

**ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF
MIGRANT CHILDREN AND CHILDREN BORN TO MIGRANT PARENTS:
Challenges, Good Practices and Recommendations**

United Nations Children's Fund (UNICEF)
&
National University of Lanus, Argentina

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ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF MIGRANT CHILDREN AND CHILDREN BORN TO MIGRANT PARENTS: CHALLENGES, GOOD PRACTICES AND RECOMMENDATIONS*

I. Introduction

Ensuring that all migrants, irrespective of their migration status, are free to enjoy their economic, social and cultural rights (ESCR) is a fundamental challenge for the universality of human rights proclaimed in 1948. The vast majority of children who move internationally, whether accompanied by their families or as unaccompanied minors, are seeking greater enjoyment of their rights. In this regard, it is important to remember that the deprivation of ESCR in countries of origin is a root cause of migration.

Access to ESCR in destination countries is both a key necessity and aspiration of migrants, including migrant children. However, as will be described below, children face a wide range of constraints and obstacles to the full enjoyment of these rights. Migrant children and women are especially vulnerable to the denial of their human rights, particularly when they are undocumented or, in the case of children, when they are unaccompanied. These restrictions occur despite the widespread recognition of the ESCR granted to all human beings irrespective of age or gender. As OHCHR has emphasized, states, through their voluntary accession to human rights treaties, agree to protect the fundamental civil, economic, social, and cultural rights of all migrants in, irrespective of immigration status (OHCHR, 2008, § 101).

When it comes to children, it has been emphatically stated in the Convention on the Rights of the Child (CRC) that all human rights, including ESCR, must be protected, respected, and fulfilled for all children within the jurisdiction of states party to the CRC. The CRC Committee and other experts have asserted that the enjoyment of rights stipulated in the CRC is not limited to children who are nationals of a state. These rights must be available to all children, including asylum seeking, refugees, and migrant children, irrespective of their nationality, immigration status, or statelessness.¹ Regarding unaccompanied children, the CRC Committee has clearly stressed that states must ensure a child's full access to social rights, such as education (both formal and informal, including vocational training), an adequate standard of living, and health care, regardless of their immigration status.² Similarly, the Committee on ESCR has affirmed that nationality is not a sufficient ground to deny access to ESCR. Thus, all children within a state, including undocumented children, have the right to education, adequate food, and affordable

* This document, along with a set of reports recently produced by UNICEF on children, migration, and human rights (in partnership with the National University of Lanús, UNLa), is sent to the OHCHR in order to provide inputs for the upcoming Annual Report of the Special Rapporteur on the Human Rights of Migrants, to be submitted next June 2010 before the Human Rights Council. These notes summarize some of the main findings and conclusions extracted from research, studies, reports, and country visits made by UNICEF and UNLa.

¹ CRC, General Comment No. 6 (2005), § 12; Touzenis-IOM (2008, § 17).

² CRC, General Comment No. 6 (2005), § 40-49.

health care. The rights enshrined in the International Covenant on Economic and Social Rights apply to everyone, including migrants, regardless of legal status and documentation.³

Despite these obligations, migrants are routinely victims of a wide range of constraints to their economic, social, and cultural rights. Migrants may be subjected to rights deprivations regarding education, health care, housing, and social security, among others, based on their condition as non-nationals or their immigration status (especially in the case of undocumented migrants⁴). Children, in particular, have been targets of such deprivations. Recommendations made by various UN Treaty Bodies concerning the constraints on the rights of children in the context of migration (especially in destination countries) are evidence of the extent of existing challenges around the world.⁵

Before analyzing these constraints and examining some challenges and recommendations to address them, it is important to consider a key aspect regarding migrant children and ESCR. According to UNICEF DPP and the University of Lanús Centre for Human Rights, there is an intrinsic relationship between social rights and achieving social integration in the host society. In other words, social cohesion and equitable human development, as well as democracy and rule of law, are reinforced through the protection and realization of social rights for all individuals in society. This must occur without discrimination based on nationality or immigration status, and must take into account child and gender perspectives.⁶ Moreover, ensuring the enjoyment of ESCR for all children, including migrants, irrespective of immigration status, represents a *sine qua non* condition to assure sustainable human development in any society. This has been reinforced by the CRC Committee, which has observed that the denial of the ESCR of migrant children, particularly undocumented children and asylum-seekers, hampers social integration, social progress, and justice.⁷

II. Challenges and Good Practices Concerning ESCR of migrants, especially children

This section highlights what UNICEF has identified as some of the main obstacles and constraints faced by migrants in the enjoyment of their ESCR, with a particular focus on children. In particular, the

³ CESCR, General Comment No. 20 (2009), *Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2 July 2009, § 30.

⁴ The Global Migration Group has pointed out that vulnerability of undocumented migrants “is not a fact of nature, but the result of social, cultural, economic and political factors that need to be addressed, including: inequalities, marginalization, lack of access to resources and information, lack of knowledge and skills, etc. (...) A holistic approach that applies human rights standards to both the fundamental causes and impacts of irregular migration may, in the long run, reduce human rights violations against irregular migrants by reducing their desperation and vulnerability” (GMG, 2008:81).

⁵ See www.hrcam.org, a database elaborated by UNICEF and the National University of Lanús, which has compiled all the recommendations of UN Committees for the last ten years, on children, migration, and human rights.

⁶ UNICEF DPP, *Migration, Children, and Human Rights: Challenges, Opportunities, and Recommendations*, New York, Winter 2010.

⁷ CRC (2009 and 2004), *Concluding Observations: France, CRC/C/FRA/CO/4*, 11 June 2009, § 30; CRC/C/15/Add.240, 30 June 2004, § 18.

following are some of the main problems and constraints faced by migrants, in relation to their ESCR, in destination countries.

Legislative restrictions on ESCR of migrants (particularly undocumented migrants)

In many countries, there are often laws, decrees, and administrative regulations that either deny some ESCR or impose arbitrary restrictions and unequal conditions on these rights, based on nationality and immigration status. For example, social rights, such as the right to health care⁸, are denied or restricted for some migrants, especially those without legal residency. Restrictions are also evident with regard to the education of undocumented migrant children. While legislation in most states does not establish a formal restriction, some states restrict access practically to education for undocumented migrant children. In other states, where laws do not explicitly mention migrant children, educational constraints and abuses stem from the irregular practices and lack of policies in these states.⁹

Despite commitments assumed through international treaties, only a few countries, such as Argentina, formally recognize the ESCR of all migrants, including undocumented migrants (see Box 1 for an example of good practice in Argentine Migration Law).

Right to social rights, education and health care of undocumented migrants

Migration Law, Argentina (No. 25.871, 2004):

ARTICLE 6 - The State, within its entire jurisdiction, will ensure equal access for immigrants and their families to the same conditions of protection, shelter, and rights enjoyed by nationals, particularly in reference to social services, public goods, health, education, justice, labor, employment and social security.

ARTICLE 7 - Under no circumstance shall the irregular status of an immigrant prevent his or her admission as a student to an educational institution, whether public or private, national, provincial or municipal, primary, secondary, tertiary or university. The authorities of educational institutions should provide guidance and advice on the procedures necessary to remedy the effects of irregular migration.

ARTICLE 8 – Foreigners shall not be denied nor restricted access to the right to health, social care and medical care, regardless of their immigration status. The authorities of health facilities should provide guidance and advice on the procedures necessary to remedy the effects of irregular migration.

⁸ For instance, regarding normative restrictions on undocumented migrants' access to health care in the USA, see Chesler (2008). Regarding legal restrictions on medical attention beyond emergency health care in some European countries, see Médecins du Monde (2009) and Huma Network (2009).

⁹ See CERD (2007), Concluding Observations: New Zealand, CERD/C/NZL/CO/17, § 23. See also PICUM (2009:14-32).

Absence of policies meant to ensure, both in law and in practice, the ESCR of all migrants, regardless of their immigration status

Although legislation may not contain a specific restriction on ESCR, based on nationality or immigration status, in many destination countries (involved in either South-South or South-North migration) there is a general lack of migration related public policies beyond policies specifically targeted at controlling migration. The absence of policies aimed at the integration of migrants in a host society not only diminishes migrants' contributions to development, but also generates rights violations and social exclusion. This is particularly true of rights-based policies capable of preventing discrimination against migrants and ensuring their effective, equal, and full integration.

In some countries, national policies or practices impede the birth registration of children born to migrant parents in cases where one or both parents are migrants and especially if one or both parents are undocumented. This violation of basic child rights—to birth registration, a name, and identity—makes access to other fundamental rights impossible, such as access to education and health care.¹⁰

Spain is an example of a good practice in the area of access to ESCR by undocumented migrants—all migrants are entitled to register before local government's registers, which is a requirement for, *inter alia*, access to social services such as education and health care. Some political parties at both the local and national level have recently proposed that this register should only be available to nationals and migrants who demonstrate legal residency. The government has rejected this proposal. In addition, the policy would have been unconstitutional given a 2007 Constitutional Court decision that stated that social rights (such as education, freedom of association, unionization and the right to strike) must be accessible to undocumented migrants.¹¹

Some states have increasingly adopted policies that reduce the access of migrants to ESCR, especially undocumented migrants

Recent discussions and initiatives in different countries may result in the violation of the ESCR of migrants. ESCR are being threatened through a strict economic approach to social rights, which cannot legitimate discriminative policies against a particular social group such as undocumented migrants¹², or through the increased politicization of immigration issues.

In this regard, policies aimed at improving the ESCR of all individuals may exclude undocumented migrants from obtaining access to such services. For example, recent discussions on who would be eligible to partake in a national health care system in the United States suggest that undocumented

¹⁰ See, *inter alia*, Human Rights Watch (2008) report on children born in China from North Korean mothers; and the Inter-American Court of Human Rights (2005), on its decision about children born in Dominican Republic from Haitians parents. See also CRC (2007), Concluding Observations: Egypt, CMW/C/EGY/CO/1, § 34-37.

¹¹ Constitutional Court, Spain, Judgment 236/2007, 7 November 2007.

¹² See Committee on Economic, Social, and Cultural Rights, CESCR (2009 and 1990), General Comment No. 20, and General Comment No. 3, respectively.

migrants would be denied access. Furthermore, new political threats such as xenophobic speech may lead to the increased restriction of migrants' ESCR, including children's access to health care and education.¹³

The lack of accurate and updated data (especially rights-based indicators, including age and gender dimensions) hinders the design, implementation, and monitoring of public policies meant to protect the ESCR of all migrants

In order to develop public policies that effectively ensure the protection of the basic rights of all members of society, states need to periodically produce accurate population data that takes into account all social groups. In this regard, it is essential to have disaggregated indicators on the status of the ESCR of all individuals, including migrants, irrespective of their migration status.

The Inter-American Commission on Human Rights has developed *Guidelines for the preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*¹⁴ (see **Recommendations** section for examples of these indicators). The Commission identifies the starting point as *the situation of structural inequality* that encompasses vast social groups in the Americas, particularly women, indigenous peoples, and undocumented immigrants. Furthermore, indicators in each state should consider the groups and sectors that endure situations of severe inequality, which condition or limit the possibility for these individuals to enjoy their social rights.¹⁵ Likewise, the Committee on the Rights of the Child, in its General Comments on Unaccompanied Children, has stated that the development of a detailed and integrated system of data collection for unaccompanied and separated children is a prerequisite for the development of effective policies that permit the full implementation of the rights children.¹⁶

Notwithstanding this, many countries do not currently have a policy to develop indicators on the ESCR of all individuals. Furthermore, many states that do have such policies fail to include migrants, particularly undocumented migrants, in data gathering programmes.

The lack of a child's perspective, in the vast majority of migration laws and policies, negatively affects the rights of children, including their ESCR

It has increasingly been shown that most countries have not considered a child's perspective within their migration laws and policies (UNICEF-UNLa, 2010; Special Rapporteur on the Human Rights of Migrants, 2009). Similarly, childhood policies in transit and destination countries have not properly taken into

¹³ See the case of Spain, above mentioned. The recent ban of minarets in Switzerland is another example of these threats. See also Macconell (2008) on xenophobia and restrictions on social services to migrants in South Africa.

¹⁴ IACHR, *Guidelines for preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.132, Doc. 14, 19 July 2008.

¹⁵ *Ibidem*, § 53.

¹⁶ CRC, General Comment No. 6 (2005), § 99.

account the particular needs of migrant children or children born to migrants. This lack of consideration for children impacts their enjoyment of ESCR, which according to CRC should be ensured to every child in society, regardless of his or her nationality and immigration status (CRC Committee, 2005, § 12). Accordingly, in order to address restrictions on rights to education, health care, or any other ESCR based on children's immigration status or the status of their parents, there must be full consideration for a child's perspective within migration policies and a migrant dimension within childhood policies. Additionally, both should adopt a gender equality approach.

Absence of policies concerning unaccompanied children aimed at addressing their particular needs, in order to ensure their human rights, as well as to adopt effective short and long term solutions

With regard to the concerns mentioned in the previous point, unaccompanied children are in a particularly vulnerable situation, which usually results in the denial of, or constraints on, their ESCR. The CRC Committee has affirmed that states' objectives and policies concerning migration control should not deny children their human rights, even if they have breached migration law or lack a particular document (CRC Committee, 2005). However, international agencies (UNICEF South Africa, 2009), civil society organizations (PICUM, 2009; Save the Children, 2009), and UN Committees (see www.hrcam.org) have documented restrictions on the ESCR of unaccompanied children.

Restrictions and violations in practice

Even when legislation and policies prohibit the restriction of migrants' ESCR or discrimination against migrants with regards to ESCR, many states employ practices by which migrants are either denied or restricted from accessing human rights, due to their immigration status.¹⁷ For instance, restrictions on children have been observed in several countries, which limit children's access to education, either because they or their parents do not have legal residency or because they do not have proper identification documents.

Human Rights Treaty Bodies¹⁸, UN agencies¹⁹, and civil society organizations²⁰ have widely verified irregular practices that lead to the deprivation of the rights of undocumented children. These practices are rooted in a variety of factors, which are often complementary, such as: xenophobic attitudes of the host population and/or public authorities; inaccurate information and prejudices about the impact of migration on the host society; lack of training of civil servants, particularly regarding human rights; and

¹⁷ See, inter alia, in Human Rights Watch (2009), existing obstacles to antiretroviral treatment by undocumented migrants with HIV in South Africa and Thailand.

¹⁸ See in www.hrcam.org the extent and variety of irregular practices on ESCR of migrant children in many countries around the globe, especially against female and undocumented migrant children.

¹⁹ See Regional Thematic Working Group on International Migration, including Human Trafficking (2008), on restrictions to migrant children regarding education and other social rights in different Asian countries.

²⁰ Among many reports on this, see PICUM, 2008.

the absence of public policies meant to disseminate information on states' human rights obligations and the rights of migrants. Moreover, these factors are aggravated because of gender discrimination. Fundamentally, the denial of, or restrictions on, the rights of migrants through irregular practices is evidence of the lack of policies, mechanisms, and bodies aimed at monitoring human rights abuses.

Disparities between the well being of migrants and nationals due to constraints on the enjoyment of ESCR

As a consequence of the variety and extent of restrictions on the ESCR of migrants, particularly undocumented migrants, their wellbeing is usually among the poorest within the host society. Indeed, experts from Human Rights Treaty Bodies have stated that in many destination countries, migrant children and children born to migrant parents suffer significant disparities due to the denial of their social rights.²¹

Beyond constraints on their social rights (such as education and health care), migrants (both documented and undocumented) also experience constraints on their ESCR in the context of labour. Factors such as xenophobia, inequities in education and training opportunities in the host society, labour exploitation, discrimination in labour conditions, as well as distinctions and obstacles based on immigration status, contribute to disparities between the enjoyment of ESCR by migrants and host country nationals. Such constraints not only affect the ESCR of migrant workers, but also the rights of their children.

According to the Inter-American Court of Human Rights, a person who enters a state and acquires employment is entitled to human rights in their place of employment without any form of discrimination. Likewise, the Court states that the migratory status of a person can never be a justification for depriving someone of the enjoyment and protection of human rights, which includes those rights related to employment. Therefore, states must ensure strict compliance with labour standards in order to provide the best possible protection for all workers, without discrimination based on nationality, social, ethnic or racial origin or immigration status. Consequently, states have the obligation to take any necessary administrative, legislative, or judicial measures to correct, *de jure*, any discriminatory situations and eradicate any practices in violation of the human rights of migrant workers by a specific employer or group of employers at the local, regional, national and international level.²² Additionally, to ensure strict compliance with labour standards, states must undertake to effectively monitor employers.

²¹ CRC (2009), Concluding Observations: Sweden, CRC/C/SWE/CO/4, § 52-53; CRC (2009), Concluding Observations: France, CRC/C/FRA/CO/4, § 78-79; CERD (2008), Concluding Observations: Dominican Republic, CERD/C/DOM/CO/12, § 18; CRC (2003), Concluding Observations: Italy, CRC/C/15/Add.198, § 20- 21.

²² Inter-American Court of Human Rights (2003, § 133, 134, 149).

Xenophobia and ESCR

As has been noted in the points above, xenophobia and racism affect the ESCR of migrants in many ways, including: (i) the establishment of laws and public policies based in xenophobia that deny or arbitrarily restrict the human rights of migrants (documented or undocumented); (ii) the dissemination and perpetuation of the wrongful belief that irregular migrants are not entitled to social rights, such as education and health care; (iii) restrictions rooted in xenophobia on migrants' access to public services, including children's access to education; (iv) negative impacts of xenophobia on the educational performance of migrant children and adolescents and children and adolescents born to migrant parents, which may result in higher dropout rates; and (v) negative impacts of xenophobia on migrant adolescents' access to employment and vocational training. It is important to bear in mind that within the current context of the economic crisis, xenophobia and discrimination have increased, as have the corresponding negative impacts on the economic and social rights of migrant workers and their families (Taran-ILO, 2009).

Impact of migration control policies, deportation, and controls in social service delivery (health, education, etc.)

Other threats to the enjoyment of human rights by migrants, including ESCR, are linked to migration control mechanisms. Many migration laws and policies, including some recently adopted, oblige various civil servants and individuals to report undocumented migrants to migration authorities.²³ Some of these provisions are imposed on health care and education workers, as well as landlords who would like to rent housing to migrants. Consequently, these provisions inhibit migrants from seeking medical assistance, sending their children to school, or obtaining a place of residence.

In some cases, this obligation to denounce undocumented migrants also applies to members of the judiciary, therefore prohibiting migrants from standing before a judge in order to defend their human rights. Therefore, migrant workers' access to justice is limited, in particular in the case of migrants' labour rights). According to the Inter-American Court of Human Rights, "at times, undocumented migrant workers cannot even resort to the courts of justice to claim their rights owing to their irregular situation. This should not occur; because, even though an undocumented migrant worker could face deportation, he should always have the right to be represented before a competent body so that he is recognized all the labour rights he has acquired as a worker" (ICHR, 2003, § 159).

Additionally, recent laws that criminalize irregular entry into a country or irregular stay (defined as the lack of, or expired, legal residency) constitute a clear threat to the social rights of migrants, who are unable to enjoy these rights for fear of being detained or convicted while seeking access to social

²³ See UNICEF TACRO–UNLa (2010), on child rights and migration policies in Latin America and Caribbean countries; See also HUMA Network (2009) on European countries.

services.²⁴ Moreover, existing legislation criminalizes organizations that offer aid to migrants, even those who are living in particularly vulnerable conditions.²⁵ Instead of protecting the rights of people in vulnerable situations, as international human rights standards demand, these measures increase the vulnerability of certain individuals, particularly undocumented migrants, who are further marginalized and denied access to basic rights. Besides, these constraints obstruct social cohesion and integration, as well as impede human development in both short and long-term.

Family reunification policies, restrictions on the right to family life, and its impact on ESCR

Related to the point above on migration control policies, many countries have increasingly restricted family reunification mechanisms, including at the regional level.²⁶ Furthermore, the regulation and interpretation of the right to family life within migration control policies, by administrative and judicial bodies, have also become increasingly restrictive. These limitations affect the ESCR of migrants, particularly children and undocumented migrants.

In particular, obstacles to family reunification may contribute to the irregular entry of children (if an unaccompanied child is seeking to reunite with his or her parents in destination) or may extend the length of irregular residence (if a family is applying for family-based residence within the host country). This situation can prolong or increase social exclusion and the deprivation of social rights. Furthermore, it can exacerbate the difficulty migrant adolescents and adults face in accessing employment which, if accessed, could improve the well being of migrants and their families, especially children.

Moreover, the ESCR of children may also be impacted by other policies related to migration control, such as the absence or restrictive interpretation of their right to family life within the deportation process of one or both of their parents. Indeed, states usually neglect to consider the rights of children when ruling on the deportation of their parents. A child's right to family life should always be considered within deportation proceedings, even if the deportation is based on an administrative offence, such as expired residence. The impact of such measures on the ESCR of children is generally ignored in this context despite the fact that considering their best interest would lead to the granting of residence to their parents and ensures the child's rights and development.

²⁴ For instance, see Italy, *Disposizioni in materia di sicurezza pubblica*, Legge 15 luglio 2009, n. 94, Gazzetta Ufficiale n. 170, 24 luglio 2009, <http://www.parlamento.it/parlam/leggi/09094l.htm>.

²⁵ See Huma Network - Médecins du Monde (2009), on this kind of regulations in countries of the European Union.

²⁶ See, for instance, restrictions included in the EU *Directive on the Right to Family Reunification of Third Country Nationals* (2003/86/EC).

Deprivation of the social rights of migrant children in detention centres

While contrary to international human rights standards, many migrant children (unaccompanied and accompanied) are detained for breaching immigration law, such as irregular entry or stay. Their enjoyment of ESCR is often constrained during detention due to a general absence of policies meant to ensure that ESCR are upheld. This includes a lack of programmes that aim to give children access to health care (including mental health care facilities), education, and other social rights within migration-related detention centres.²⁷ States should develop mechanisms, particularly monitoring mechanisms, to ensure that ESCR are upheld in these centres. In addition, states should house children in centres that, as opposed to prison-like facilities, are designed with a social-protection approach.

Child repatriation policies and ESCR

As mentioned above, in most destination countries, deportation and repatriation measures do not incorporate a child perspective or account for the economic or social rights of children. For example, children are often deported based on breaches of migration law without consideration for their best interests or their specific rights and needs. In this regard, it is important to highlight that the CRC Committee has stated that repatriating unaccompanied children to their country of origin should not take place if it would be in violation of the fundamental human rights of the child. This requires that repatriation only occur if it is in the best interest of the child. This in turn requires taking into account the socio-economic conditions awaiting the child upon return. The CRC Committee affirmed that, “[n]on-rights-based arguments, such as those relating to general migration control, cannot override best interests.”²⁸ See also the section above for a related discussion on family reunification.

Absence of regularization programmes

The denial of ESCR to migrants, particularly undocumented migrants, may last for many years due to the following factors: (i) the lack of legislative and policy reform aimed to ensure social rights to all individuals within a state’s jurisdiction without discrimination; and (ii) the absence of regularization programmes, either permanent regularization avenues or extraordinary regularization plans, which would allow migrants to obtain authorization for residence, including a work permit.

The OHCHR has advocated for regularization programmes stating that, “migrant regularisation programmes typically have two complementary goals: on the one hand, they incorporate workers who are in the ‘underground’ economy into the formal economy, and so increase their contributions to national tax and social security revenues; on the other hand they are designed to limit worker exploitation and abuse. This approach recognises that migrants who do legal and decent work are likely to contribute more to development than those who are economically exploited and socially excluded”

²⁷ See UNICEF TACRO – UNLa (2010); and UNICEF-UNLa, www.hrcam.org.

²⁸ CRC, General Comment No. 6 (2005), § 84, 86.

(OHCHR, 2008, § 47). Thus regularization programs have clear benefits for both the host country and the migrants themselves.

Latin American states have echoed this sentiment and consider regularization programmes an act of social justice. Regularization programmes provide identity to undocumented migrants, protect them from abuses, and facilitate their effective integration into the host society (including labour markets and the civil service), while also providing human capital to host countries and transparency to public policies.²⁹

Constraints on the rights of adult migrants and the impact of these constraints on the rights of their children, such as the right to an adequate standard of living

An issue that so far has not been sufficiently debated is the extent to which migration policies and particular restrictions imposed on migrant workers impact the rights of their children. In general, constraints on the rights of adult migrants impact the rights of their children, in the short term, and increase disparity and unequal development in the long term.³⁰ For instance, the labour conditions of migrant workers, restrictions on their right to work, as well as the absence of regularization policies contribute to the marginalization of migrants. This marginalization in turn deprives their children of the right to an adequate standard of living.

Amnesty International has highlighted that poor working and economic conditions for migrant adults affect the general health and welfare of their children, including premature babies, increasing the risk of serious illness or death.³¹

Lack of a Gender Approach within migration policies and the impact on ESCR of migrant women and female children

Migrant female children may suffer particular deprivations of their ESCR based on the absence of a gender dimension, in general and particularly within migration laws and policies. These circumstances leave migrant female children in vulnerable conditions that can increase gender-related gaps³², social exclusion, and poverty.

Usually, migrant women become involved in care activities, particularly paid domestic work (Ghosh, 2009: 24). These women are among the world's most vulnerable workers (Rodríguez Pizarro, 2004)

²⁹ See, among others, Fifth South American Conference on Migration, Declaration of La Paz, 26 November 2004, § 17; Ibero-American Forum on Migration and Development, Cuenca, Ecuador, 10-11 April 2008, Final Report, Session IV, Integration of Migrants, § E.

³⁰ For further details, see UNLa-UNICEF TACRO (2010), section 4.1, "The right to an adequate standard of living. Social Rights of child migrants' parents and regularization policies".

³¹ See Amnesty International (2009) report on migrant workers in South Korea.

³² Examples include labour and education opportunities, due to discrimination based on sexual and ethnic division of work. On this issue, see several articles on gender approach and gaps within migration policies in Spain, in VV.AA. (2006).

because domestic paid work is often undervalued as informal work and not recognized under labour law or labour codes. As a result, most domestic workers do not benefit from the fundamental rights that they are entitled to (GMG, 2008:37).

With regard to this particular issue, the CEDAW Committee has affirmed that states should take effective measures to integrate migrant women into the labour market.³³ Moreover, states should take appropriate measures to protect female domestic workers, ensuring that: (i) migrant women have access to regular migration status; (ii) there is more systematic involvement of labour authorities in monitoring the working conditions of women; (iii) migrant female workers in domestic services have access to mechanisms for bringing complaints against employers; and (iv) all abuses, including ill treatment, are investigated and punished accordingly.³⁴

ESCR of migrant adolescents and the absence of rights-based integration policies

In many destination countries, migrant adolescents, both unaccompanied and accompanied, cope with a variety of obstacles and constraints to their ESCR. Legislative, policy and practical barriers, including increasing xenophobia and racism, may impact their rights. Also, the absence of cultural-sensitivity and inter-cultural policies may obstruct their enjoyment of social rights and their integration into the host society.

The unemployment of migrant adolescents is a growing concern and should be addressed from a rights based perspective, including access to education (e.g. vocational) and must be dealt with in the context of the current economic crisis.

Restrictions on access to justice to defend their ESCR

In many countries, migration laws and policies do not expressly include due process mechanisms aimed at ensuring migrants' access to the justice system in order to defend their rights in cases where their rights may be affected by a migration-related decision. On the one hand, respect for the rights granted under the ICESCR has historically been limited in terms of their justiciability although local, national and international courts have increasingly recognized their justiciability. On the other hand, as mentioned above, migrants may not seek to defend their ESCR through the judicial system for fear of detention or deportation.

Domestic and international judicial systems are increasingly taking a protection approach to the ESCR of migrants.³⁵ In particular, the use of this approach may be observed in cases regarding the labour rights

³³ CEDAW, Concluding Observations on Germany (CEDAW/C/DEU/CO/6, 10 February 2009, par. 60), Austria (CEDAW/C/AUT/CO/6, 2 February 2007, par. 30).

³⁴ CMW, Concluding Observations: Mexico (CMW/C/MEX/CO/1, 20 December 2006, § 34); Egypt (CMW/C/EGY/CO/1, 25 May 2007, § 39); Ecuador (CMW/C/ECU/CO/1, 5 December 2007, § 38).

³⁵ To review case law in different jurisdictions, see Ceriani Cernadas and Fava (2009).

of undocumented migrants³⁶, irregular migrant children's right to health care, and migrant children's labour rights³⁷, particularly regarding domestic workers in destination countries³⁸. Human rights standards require the use of effective mechanisms, including due process, aimed at ensuring that all individuals are able to submit cases before administrative and justice courts in order to protect their ESCR. In this regard, the Inter-American Commission of Human Rights has specifically addressed the necessity of ensuring access to justice and due process, as a guarantee of ESCR for groups in vulnerable conditions, which includes migrants.³⁹ Both the Inter-American Commission on Human Rights and the Court have highlighted that "in cases that involve especially vulnerable groups, the Inter-American Court has identified the need to draw links between the scope of administrative due process and effective observance of the prohibition of discrimination."⁴⁰ These guarantees should include, amongst others, the right to judicial review of administrative decisions.⁴¹

The economic crisis and regressive measures concerning ESCR of migrants

The current financial crisis may lead to increased restrictions on the ESCR of migrants, including children. For example, temporary migrant workers, particularly those who are undocumented, have suffered pay cuts, deterioration of working conditions and deprivation of health care services (UNICEF, 2009, Abella, 2009). These restrictions may in turn negatively impact the wellbeing and the human rights of their children (ILO, 2009). Moreover, as illustrated above in the example of the education of undocumented migrant children, every constraint on the social rights of migrant children also presents an obstacle to the sustainable human, social and economic development of the entire society, both in the short and long run.

III. Recommendations

Considering the variety and gravity of the constraints and problems mentioned above, which by no means are *all* the problems faced by migrant children regarding their ESCR, the following set of recommendations could be taken into account in the Special Rapporteur's Report.

³⁶ Inter-American Court of Human Rights (2003), Advisory Opinion No. 18.

³⁷ European Committee on Social Rights (2004), Complaint No. 14/2003, by the International Federation of Human Rights Leagues, FIDH, v. France, Decision of the Merits, 8th September, 2004.

³⁸ European Court of Human Rights (2005), Case *Siliadin v. France*, Application No. 73316/2001, judgment 26 July 2005.

³⁹ ICHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007.

⁴⁰ *Idem*, § 172, 176.

⁴¹ For more details, see Inter-American Court of Human Rights (2003, § 122-124).

General Recommendations

- States should **recognize ESCR in laws** for all individuals, regardless of their nationality or immigration status.
 - This should include a review of existing legislation with the intention of eliminating discriminatory regulations against migrants and the enactment of further legislation required to fully recognize the ESCR of migrants.
- States should **adopt public policies** meant to effectively ensure ESCR for all migrants.
 - These policies should include, among others: social participation in policy design; proper budget allocations; and accurate data collection.
 - Policies should also include the implementation of public campaigns aimed at providing accurate information and training to civil servants on ESCR with regards to migrants, particularly to authorities and workers in social services (education, health care, social security, etc.).
- States should adequately **monitor the implementation and enforcement** of these laws and policies.
 - This would require, among other mechanisms: periodic evaluation and discussion of the impact of public policies on the rights of migrants; independent civil society monitoring bodies; judicial control; social participation in policy evaluation and, if appropriate, redesign; data collection; and the dissemination of information to civil society.
- Migration **policies should include a child perspective** in order to ensure that the particular needs and rights of children affected by migration are properly addressed.
 - In this sense, it is critical that states examine existing migration laws and policies for compliance with the CRC and other international human rights legal principles (e.g., principles on the best interests of the child, non-discrimination, progressiveness), as well as standards produced by the CRC Committee and other international human rights bodies.
 - Similarly, childhood policies and programmes should be reviewed in order to ensure that the particular needs of migrant children and children born to migrant parents are fully addressed.
 - Among other key issues, migration policies should ensure: the participation of migrant children in discussions on policies and programmes that may affect them (including within migration control procedures before administrative and judicial bodies); the existence of officers responsible for children within migration bodies; the training of migration officers on the rights of the child; bodies or trained personnel who are able to evaluate the impact of any migration-control measure on children's ESCR (including measures taken against the child or their parents, such as deportation).
- Migration **policies should also take into account the particular needs and rights of unaccompanied children.**
 - The principle of the best interests of the child, along with other human rights principles, should guide the objectives of these policies, as well as any decision that may affect children's rights.

- States should not repatriate unaccompanied children against their best interests, which includes considering the extent to which the child is able to enjoy ESCR in the country of origin.
 - ESCR of unaccompanied children (e.g., health care, housing) should be ensured immediately upon arrival, regardless of their immigration status.
 - States should not detain unaccompanied children due to their immigration status, but should place them in social centres, consistent with a protection approach, that aim to ensure the best interest of the child, grant access to social services (in equal condition to host country nationals), and, if appropriate, facilitate social integration into the host society.⁴²
 - Policies should facilitate family reunification for unaccompanied children (whether in the country of origin or destination), taking into consideration several factors, including the best interest of the child.
- States should develop policies and programmes meant to ensure, through a rights-based approach, the **social integration of migrant adolescents**, including:
 - Access, without discrimination, to employment and vocational training and social security benefits, ensuring a gender dimension.
 - Prevention or combat of xenophobia and racism directed at migrants and adolescents born to migrant parents, particularly at school, health facilities and at work.
 - Support for family reunification in the country of destination, without age discrimination.
 - Support, in a durable manner, for the regularization of unaccompanied adolescents (when in their best interest) and guarantee of legal residence once they become adults.
 - States should ensure a **gender approach to migration policies and programmes** in order to prevent gender-related discrimination against, and disparity among, migrant female children, adolescents, and women especially on issues such as labour rights, social integration, health care, education and training, sexual and reproductive rights, protection against exploitation, and abuse, etc.
 - States should develop **public policies to regularize undocumented migrants** (especially children and their families), through flexible, permanent, and regular legal avenues and by extraordinary regularizations, which aim to contribute to the social integration of a large number of irregular migrants living within a host society.
 - As a key component of social policies and other public policies meant to ensure ESCR, it is critical that states **guarantee access to justice**, as well as to due process of law, for all migrants, regardless of their immigration status.

⁴² UN Committees have recommended that: a) States have to improve the situation in reception centres for unaccompanied children seeking asylum, in terms of resources and adequately trained and competent staff, so that the assistance and care for these children reaches the same level as that provided in other institutions under the child welfare system (CRC, Concluding Observations: Norway, CRC/C/15/Add.263, 21 September 2005, § 42); b) States should provide specific training in children's rights for State officials working in border areas who come into contact with unaccompanied minors (CMW, Concluding Observations on Mexico, cit. § 42)

Indicators Needed for Data Collection by States on ESCR of Migrants

Indicators for data collection on the ESCR of migrants should include, *inter alia*:

- **On Equality and Non Discrimination**
 - Existence and jurisdiction of any or all of the following specific government areas to promote equality and non-discrimination within the country: (i) offices for the advancement of women; (ii) antidiscrimination offices; (iii) ombudsmen or similar; and (iv) immigration affairs offices.
 - Existence of policies or programmes on employment integration or regularization for migrants and refugees, and on access to other social rights.
- **On Signs of Progress**
 - Evaluations of living standards and labour/social integration of immigrants. Main outcomes should be made available.
- **On Basic Financial Context and Budgetary Commitments**
 - Allowance in budgets to meet the cost of regularization for migrant workers. Amount and areas covered.
 - Outcome indicators: Wage gap between men and women, between migrants and nationals, between indigenous peoples and Afro descendent.
- **On Data and Access to Information**
 - Existence of the following sources of statistical information: (i) National population and housing census; (ii) National agricultural census; (iii) National economic census; (iv) Permanent household surveys; (v) Household spending survey; (vi) Surveys of immigrants and ethnic groups, refugees, asylum seekers, internally displaced persons, and stateless persons; and (vii) Special modules for immigrants, minority groups and indigenous peoples in any or all of the foregoing.
- **On Social Security**
 - Percentage of immigrants, refugees, asylum seekers, and stateless persons with social security coverage.
- **On the Impact of Migration Control Policies and Practices**
 - School dropout rates for migrant children or children with migrant parents affected by migration control policies.
 - Access to tertiary and university studies by migrant adolescents and those born to migrant parents.
 - Access to health care and reproductive rights, both by migrant children and their mothers during pregnancy and birth.
 - Access to work, labour conditions, and training for migrant adolescent girls.

Recommendations Concerning Non discrimination and Migrant Children’s Right to Education

Finally, it is important to highlight the recommendations made to states by the Human Rights Treaty Bodies regarding discrimination against migrant children and their right to education. The following recommendations are taken from: UNICEF (2010), *Migration, Children, and Human Rights: Challenges, Opportunities, and Recommendations*, New York, Winter 2010.

- States have to take strong proactive measures to ensure that children born to migrant parents have equal access to education.⁴³
- States must facilitate enrolment in schools at all levels for children with missing or incomplete documents, as well as children who cannot present a birth certificate, and make sure that they are not discriminated against in practice.⁴⁴
- States must ensure that all children are able to gain full academic credit for their school attendance.⁴⁵
- States must adopt measures in order to reduce dropout rates to ensure the right to education for all children living on their territory⁴⁶, and strengthen educational and vocational programmes, particularly for children who do not attend regular school (especially migrant children).⁴⁷

Recommendations made by Human Rights Treaty Bodies on non-discrimination against migrants:

- States must launch comprehensive massive public education campaigns, to prevent and combat negative societal attitudes towards migrants⁴⁸ as well as develop a culture of tolerance in the society at large through all possible channels, including schools, media and the law.⁴⁹
- States should closely monitor the incidence of, and combat, racism and xenophobia, and promote intercultural understanding and tolerance among all groups in society.⁵⁰

⁴³ CRC, Concluding Observations on The Kingdom of the Netherlands (Netherlands Antilles), CRC/C/15/Add.186, 7 June 2002, § 26; CMW, Concluding Observations on Ecuador, CMW/C/ECU/CO/1, 5 December 2007, § 36.

⁴⁴ CRC, Concluding Observations on The Kingdom of the Netherlands (CRC/C/NLD/CO/3, 30 January 2009, § 62) and on Dominican Republic (CRC/C/DOM/CO/2, 11 February 2008, § 71, 73); CMW, Concluding Observations on Egypt (CMW/C/EGY/CO/1, 25 May 2007, § 37).

⁴⁵ CRC, Concluding Observations on Greece; CRC/C/15/Add.170, 2 April 2002, § 67.

⁴⁶ CRC, Concluding Observations on Dominican Republic, cit. § 71.

⁴⁷ CRC, Concluding Observations on México, CRC/C/MEX/CO/3, 2 June 2006, § 57.

⁴⁸ Committee on the Rights of the Child (CRC), Concluding Observations on Libyan Arab Jamahiriya (CRC/C/15/Add.209, 4 July 2003, § 26); Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), Concluding Observations on Mexico (2006, cit., § 24), Ecuador (CMW/C/ECU/CO/1, 5 December 2007, § 20), Bolivia (CMW/C/BOL/CO/1, 29 April 2008, § 22), Syrian Arab Republic (CMW/C/SYR/CO/1, 2 May 2008, § 24), El Salvador (CMW/C/SLV/CO/1, 27 November 2008, § 24), Azerbaijan (CMW/C/AZE/CO/1, 30 April 2009, § 25); Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations on Spain (CERD/C/64/CO/6, 28 April 2004, § 10).

⁴⁹ CRC, Concluding Observations on Croatia, CRC/C/15/Add. 243, 1 October 2004, § 22.

⁵⁰ CRC, Concluding Observations on Sweden (CRC/C/15/Add.248, 30 March 2005, § 19); CESCR, Concluding Observations on Denmark (E/C.12/1/Add.102, 14 December 2004, § 24), and Spain (E/C.12/1/Add.99, 7 June 2004, § 25).

- Public officials must be trained, including the staff of all governmental and public institutions (especially those working in the area of migration), on the elimination of discrimination against migrants, particularly with respect to the equal rights of all children within the territory of the State in order to combat the social marginalization and stigmatization of these children.⁵¹
- States must take administrative and judicial measures in order to prevent and eliminate de facto discrimination against foreigners, and in particular, children⁵². Likewise, cases of discrimination against children, in all sectors of society, must be addressed effectively, including with disciplinary, administrative or, if necessary, penal sanctions.⁵³
- States should review and monitor their laws and regulations in order to ascertain whether they clearly prohibit discrimination against non nationals and guarantee the right to equal treatment and non discrimination.⁵⁴
- States must also ensure that foreigners, newly arrived in the country of destination, are not pushed into poverty and social marginalization.⁵⁵

⁵¹ CRC, Concluding Observations on Dominican Republic (CRC/C/DOM/CO/2, 11 February 2008, § 28); CMW, Concluding Observations on Mexico (CMW/C/MEX/CO/1, 20 December 2006, § 24), Egypt (CMW/C/EGY/CO/1, 25 May 2007, § 21), Ecuador (CMW/C/ECU/CO/1, 5 December 2007, § 20), Bolivia (CMW/C/BOL/CO/1, 29 April 2008, PARR. 22), Syrian Arab Republic (CMW/C/SYR/CO/1, 2 May 2008, § 24), El Salvador (CMW/C/SLV/CO/1, 27 November 2008, § 24), and Azerbaijan (CMW/C/AZE/CO/1, 30 April 2009, § 25).

⁵² CRC, Concluding Observations on Germany, CRC/C/15/Add.226, 26 February 2004, § 24.

⁵³ CRC, Concluding Observations on United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4, 20 October 2008, § 25.

⁵⁴ Committee on the Rights of the Child (CRC), Concluding Observations on Dominican Republic (CRC/C/DOM/CO/2, 11 February 2008, § 28); Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on Norway (E/C.12/1/Add.109, 23/06/2005, § 27).

⁵⁵ Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations on Denmark (CERD/C/DEN/CO/17, 19 October 2006, § 18).

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