políticas que no superan el test básico*, Papeles de Relaciones Ecosociales y Cambio Global, No. 105, Madrid, 2009, pp. 125-122.

³¹ Cornelius, W., *Reforming the Management of Migration Flows from Latin America to the United States*, The Center for Comparative Immigration Studies, University of California, San Diego, Working Paper 170, December 2008. See also: International Migration Institute, *A transatlantic comparison of South-North migration: The experiences of Mexico and Morocco*, Policy Brief No. 1, UK, March 2009

³² For example, many European countries are increasingly restricting access to family migration visas, long-term residence status and citizenship, through e.g. heightening requirements in measures such as tests of language and knowledge of the country. See for instance changes to the Immigration Regulations in the United Kingdom in: Home Office *Statement of Intent: Family Migration*, June 2012, regarding new requirements for family migration visas, as well as the intention to end the permanent possibility to regularise status after 14 years of residence in the UK (if some period of the residence has been regular).

³³ Ratha, D. and Shaw, W., *South-South Migration and Remittances*, Working Paper No. 102, World Bank, Washington D.C. 2007, page 26-27.

³⁴ Donato, K. M., Wagner, B., and Patterson, E. (2008), “The cat and mouse game at the Mexico-U.S. border: Gendered patterns and recent shifts.” In: *International Migration Review* 42 (2): 330–59; Donato, K. M., Gabaccia, D., Holdaway, J., Manalansan IV, M., and Pessar, P.R. (2006), “A glass half full? Gender in migration studies.” In: *International Migration Review* 40 (1): 3–26; Hondagneu-Sotelo, P., *Gendered transitions: Mexican experiences of immigration*. University of California Press, Berkeley 1994; Hondagneu-Sotelo, P., *Gender and U.S. immigration: Contemporary*

trends. University of California Press, Berkeley 2003; Houstoun, M.F., Kramer, R.G., and Barrett, J.M., (1984), "Female predominance of immigration to the U.S." In: *International Migration Review* 18 (4): 908–63; Kanaiaupuni, S. M. (1998), "The role of women in the social process of migration: Organizational strategies of Mexican households." Unpublished manuscript, University of Wisconsin–Madison; Kanaiaupuni, S. M. (2000), "Reframing the migration question: Men, women and gender in Mexico." In: *Social Forces* 78 (4): 1311–48; Lindstrom, D. P., *The differential role of family networks in individual migration decisions*. Paper presented at the annual meeting of the Population Association of America, Washington, DC, 1991.

³⁵ In Latin America, these structures are not homogeneous: while in Mexico there is a predominantly patriarchal family system, matri-focal families are the general rule in the Caribbean region, particularly in the Dominican Republic (See for example: Donato, K., *U.S. Migration from Latin America: Gendered Patterns and Shifts*, Annals of the American Academy of Political and Social Science 2010).

³⁶ Cortés, R., 2011, op. cit., p. 5.

³⁷ Ibid.

³⁸ Cortés, R., 2007, *Children and Women Left Behind in Labor Sending Countries: An Appraisal of the Social Risks*, Global Report on Migration and Children 2007; Cortés, R., 2011, op.cit.; *Migration, Human Rights and Sustainable Human Development*, UNICEF / UNDP Background Paper for the 2007 Global Forum on Migration and Development; *The Rights of Children, Youth and Women in the Context of Migration*, UNICEF Policy and Practice, 2011; *Migration, Development and Children Left Behind: A Multidimensional Perspective*, UNICEF Policy and Practice, 2010.

³⁹ Cortés, R., 2007, op. cit.; Global Report on Migration and Children, October 2007, page 10-12; Cortés, R., 2011, op. cit. page 6; *The Rights of Children, Youth and Women in the Context of Migration*, UNICEF Policy and Practice, 2011, page 15.

⁴⁰ UNICEF / UNDP Background Paper for the 2007 Global Forum on Migration and Development, pp. 5-6.

⁴¹ E.g. *The Rights of Children, Youth and Women in the Context of Migration*, UNICEF Policy and Practice, 2011; UNFPA, State of World Population, *A Passage to Hope. Women and International Migration*, Geneva, 2006; United Nations Department of Economic and Social Affairs, *World Survey on the Role of Women in Development: Women and International Migration*, 2004; Global Commission on International Migration, *Gender and migration*, September 2005.

⁴² E.g. *The Rights of Children, Youth and Women in the Context of Migration*, UNICEF Policy and Practice, 2011; UNFPA, State of World Population, *A Passage to Hope. Women and International Migration*, Geneva, 2006; United Nations Department of Economic and Social Affairs, *World Survey on the Role of Women in Development: Women and International Migration*, 2004; Global Commission on International Migration, *Gender and migration*, September 2005.

⁴³ For an overview of cases of abuse-related migration, see: Jolly, S., *Gender and Migration*, Overview Report. BRIDGE, UK.

⁴⁴ Both researchers and practitioners give account of the difficulties faced by foreign domestic workers in the Gulf countries.

⁴⁵ UNFPA, State of the World Population, op. cit.

⁴⁶ International Labour Organization, *Migration and child labour. Exploring child migrant vulnerabilities and those of children left behind*. Working Paper by Hans van de Glind, September 2010.

⁴⁷ UNFPA State of World Population, op. cit.; GMG, *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Declaration of Human Rights*, 2008, p. 46.

⁴⁸ Report of the former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, 14 May 2009 (A/HRC/11/7), para. 26; PICUM, *Strategies to End Double Violence Against Women: Protecting Rights and Ensuring Justice*, 2012.

⁴⁹ Cortés, R., 2011, op cit., p. 5.

⁵⁰ General Comment 1 on Migrant Domestic Workers, Committee on the Protection of the Rights, of all Migrant Workers and Members of Their Families, 23 Feb. 2011. In 2011 governments, trade unions, and employer organizations that make up the ILO adopted the Convention on Decent Work for Domestic Workers, which establishes the first global standards for domestic workers.

⁵¹ General Recommendation No. 26 on Women Migrant Workers, Committee on the Elimination of Discrimination against Women, 5 December 2008 (CEDAW/C/2009/WP.1/R).

⁵² Migration policies must be consistent with State obligations under relevant ILO Conventions.

⁵³ They are: The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol on the Involvement of Children in Armed Conflict. The General Assembly adopted on 19 December 2011 the third Optional Protocol to the Convention on the Rights of the Child, which establishes a communications procedure for violations of children's rights.

⁵⁴ All countries except for Somalia, the United States of America and South Sudan.

⁵⁵ General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin, Committee on the Rights of the Child, Committee on the Rights of the Child, 2005 (CRC/GC/2005/6). See also jurisprudence of the Inter-American Court of Human Rights.

⁵⁶ General Comment No. 20 on *Non-discrimination in economic, social and cultural rights (art. 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights)*, CESCR, 2 July 2009 (E/C.12/GC/20), paragraph 30. Also, see Advisory Opinions of Inter-American Court of Human Rights cited below.

⁵⁷ See supra *Study of the Office of the United Nations High Commissioner for Human Rights*.

⁵⁸ See supra G.C. No. 6, CRC Committee, para. 18.

⁵⁹ See supra G.C. No. 6, CRC Committee, para.12.

⁶⁰ Ibid.

⁶¹ See supra G.C. No. 6, CRC Committee, para. 20

⁶² See supra G.C. No. 6, CRC Committee, para. 19.

⁶³ Article 9 CRC states that separation, against the child's wishes must only occur when 'necessary for the best interests of the child', and indeed such necessity is to be determined by competent authorities in accordance with applicable law and procedures and subject to judicial review.

⁶⁴ See supra G.C. No. 6, CRC Committee, para. 86.

⁶⁵ General Comment No. 12 on The Right of the Child to be Heard, Committee on the Rights of the Child, 20 July 2009 (CRC/C/GC/12).

⁶⁶ *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems*, UNICEF 2007.

⁶⁷ These States are Belgium and the Cook Islands. In its Concluding Observations, the Committee on the Rights of the Child has recommended that both Belgium and the Cook Islands speed up the process of withdrawing their respective declaration and reservation regarding Article 2. Belgium: Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Fifty-fourth session, Concluding observations: Belgium (Combined Third and Fourth Periodic Reports), 2010, available at: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.OPSC.BEL.CO.1.doc>; Cook Islands: Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Fifty-ninth session, Concluding observations: Cook Islands (Initial and Addendum Reports), 2012, available at: http://www.crin.org/docs/CRC_C_COK_CO_1.pdf. Furthermore, Japan has a declaration interpreting article 9.1 - that a child should not be separated from their parents except when it is in their best interests – as not applying in cases of deportation in accordance with migration law.

⁶⁸ ICESCR, Article 2, and CESCR, General Comment 3 on the Scope of States Obligations.

⁶⁹ General Recommendation No. 26 on Women Migrant Workers, CEDAW (see above).

⁷⁰ Other basic documents include: the American Declaration of the Rights and Duties of Man and the Inter-American Convention against Torture, the additional Protocols to the American Convention on Economic, Social and Cultural rights and on the Death Penalty, and, the Inter-American Conventions on violence against women, forced disappearance of persons and discrimination against persons with disabilities.

⁷¹ See: www.hrcam.org for a comprehensive compilation of these documents.

⁷² The European Court of Human Rights stated that due consideration should be given to cases where a parent has settled in a country of destination and wishes to be reunited with their child who is temporarily in the country of origin. In addition, it may be unreasonable to force the parent to choose between giving up the position acquired in the country of settlement or to renounce the right to be reunited with the child.

⁷³ See: http://www2.ohchr.org/english/issues/escr/docs/OHCHR_ESCR_Bulletin6-August2011.pdf In February 2012, the UNICEF Regional Office for Latin America and the Caribbean (UNICEF-TACRO) submitted an *Amicus Curiae* to the Inter-American Court of Human Rights. The legal brief requests the regional court to issue an advisory opinion in regard to the obligations of States Parties to the American Convention on Human Rights and other related regional treaties with respect to migrant children. The Court was asked to establish specific legal standards regarding, inter alia: procedures to determine the

circumstances that call for special protection measures for migrant boys, girls and adolescents; a system of guarantees to apply in migration proceedings involving children; standards for the application of precautionary measures in migration procedures based on the principle of non-detention of migrant children; state obligations regarding migrant children in custody; due process guarantees related to children deprived of liberty in migration procedures; the principle of non-refoulement in regard to migrant children; procedures for the treatment of children seeking asylum or refugee status; and the child's right to family life in cases when parents are deported. OHCHR's Regional Office for South America also submitted information to the Court.

⁷⁴ Functions of the African Court of Justice and Human Rights include: collecting documents and undertaking studies and research on human and peoples' rights matters in Africa; establishing rules aimed at solving the legal problems relating to human and peoples' rights; ensuring protection of human and peoples' rights; and, interpreting all the provisions of the African Charter on Human and Peoples Rights, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and other legal instruments relating to human rights, to which the States are parties.

⁷⁵ Cissé, H., *The Protection of Fundamental Human Rights of West African Migrants: Possible Recourse in African Regional and Sub Regional Mechanisms*, Justice Without Borders Project, 2010. See: www.jsf-jwb-migrants.org

⁷⁶ See: ICPD Program of Action, Chapter X, paragraph 12. Available at: <http://www.un.org/popin/icpd/conference/offeng/poa.html>

⁷⁷ Ibid, Chapter X, paragraph 12.

⁷⁸ Ibid, Chapter X, paragraph 18.

⁷⁹ The United Nations Institute for Training and Research (UNITAR) has been executing the International Migration Policy Program, an inter-agency program co-sponsored by ILO, IOM, the United Nations Population Fund (UNFPA) and UNITAR. The aim has been to strengthen the capacity of Governments to manage migration and to reach a shared understanding of migration policy issues. The program organizes regional conferences, seminars and training workshops for concerned senior government officials.

⁸⁰ *International Migration and Development*. Report of the Secretary-General. A/65/203. 2 August 2010.

⁸¹ For more information about the Global Migration Group, see: <http://www.globalmigrationgroup.org>

⁸² Ibid.

⁸³ Ibid.

⁸⁴ The Global Forum on Migration and Development is a voluntary, intergovernmental, non-binding and informal consultative process that emerged from the 2006 High-level Dialogue on International Migration and Development.

⁸⁵ Proceedings, outcomes and recommendations of the GFMD 2010 Mexico are available at: <http://gfmd.org/en/meetings/2010>. The program of the GFMD 2011 Switzerland *Concluding Debate* is available at: https://wpw.gfmd.org/documents/switzerland/Annex-1_GFMD-2011-Concluding-Debate-Program_en.pdf, and the program of the GFMD 2011 *Civil Society Days* at: https://wpw.gfmd.org/documents/switzerland/gfmd_swiss11_civil_society_program.pdf.

⁸⁶ See: *Mobilizing Migrant Community and Civil Society Voices*, Report for the Second Global Forum on Migration and Development: The Migrant Forum in Asia (MFA) Experience, MFA 2009.

⁸⁷ UNICEF Child Protection Strategy, E/ICEF/2008/5/Rev. 1, 20 May 2008.

⁸⁸ *Past Trends towards Increasing 'Criminalization' of Irregular Migration Continue; Migrants Face Racism, Abuse, Appalling Housing Conditions, UNGA Third Committee Told*, 22 Oct. 2010. Press release available at: <http://www.un.org/News/Press/docs/2010/gashc3986.doc.htm>

⁸⁹ UNICEF Factsheet on the Impact of the Economic Crisis on Migration and Children's Rights, 2009.

⁹⁰ *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, ARC and Colorlines 2011 (Available at: http://www.annarbor.com/ARC_Report_Shattered_Families_FULL_REPORT.pdf). This report, published in November 2011, estimates that nearly 5,100 children currently in foster care in the USA are children of deported or detained parents. See also: <http://www.fathersandfamilies.org/2012/05/16/mi-dhs-takes-children-from-undocumented-guatemalan-dad/> and <http://annarbor.com/news/deported-fathers-children-to-be-listed-on-state-adoption-website/?cmpid=mlive-@mlive-news-a2>

⁹¹ Ibid.

⁹² Report of the former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, 14 May 2009 (A/HRC/11/7), para. 25.

⁹³ Working Group on Arbitrary Detention, Annual Report, 5 January 2010 (A/HCR/13/30).

⁹⁴ Report of the Special Rapporteur on Human Rights of Migrants, Francois Crépeau, 2 April 2012 (A/HRC/20/24).

⁹⁵ High Commissioner for Human Rights, Statement on International Migrants Day, 18 December 2011, available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E>

⁹⁶ See OHCHR-UNHCR *Global Roundtable on Alternatives to Detention*, 11-12 May 2011, informal summary conclusions available at <http://www.ohchr.org/EN/Issues/Migration/Pages/Roundtable.aspx>

⁹⁷ See supra, High Commissioner for Human Rights, Statement on International Migrants Day, 18 December 2011.

⁹⁸ The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (the Bali Process) is co-chaired by the Governments of Indonesia and Australia. The Bali Process brings together participants to work on practical measures to help combat people smuggling, trafficking in persons and related transnational crime in the Asia-Pacific region. Initiated at the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime held in Bali in February 2002, the Bali Process involves 46 members including the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM). There are a further 29 observers to the process. For more information, including Bali Process Members, see:

<http://www.baliprocess.net> and <http://www.baliprocess.net/index.asp?pageID=2145831409>

⁹⁹ The Puebla Process, also known as Regional Conference on Migration (RCM), was established in 1996, as a result of the Tuxtla II Presidential Summit in February 1996, to provide an inter-governmental regional migration forum for the exchange of information, experiences and best practices, and overall consultation to promote regional cooperation on migration within the framework of economic and social development for the Americas. For more information, including RCP Members, see:

<http://www.rcmvs.org>

¹⁰⁰ Hansel, R., *An Assessment of Principal Regional Consultative Processes on Migration*. IOM Research Series, 2010.

¹⁰¹ Article 9 CRC states that separation, against the child's wishes, must only occur when 'necessary for the best interests of the child', and indeed such necessity is to be determined by competent authorities in accordance with applicable law and procedures and subject to judicial review (see above).

¹⁰² For example in Italy, see Rozzi, E., op. cit., p.186.

¹⁰³ It should be applied, for example, when: issuing a resident permit to an unaccompanied child; repatriating children; facilitating family reunification in countries of origin, transit and destination; designing child protection programs for migrant children and programs to ensure their access to economic, social and cultural rights; designing regularization programs; considering detention or deprivation of liberty of the migrant child; and, designing child-friendly programs for consular services.

¹⁰⁴ *Guidelines on the Formal Determination of the Best Interests of the Child*, Provisional Release, UNHCR, May 2006.

¹⁰⁵ Technical Note, *Human Rights Standards Relevant to Repatriation Procedures of Unaccompanied and Separated Migrant Children*, UNICEF and National University of Lanús, Argentina, 2011.

¹⁰⁶ Recent examples are: Concluding Observations, Spain, CRC/C/ESP/CO/3-4, 3rd November 2010, §27; b) Concluding Observations, Japan, CRC/C/JPN/CO/3, 22 June 2010, §78. c) Concluding Observations, Belarus, CRC/C/BLR/CO/3-4 2011§ 68.

¹⁰⁷ See supra G.C. No. 6, CRC Committee, para. 20.

¹⁰⁸ European Commission (2010), *European Commission calls for increased protection of unaccompanied minors entering the EU*, Brussels, 6 May 2010, IP/10/534.

¹⁰⁹ See supra, Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration, A/HRC/15/29, 5 July 2010.

¹¹⁰ See supra, Report of the former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, 14 May 2009 (A/HRC/11/7).

¹¹¹ Article 19, National Immigration Law T.U. 286/98 (Legislative Decree No. 286/1998 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (25 July 1998), Children accompanied by irregular migrant parents or foster persons are entitled to the right to follow the parents/foster persons if they are expelled, but this is a right of the child.

¹¹² There is sufficient case law establishing that this is a breach of the right to family life (Article 8 ECHR). However, in the UK for example, when families do not have legal representation or know their rights, they are sometimes threatened with separation nonetheless, in order to scare them away, or otherwise, as some are desperate enough to agree, since it is easier to accommodate separated children

than whole families. Examples of relevant case law include: *Wallová and Walla v. Czech Republic*, judgment of 26 October 2006 (Application no. 23848/04, para.74-75), *Saviny v. the Ukraine*, 18 December 2008 (39948/06, para. 57), *Havelka and others v. Czech Republic*, 21 June 2007 (23499/06, para. 61), *Moser v. Austria*, 21 September 2006 (12643/02, para. 70, 73).

¹¹³ E.g. see supra, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, ARC and Colorlines 2011, p. 17-21; Kanics, J., "Realizing the rights of undocumented children in Europe" in: Bhabha, J. (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, p. 138; Rozzi, E., "Undocumented migrant and Roma children in Italy: between rights protection and control" in: Bhabha, J. (ed.) op.cit., p.192. Also, procedural safeguards, such as interpretation in court proceedings removing a child from a parent's custody, are not always respected.

¹¹⁴ See: *Amicus Curiae* submitted by UNICEF-TACRO to the Inter-American Court of Human Rights, February 2012.

¹¹⁵ Report of the former Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, 25 February 2008 (A/HRC/7/12).

¹¹⁶ See: http://www.libertysecurity.org/IMG/pdf_eu-ep-detention-centres-report.pdf

¹¹⁷ Article 17 of this Directive states that "Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy" (See: 2008/115/EC, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>).

¹¹⁸ The concept of deprivation of freedom is recorded in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Resolution 45-113 of the UN General Assembly of December 14, 1990, Rule 11b). Furthermore, according the Inter-American Commission on Human Rights deprivation of freedom means "any form of arrest, imprisonment, institutionalization, or custody of a person, for humanitarian reasons, treatment, care, protection, or for crimes and violations of the law, ordered by or under de facto control of a judicial or administrative authority or other authority, whether in public or private institution, which cannot have their freedom of movement. It applies to not just people imprisoned for crimes or violations and breaches of law, whether they were tried or convicted, but also people who are under the custody and supervision of certain institutions such as institutions for children; centers for migrants, refugees, asylum seekers or refugees, stateless and undocumented, and any other similar institution designed for the detention of persons" (IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. March 2008).

¹¹⁹ Even in the case of children in conflict with criminal law (children alleged as, accused of, or recognized as having infringed the penal law) and child recidivists, the Committee of the Rights of the Child has declared that detention should be avoided. See: Committee on the Rights of the Child, General Comment No. 10 on Children's Rights in Juvenile Justice, 2007(CRC/C/GC/10), para 23.

¹²⁰ See supra G.C. No. 6, CRC Committee, para 61.

¹²¹ Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, to the Human Rights Council, 14 May 2009 (A/HRC/11/7) and Report to the General Assembly, 3 August 2009, (A/64/213).

¹²² There are practices in various countries of destination where no precautionary action is taken: whole families are free or placed in open centers while immigration proceedings are pending. (If necessary, simple restriction of movement, in the form of non-custodial measures can be applied)

¹²³ Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, May 14, 2009 (A/HRC/11/7), para 62. This position was reaffirmed in the Report of the Rapporteur the following year August 3, 2010, (A/65/222), para 48.

¹²⁴ See supra, Report of the Special Rapporteur on the Human Rights of Migrants, Francois Crépeau, 2012.

¹²⁵ *Guidelines for the Alternative Care of Children*, Human Rights Council, 15 June 2009 (A/HRC/11/L.13).

¹²⁶ PICUM Submission to the OHCHR Special Rapporteur on Migrants 2012 thematic report on Detention, January 26, 2012.

¹²⁷ Ibid.

¹²⁸ Detailed standards on conditions of detention are set out in the following UN General Assembly Resolutions: (1) Standard Minimum Rules on the Treatment of Prisoners, adopted in 1955, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. (2) Body of Principles for the Protection of All Persons under Any Form of Detention or

Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988. (3) Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

¹²⁹ See supra, Report of the Special Rapporteur of Human Rights of Migrants, Francois Crépeau, to the Human Rights Council, 2012.

¹³⁰ See supra, *Amicus Curiae* submitted by UNICEF-TACRO to the Inter-American Court of Human Rights in February 2012.

¹³¹ See supra G.C. No. 6, CRC Committee, para. 61.

¹³² See supra Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, 4 August 2010 (A/65/222), para. 87

¹³³ The well-established principle of *non-refoulement* in international human rights law applies to all expulsions of nationals or non-nationals, including migrants, whatever their status, as well as refugees to a state, *where the individual or group of individuals' lives or freedom would be threatened on the account of race, religion, nationality or other status or where there are substantial grounds for believing that the individual would be in danger of being subjected to torture or to other inhuman or degrading treatment or punishment*. This principle is absolute and is not subject to any exceptions, whether in law or in practice, and applies to all expulsions, regardless of considerations of national security, or other strong public interests, economic pressures, or heightened influx of migrants. Thus, it applies in cases of repatriation, which means that states shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 (right to life) and 37 (deprivation of liberty) of the CRC, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.

¹³⁴ *UNHCR Guidelines on Determining the Best Interests of the Child*, UNHCR 2008.

¹³⁵ *Silent Harm. A report assessing the situation of repatriated children's psycho-social health*, UNICEF Kosovo, in cooperation with the Kosovo Health Foundation, March 2012

¹³⁶ *Ibid.*

¹³⁷ UNICEF Child Protection Strategy, E/ICEF/2008/5/Rev. 1, 20 May 2008.

¹³⁸ Institute of Gender Studies, *Young Migrants in Secondary Education, Promoting Integration and Mutual Understanding Through Dialogue and Exchange of the Mediterranean* (MIGS), 2011.

¹³⁹ Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante (2009), A/64/213. 3 August 2009.

¹⁴⁰ ICESCR, Article 2, and CESCR Committee, General Comment No. 20, Non-discrimination in economic, social and cultural rights, 2009.

¹⁴¹ *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM 2008. See also supra, Report of the Special Rapporteur of Human Rights, Jorge Bustamante, to the Human Rights Council (A/HRC/17/33).

¹⁴² In Italy, the Security Package establishes that renting a house to irregular migrants carries a penalty of up to three years' imprisonment. In the USA, several states particularly Alabama and Arizona have passed legislation requiring schools to report the immigration status of students and transporting, harboring, or renting property to irregular migrants will be considered illegal.

¹⁴³ See supra, A/HRC/15/29, para. 63.

¹⁴⁴ *Rights of Accompanied Children in an Irregular Situation*, Platform for International Cooperation on Undocumented Migrants (PICUM), Paper prepared for UNICEF Brussels, Nov. 2011.

¹⁴⁵ See the case of *Yean and Bosico v. Dominican Republic (2005)*, where the Inter-American Court of Human Rights referred, inter alia, to the State obligation to guarantee the right of the child to birth registration, which may under certain circumstances include non-national children.

¹⁴⁶ *Rights of Accompanied Children in an Irregular Situation*, Save the Children and Forced Migration Studies Program, 2009; Report of Special Rapporteur on the Human Rights of Migrants, (2009); Inter-American Court of Human Rights, Case Yean and Bosico (2005); *Migration, Children and Human Rights: Challenges and Opportunities*, UNICEF, Final Draft 1 November 2010.

¹⁴⁷ Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante (2009), A/64/213. 3 August 2009, para. 59

¹⁴⁸ Kraler, A., *Regularisations: A misguided option or part and parcel of a comprehensive policy response to irregular migration?* IMISCOE Working Paper 2009, p.28. Regularization is also possible in France after 10 years of continuous residence, or 15 years for students ('Chevènement Law', Loi n° 98-349 du 11 mai 1998 relative à l'entrée et au séjour des étrangers en France et au droit d'asile, published in the Official Journal 12 May 1998, c.f. Karin Sohler, "Country Study: France" in Martin Baldwin-Edwards and

Albert Kraler (eds.) "REGINE Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third country nationals in the Member States of the EU - Appendix A: Country Studies", ICMPD, Vienna, January 2009.

¹⁴⁹ This has been the most significant regularization avenue since 2009 - between 2009 and 2011, 11,016 applications were granted under this procedure, out of 27,668 regularization applications granted in total. In 2011, this criterion represented 43.8% of all positive decisions. While disaggregated data is not available to know how many children were affected by this regularization, the figures from 2011 show that the 2,910 applications granted for "durable local ties" regularised 3,745 people, which gives some indication. Centre for Equal Opportunities and Opposition to Racism, *Annual Report on Migration 2011*, 2012, p.121; Office of Foreigners, *Demandes d'Autorisation de Séjour pour Motifs Humanitaires Données Statistiques – Année d'exercice 2011*.

¹⁵⁰ *New York Times*, "Obama to Permit Young Migrants to Remain in U.S.", 15 June 2012.

¹⁵¹ International Labour Office, *A Global Alliance against Forced Labour: Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* 2005, Report I (B), International Labour Conference, 93rd Session 2005, ILO, Geneva, 2005, pp. 14–15.

¹⁵² UNODC Draft Contribution to *Joint GMG Thematic Report Migration, Youth and Human Rights: Challenges and Opportunities*

¹⁵³ See: www.ilo.org (under "trafficking in persons").

¹⁵⁴ See supra, Report of Regional Seminar on *Children Who Cross Borders in Southern Africa*, Convened by Save the Children UK in collaboration with University of the Witwatersrand, Forced Migration Studies Program, May 25 - 27, 2009 in Johannesburg, South Africa.

¹⁵⁵ Ibid.

¹⁵⁶ See supra G.C. No. 6, CRC Committee, para. 50.

¹⁵⁷ Guideline 8, Special measures for the protection and support of child victims of trafficking, The Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002). Available at: [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/caf3deb2b05d4f35c1256bf30051a003/\\$FILE/N0240168.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/caf3deb2b05d4f35c1256bf30051a003/$FILE/N0240168.pdf)

¹⁵⁸ UNICEF Innocenti Research Centre, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, The United Nations Children's Fund, February 2009.

¹⁵⁹ The Committee on the Rights of the Child has stressed its concern "at the disruption and changes in the family situation due to the high and increasing migration flows and at the high and increasing number of children left behind either by their mother or father working abroad" (Committee on the Rights of the Child, Concluding Observations: The Philippines, CRC/C/PHL/CO/3-4). In the case of Romania, the Committee is concerned "about media reports of several cases of suicide, particularly among children left behind by migrating parents, although statistics on such cases are not systematically collected" (Committee on the Rights of the Child, Concluding Observations: Romania, CRC/C/ROM/CO/4. 2009).

¹⁶⁰ See supra, Report of Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, to the Human Rights Council (A/HRC/11/7 14).

¹⁶¹ Recent work by UNICEF outlines a full methodological guide to gauge the impact of migration on children and women left behind from a social, economic and psychological perspective applying a mixed methods approach through household surveys and focus groups (See: *Research on International Migration and Those Left Behind: A Methodological Evaluation*, UNICEF 2009).

¹⁶² Ibid.

¹⁶³ In its Concluding Observations to Sri Lanka, the CRC Committee emphasized "its deep concern about the physical, psychological and social impact that massive women labor migrations have on the rights and wellbeing of children as most of the over one million women migrants leave behind children, half of whom are under 6 years old....and the Committee remains concerned over the inconsistent implementation of protective safety net programmes and the insufficient coordination amongst child-care authorities to monitor the wellbeing of children of migrant mothers." (Committee on the Rights of the Child, Concluding Observations: Sri Lanka, CRC/C/LKA/CO/3-4)

¹⁶⁴ Shamir, H., *What's the Border Got to Do With It? How Immigration Regimes Affect Familial Care Provision - A Comparative Analysis*. American University Journal of Gender, Social Policy and the Law. 19 Am. U.J. Gender Soc. Pol'y & L. 601.

¹⁶⁵ The CRC Committee has pointed out with concern that many children left behind, particularly girls, "need to take on responsibilities for the household and their younger brothers and sisters owing to, inter alia, [...] the lack of support for these children." (See: Committee on the Rights of the Child, Concluding Observations: Ecuador, CRC/C/ECU/CO/4. 2010).

¹⁶⁶ The CRC Committee has expressed its concern “...about the absence of measures taken to mitigate the effects of migration of parents on children staying behind. The Committee is concerned that the State party does not ensure adequate measures of social and psychological assistance for families, as well as an adequate education for children staying behind...” (Committee on the Rights of the Child, Concluding Observations: Republic of Moldova, E/C.12/MDA/CO/2).

¹⁶⁷ The Global Migration Group (GMG) has identified these children as a vulnerable group and stressed the need for policies that, “take cognizance of how migration affects these children and protect their rights by enhancing access to benefits of migration while simultaneously protecting against vulnerabilities” (See: GMG 2008, *International Migration and Human Rights: Challenges and opportunities on the threshold of the 60th anniversary of the Universal Declaration of Human Rights*, GMG, Par. 53. Geneva). The Human Rights Council has also called upon States to take appropriate measures to promote and protect effectively the rights of children who are left behind in their country of origin by migrating family members (See: Human Rights Council 2009, Twelfth Session, Human rights of migrants: migration and the human rights of the child, Twelfth session, Agenda item 3, Promotion and protection of all human rights, civil, Political, economic, social and cultural rights, including the right to development, A/HRC/12/L.16, Geneva, 2nd October, 2009, Para. 3-4).

¹⁶⁸ See supra, Report of Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, to the Human Rights Council (A/HRC/11/7).

¹⁶⁹ *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, 2008.

¹⁷⁰ Ibid.

¹⁷¹ *Children, Adolescents and Migration: Filling the Evidence Gap*. UNICEF, UNDESA, SUSSC/UNDP and University of Houston, 2010.

¹⁷² The UN Global Migration Database (UNGMD) has been developed to collect data on the international migrant stock by age, sex and country of destination, birth and citizenship. A web-based interface of the UN Global Migration Database was launched in December 2008 and is available at:

<http://esa.un.org/unmigration>.

¹⁷³ See supra G.C. No. 6, CRC Committee, para. 82, where it is explicitly stated that “Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child.”

¹⁷⁴ See: UN General Assembly (2010), *Guidelines for the Alternative Care of Children*.

On alternative care procedures, article 25 of the CRC asserts: “States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement”.

¹⁷⁵ The report *Migrants Count: Five Steps Toward Better Migration data*, published by the Center for Global Development in 2009, and endorsed by a wide number of UN Agencies, provides succinct and clear guidelines to improve the quality and availability of gender and age disaggregated migration data in line with what the CRC Committee has noted regarding the collection of sufficient and reliable data on children as an essential part of implementing the CRC.