



# General Assembly

Distr.: General  
5 July 2010

Original: English

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## Human Rights Council

### Fifteenth session

Agenda items 2 and 3

### Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development

## 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

### *Summary*

The present report is submitted pursuant to Human Rights Council resolution 12/6, in which the Office of the High Commissioner for Human Rights (OHCHR) was requested to prepare a study 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, in consultation with relevant stakeholders.

This report seeks to set out the specific standards and principles that inform the international framework of protection of the rights of the child in the context of migration. It examines challenges in the practical implementation of this framework, and notes some best practices in terms of legislation, jurisprudence and joint efforts at the bilateral, regional and international levels. The report ends with conclusions and recommendations which aim to strengthen the implementation of the international framework and better protect the rights of the child in the context of migration.

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## I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 12/6, in which the Office of the High Commissioner for Human Rights (OHCHR) was requested to prepare a study 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, in consultation with relevant stakeholders.

2. Written submissions were received from States, intergovernmental organizations, national human rights institutions, non-governmental organizations (NGOs) and individual experts.<sup>1</sup> On 25 May 2010, OHCHR organized a one-day open-ended consultation on the issue of protecting the rights of the child in the context of migration. The results of that consultation, which included input from expert participants, States and other stakeholders, have informed the preparation of this report.<sup>2</sup>

3. The outcome document of the special session of the General Assembly on children, *A world fit for children*, pledged to build “a world in which all girls and boys can enjoy childhood ... where their safety and well-being are paramount and where they can develop in health, peace and dignity”. Yet, to many migrant children, these laudable goals will sound hollow. Often the object of suspicion, neglect and abuse, children are locked up in immigration detention centres, denied access to essential services because of their or their parents’ status and subjected to the same regimes of criminalization as adult migrants.

4. Children in the context of migration, including children left behind and children on the move,<sup>3</sup> appear in the universal protected group of “children” at the same time as they are divided into a number of different legal categories. Article 1 of the Convention on the Rights of the Child defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. Children are also placed in a range of different categories of persons on the move, including refugees<sup>4</sup>, stateless persons,<sup>5</sup> migrant workers or family members of such workers,<sup>6</sup> trafficked persons or smuggled persons<sup>7</sup> and separated or unaccompanied children.<sup>8</sup>

<sup>1</sup> The text of most submissions received can be found on the migration page of the OHCHR website. Available from <http://www2.ohchr.org/english/issues/migration/consultation/index.htm>.

<sup>2</sup> A report of this consultation, as well as the interventions of participants and other useful links can be found on the migration page of the OHCHR website (see footnote 1).

<sup>3</sup> The Special Rapporteur on the human rights of migrants has noted that “children on the move are migrant children taking an active part in the migration process” (A/HRC/11/7).

<sup>4</sup> “A person who ... owing to a well-founded fear of being persecuted on account of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (art. 1A, Convention relating to the Status of Refugees).

<sup>5</sup> “A person who is not considered as a national by any State under the operation of its law” (art. 1, para. 1, Convention relating to the Status of Stateless Persons).

<sup>6</sup> “A person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national” (art. 2, para. 1, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families).

<sup>7</sup> Trafficking is defined as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation” (art. 3(a), Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational

5. As human mobility, including child mobility, has become more complex, movements can include elements of the search for protection entwined with the search for opportunity. Often these motivations will change along the migratory route, shifting children from one category to another. The challenge for the formulation and implementation of policy is to ensure that such categorization does not impede a human rights-based response to the assistance and protection needs of children in the context of migration. This report will concentrate on the international movement of migrant children in view of their particular vulnerability as non-nationals, while recognizing that a far greater number of children move within their countries, as internally displaced persons and internal migrants.<sup>9</sup>

6. Asylum-seeking and refugee children have particular international protection needs which must be identified and addressed. At the same time, it is necessary to bear in mind that children can have, and can acquire in the course of movement, a need for protection that is different from refugee status, but that is no less important. It is critical also to recognize and address in policy and practice the particular vulnerability of girl children to violence and discrimination within the context of migration.

7. Children are affected by migration in various ways: children are left behind by one or both parents who migrate; they accompany their migrating parents; and they migrate alone, independently of parents and adult guardians. Some children return to their countries of origin, either voluntarily or as the result of force. There are unfortunately limited statistics on the global movement of children<sup>10</sup> and this lack of disaggregated data is one of many challenges in formulating and implementing child-sensitive migration policies.<sup>11</sup>

8. Both immigration and child-protection<sup>12</sup> legislation are employed to deal with the issue of migrant children. However, these standards are sometimes applied in a confusing

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Organized Crime). Smuggling has been distinguished from trafficking and is defined as “the procurement in order to obtain, directly or indirectly, a financial or other material benefit of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” (art. 3(a), Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime).

<sup>8</sup> Unaccompanied children “have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so”; separated children “have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members”. (Committee on the Rights of the Child, general comment No. 6 on treatment of unaccompanied and separated children outside their country of origin).

<sup>9</sup> Such children will require specific protection in the context of their displacement. See United Nations Development Programme (UNDP), *Overcoming barriers: Human mobility and development, Human Development Report 2009* (Basingstoke and New York, Palgrave Macmillan, 2009).

<sup>10</sup> The recent report of the Special Rapporteur on the human rights of migrants notes that “there is no accurate statistical information on the number of children involved in the international migration process. Age is not a common variable of disaggregated statistical data on international migration” (A/HRC/11/7, p. 5).

<sup>11</sup> See Jeronimo Cortina and Bela Hovy, “Boosting Cooperation: UNICEF, UNDESA and SU/SSC Joint Studies on Migration”, *South-South in Action*, vol. summer 2009, pp. 3–5 (MediaGlobal, 2009).

<sup>12</sup> A child protection system comprises a set of laws, policies, regulations and services, in particular services related to social welfare, education, health, security, labour and justice. Given that such a system requires the input and actions of a wide variety of public authorities, in addition to private actors such as NGOs, the issue of coordination is both an imperative and a significant challenge in practice. In the case of migration policies, this is further complicated by the need to ensure that there is coordination across international borders.

or even contradictory manner, often letting immigration policies override child-protection exigencies and associated human rights obligations.

## **II. Normative standards that protect the rights of the child in the context of migration**

9. International law first explicitly recognized the particular protection needs of children in 1924, when the Geneva Declaration on the Rights of the Child was adopted by the League of Nations. Subsequently, the core international human rights instruments<sup>13</sup> were developed, which contain general provisions that are applicable to children in the context of migration. All children are thus entitled to enjoy equal access to fundamental civil, political, economic, social and cultural rights. The principal normative standards of child protection are equally applicable to migrant children and children implicated in the process of migration. Accordingly, international law provides that all such children be seen and protected as children first and foremost, rather than letting their migratory or other status, or that of their parents, dictate their access to protection and assistance. The Convention on the Rights of the Child is the primary normative standard in relation to children's rights (see following section), in addition to which all the general provisions of international human rights law contained in the core human rights instruments are applicable to children.

10. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families contains specific provisions which protect children, including in relation to access to birth registration (art. 29) and to education (art. 30). In addition, the Convention provides that when a migrant worker is deprived of liberty, the detaining State must pay attention to problems posed to their spouses and minor children (art. 17, para. 6). All migrant workers and members of their families are also protected from unlawful confiscation and destruction of their identity documents (art. 21), from collective expulsion (art. 22), and have the right to consular protection and assistance (art. 23).

11. Two conventions of the International Labour Organization (ILO) relate to the situation of migrant workers; the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). In addition, the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182) specifically protect the rights of children who work.

12. The Convention relating to the Status of Refugees of 1951 protects the rights of child refugees and asylum-seekers. Although there is no specific mention of child refugees in this instrument, its provisions – including article 22 which requires States to extend to refugees equal treatment as nationals in regard to education – apply equally to the situation of children.

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<sup>13</sup> These are: the Universal Declaration of Human Rights; International Convention on the Elimination of All Forms of Racial Discrimination ; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons with Disabilities.

13. The Convention on the Reduction of Statelessness of 1961 requires States to grant nationality to any person born on their territory if this person would otherwise be stateless (art. 1) and prohibits States from depriving persons of their nationality if such deprivation would render them stateless (art. 8).<sup>14</sup>

14. United Nations treaty bodies, as committees of independent experts that monitor the implementation of the core international human rights treaties, have provided authoritative guidance on the situation of children in the context of migration in the form of general comments, including general comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin of the Committee on the Rights of the Child.<sup>15</sup>

15. The special procedures mechanisms of the Human Rights Council have also addressed relevant issues within their thematic and country-specific mandates.<sup>16</sup> Of particular importance is the work of the Special Rapporteur on the human rights of migrants, who has recently issued a report on the situation of children in the context of migration (A/HRC/11/7).

16. Also relevant to the situation of children in the context of migration are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

17. At the regional level, the following instruments, among others, provide protection of the rights of the child in the context of migration: the African Charter on the Rights and Welfare of the Child; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; the American Convention on Human Rights; and the Inter-American Convention on International Traffic in Minors.

### **III. The Convention on the Rights of the Child: General principles and definitions**

18. The Convention on the Rights of the Child is the most widely ratified international human rights treaty, with 193 States parties. It contains a comprehensive set of legally binding international standards, and elaborates on many of the general provisions contained in earlier instruments with specific reference to the rights of the child. The Convention applies to every child, regardless of categorization, or of his or her nationality or immigration status. This Convention is thus a key standard of protection for all children in the context of migration.

19. The Convention is supplemented by two Optional Protocols: the Optional Protocol on the sale of children, child prostitution and child pornography and the Optional Protocol on the involvement of children in armed conflict. Both these instruments provide protection to children in the context of migration.

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<sup>14</sup> See also the provisions of the Convention relating to the Status of Stateless Persons.

<sup>15</sup> On the work of the treaty bodies and reference to other relevant general comments, see [www.ohchr.org](http://www.ohchr.org). See also [www.hrcam.org](http://www.hrcam.org), a database created by UNICEF and the National University of Lanús, which compiles excerpts from concluding observations related to children, human rights and migration (2000–2009).

<sup>16</sup> See <http://www2.ohchr.org/english/bodies/chr/special/index.htm> for information on the work of the special procedures of the Human Rights Council.

20. Certain general principles underline the obligation of States to protect the rights of all children, and are of relevance to the situation of children in the context of migration.

### A. Non-discrimination

21. The principle of non-discrimination, as set out in article 2, paragraph 1, of the Convention provides that all rights contained therein are applicable “to each child within their [States Parties’] jurisdiction without discrimination of any kind”. This would include a prohibition on discrimination on the basis of nationality, immigration status or statelessness. Children should also be protected against discrimination or punishment on account of the status of their parents, legal guardians or family members (art. 2, para. 2). The Committee on Economic, Social and Cultural Rights has further elaborated that the “ground of nationality should not bar access to Covenant rights, e.g., all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care.”<sup>17</sup>

22. The Committee on the Rights of the Child has emphasized that discrimination, “whether it is overt or hidden” is an affront to the human dignity of children.<sup>18</sup> The Committee has addressed the issue of disparities that exist between especially vulnerable children (which would include children affected by migration) and other children, noting that these disparities often amount to de facto discrimination in the areas of health care, education and social services.<sup>19</sup> The Committee on Economic, Social and Cultural Rights has similarly noted that both direct and indirect discrimination will have an impact on the enjoyment of Covenant rights.<sup>20</sup>

23. Recognizing that, in some situations, such as in the context of certain political rights, limited distinctions can be made between nationals and non-nationals, the Committee on the Elimination of Racial Discrimination has nevertheless stated that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation ... are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.<sup>21</sup> The principle of non-discrimination thus prohibits distinctions that are unjustifiable, unfair or arbitrary.

### B. The best interests of the child

24. The principle of the best interests of the child is derived from article 3, paragraph 1, of the Convention on the Rights of the Child which states 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

<sup>17</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20 on non-discrimination in economic, social and cultural rights (art. 2, para. 2). The Committee on the Rights of the Child has specified that in view of the absolute nature of obligations deriving from the Convention and their *lex specialis* character, article 2 paragraph 3, of the Covenant on Economic, Social and Cultural Rights would not apply with regard to unaccompanied and separated children (see its general comment No. 6).

<sup>18</sup> Committee on the Rights of the Child, general comment No. 1 on the aims of education (art. 29, para. 1).

<sup>19</sup> Jaap E Doek, “The CRC General Principles”, *18 Candles: The Convention on the Rights of the Child Reaches Maturity* (Sion, OHCHR and Institut international des droits de l’enfant, 2008), p. 33.

<sup>20</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20.

<sup>21</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 30 on non-citizens.

primary consideration”. Accordingly, all authorities and institutions that come into contact with children in the context of migration are required to determine that their actions are primarily concerned with protecting the interests of the individual child. This principle should override all others, including conflicting provisions of migration policy should these arise.

25. It should be noted that the meaning of what constitutes the “best interest” will necessarily be different in different contexts, depending on the situation of the individual child. This makes it necessary to ensure that the individual circumstances of the child be taken into account when determining what is in his or her best interests, including his or her nationality, upbringing, cultural and linguistic background, vulnerability and particular protection needs. The Committee on the Rights of the Child has recommended that, in order to provide sufficient protection to children, the principle should be integrated into relevant legislation and be a core component of any decision-making process. The other general principles of child protection should be integrated into best interest determinations.

### **C. Right to life, survival and development**

26. The right to life of the child is a fundamental human rights standard (art. 6 of the Convention on the Rights of the Child). It has been interpreted to encompass but also go beyond physical survival, to include the development of the child “to the maximum extent possible” (art. 6, para. 2). Ensuring the non-discriminatory access of migrant children to economic, social and cultural rights and promoting the concept of leisure and play which encourage the fullest possible development of the child’s personality will allow for such development. Equally important will be protecting children in the context of migration from exploitation, detention and separation from their families in contradiction of their best interests. The development of irregular child migrants in countries of transit and destination can be severely affected by constraints on their rights or the rights of their parents.

27. Linked to the general principle of survival and development is the principle of evolving capacities (art. 5), which underlines the notion that the child is a full bearer of rights, respects the responsibilities, rights and duties of parents and guardians, and links to the requirement that the age and maturity of the child be taken into account in decision-making, particularly as their capacity to make decisions evolves.

### **D. Right to be heard**

28. The right of all children to participate in matters and decisions which concern them informs every provision of the Convention, highlighting the principle of agency, and making clear that where appropriate children should be able to express their views, and to be heard in judicial or administrative proceedings affecting them (art. 12).

29. This principle has very practical policy implications, requiring State authorities to guarantee in law and administrative practice the right of children on the move to participate and to provide adequate information to children, as well as providing appropriate forums in which children can exercise their right to be heard. Decisions should not be made, for example in respect of border control and return decisions or the delivery of social services, without consulting the affected children. In order to give effect to this right, in addition, it is vital that all relevant personnel are adequately trained in applying a child-sensitive perspective in their actions.

30. Migrant children should also be able to be heard in a variety of judicial or administrative settings including in all aspects of immigration and asylum proceedings (such as in the context of the detention or deportation of themselves or their parents), in

complaints procedures relating to exploitation and abuse in the workplace, and in the design and delivery of social services to migrant communities.<sup>22</sup>

#### IV. Challenges in implementation

31. Children migrate in various ways with a variety of motives, yet the movement of children is usually considered within the framework of the migration of adults. The distinct interests, perspectives and vulnerabilities of children are thus discounted in the formulation of national migration policies and related legislation, since most of these policies operate under the assumption that all migrants are adults. On the other hand, most national childhood policies do not take account of the needs and rights of migrant children, who can be excluded explicitly or in practice from the protection of legislation and regulations put in place by Governments to protect children who are nationals of the country. Thus inadequate child protection systems and lack of effective implementation of the existing normative framework result in serious protection gaps for migrant children in every region of the world.

32. Children who migrate are also confronted by policies made on the basis of inaccurate and inappropriate assumptions. For instance, it is often assumed that all children who migrate independently have been subject to trafficking and therefore are in need of “rescue” and return to their countries of origin.<sup>23</sup>

33. Another general challenge relates to the inadequate recognition of the impact of immigration control policies on the protection situation of children in the context of migration. For example, when their parents are criminalized and subject to detention, exclusion or deportation, the children of irregular migrant parents will also suffer. The Working Group on Arbitrary Detention has asserted the principle that criminalizing irregular stay in a country exceeds the legitimate interest of States to control and regulate irregular migration, and can lead to unnecessary detention and encourage stigmatization, hostility and xenophobia.<sup>24</sup> Moreover, there is a growing consensus that, while entering a State without a valid visa or overstaying a visa may constitute an administrative offence, it should not be considered as a criminal offence.<sup>25</sup>

34. Children, whether they migrate on their own or with their families, can be subject to high levels of physical, psychological and sexual violence within the migratory process.<sup>26</sup> Such violence is perpetrated inter alia by both State authorities and non-State actors, while the children are being moved by traffickers and smugglers, at the border, in detention and in the workplace. Article 37 of the Convention on the Rights of the Child protects all children, regardless of location or legal status, from torture or other cruel, inhuman or degrading

<sup>22</sup> See Committee on the Rights of the Child, general comment No. 12 on the right of the child to be heard.

<sup>23</sup> See Global Alliance Against Trafficking in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (Bangkok, 2007).

<sup>24</sup> Working Group on Arbitrary Detention, deliberation No. 5 concerning the situation regarding immigrants and asylum-seekers (E/CN.4/2000/4, annex II).

<sup>25</sup> See report of the Special Rapporteur on the human rights of migrants, A/HRC/7/12, para. 41, and Global Migration Group, “Rooting Migration Policies in Human Rights, Ensuring the Rights of All Migrants and Improving Human Development Outcomes”, Background Paper, (27–28 May 2010), p. 4.

<sup>26</sup> See the report of the independent expert for the United Nations Study on Violence against Children, A/61/299. This study identified the vulnerability of children to violence, including children in the context of migration. In particular, the study identified high levels of violence perpetrated by police officials against marginalized groups of children, such as children living on the streets.

treatment.<sup>27</sup> Yet, the vulnerability of migrant children is compounded when they are denied access to the courts in order to seek justice and remedies.<sup>28</sup>

35. Children and their families can be subject to xenophobia, racism, hate crimes and hate speech in host and transit countries, often bolstered by official policies which marginalize and exclude migrants and their communities and impede integration. The participation of children is particularly crucial in the design and implementation of effective integration policies in countries of destination, including programmes and campaigns against xenophobia and racism.

36. Human rights treaty bodies have on a number of occasions recommended that States should closely monitor and combat racism and xenophobia, and promote intercultural understanding and tolerance among all groups in society.<sup>29</sup>

## A. Separated and unaccompanied children

37. Many separated and unaccompanied children have experienced significant trauma and violence in the course of their journey, some will have fallen into the hands of traffickers and some will be in need of humanitarian assistance owing to the conditions of their movement. Yet, many children who migrate on their own are denied access to legal and practical assistance and detained unlawfully. Unaccompanied children can be wrongly determined to be adult irregular migrants, and deported without the effective opportunity to seek asylum and in the absence of due process, and without regard for the rights of the child.

38. General comment No. 6 of the Committee on the Rights of the Child provides comprehensive guidance to States and other stakeholders on the protection of unaccompanied and separated children.<sup>30</sup> This includes inter alia that all such children should be identified and registered as soon as possible following their entry into the host country, and a competent guardian or legal representative should be appointed, taking into consideration the views of the child. Those assigned legal guardianship duties, as well as any other person/s in charge of safeguarding the child's best interests, should be provided

<sup>27</sup> Such a prohibition is reinforced by article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights, and the Convention against Torture. In a conclusion that applies equally to the situation of many migrant children, the Committee on the Rights of the Child has expressed its concern at the "ill-treatment, corporal punishment, torture and sexual abuse of children in detention facilities, and alleged instances of killings of children living and/or working on the streets by law enforcement officials" (CRC/C/15/Add.115, paras. 38-39). Article 19 of the related Convention, in addition, establishes a duty on States to protect children from violence and exploitation perpetrated by parents, guardians and other persons who are in a care-providing role (such as employers).

<sup>28</sup> The Inter-American Court has observed that "[at] times, undocumented migrant workers cannot even resort to the courts of justice to claim their rights owing to their irregular situation" ("Juridical Condition and Rights of Undocumented Migrants", Advisory Opinion OC-18/03, 17 September 2003).

<sup>29</sup> See, for example, Committee on the Rights of the Child, concluding observations on Sweden (CRC/C/15/Add.248, para. 19); Committee on Economic, Social and Cultural Rights, concluding observations on Denmark (E/C.12/1/Add.102, para. 24), and Spain (E/C.12/1/Add.99, para. 25).

<sup>30</sup> Additional guidance is provided, inter alia, in the Inter-Agency Guiding Principles on Unaccompanied and Separated Children; Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum of UNHCR; Guidelines on Human Rights and Human Trafficking recommended by OHCHR; Guidelines for Children's Asylum Claims of UNHCR; and the Separated Children in Europe Programme Statement of Good Practice (SCEP).

with appropriate training and support to carry out their functions effectively.<sup>31</sup> Under no circumstance should unaccompanied and separated children be refused entry to the territory.

## **B. Border controls**

39. The border can be a dangerous place for migrant children, including separated and unaccompanied children. They can be subject to high levels of violence by border guards and arbitrary and prolonged detention, and can be denied the right to seek asylum. Children at borders are often regarded with suspicion by officials who cast doubt on their age and motivations for movement.

40. Interception practices at land, sea and air borders can be arbitrary and even unlawful, with entire groups of migrants, including unaccompanied and separated children, being pushed back to transit countries or countries of origin. The humanitarian needs of migrants in such circumstances, some of whom have been on the move for weeks or months, are ignored. Because of their heightened vulnerability, children will often suffer disproportionately. Equally seriously, protection needs can also be ignored, often with drastic consequences.

41. International law provides an absolute prohibition of refoulement, i.e., the return of anyone to a country where they would be at risk of torture, cruel, inhuman and degrading treatment,<sup>32</sup> or the return of a refugee to any country in any manner whatsoever where his or her life or freedom would be threatened.<sup>33</sup> All children should have access to an effective procedure to establish, in a child-friendly manner, the risk they would face if returned to their country of origin, or to any risk of “chain refoulement” (i.e. removal to third countries in which the person would be at risk of refoulement). This would include access to asylum procedures and procedures to establish whether they have been subject to trafficking and other serious human rights violations. Where appropriate, border authorities should promptly refer migrant children to child protection authorities and other relevant services. An independent guardian or legal advisor should be appointed promptly to advise and protect separated children.<sup>34</sup>

## **C. Age assessment**

42. Despite the fact that the assessment of age can be the key to being protected as a child, many migrant and asylum-seeking children can be subject to inappropriate age determination techniques, which can interfere with their right to privacy and violations of their human dignity. The false belief that such techniques are an exact science can lead to serious errors<sup>35</sup> and can place children at risk of refoulement, detention and denial of essential services.<sup>36</sup>

<sup>31</sup> European Union Agency for Fundamental Rights, “Separated, asylum-seeking children in European Union Member States”, summary report (April 2010), p. 34.

<sup>32</sup> Convention against Torture, art. 3.

<sup>33</sup> Convention relating to the Status of Refugees, art. 33.

<sup>34</sup> SCEP, p. 16.

<sup>35</sup> Medical assessment methods, such as bone and teeth analysis, are associated with a margin of error of at least two years in either direction. This can be compounded by cultural differences in recording age, and lack of documentary evidence. One report has noted that in some countries an official “culture of disbelief” pervades the issue of age assessment, putting the burden of proof on the child to prove that they are not adults. See Heaven Crawley, “When is a Child Not a Child? Asylum, Age

43. Recognizing the inherent limitations of such processes, general comment No. 6 of the Committee on the Rights of the Child recommends that any age assessment procedure should take into account the psychological maturity of the individual in addition to physical and cultural factors.

44. Safeguards surrounding the issue of age assessment should include that such assessments only be carried out as a measure of last resort when the age of the individual is disputed, that the benefit of the doubt be given to the individual, that information about the process and possible consequences be provided to the individual in a child-friendly manner, that his or her informed consent be sought, and that the individual be protected from return while his or her age is being assessed. Age assessments should ideally be carried out by an independent panel of experts, and the individual should be given the effective opportunity to appeal the decision.<sup>37</sup>

## D. Return

45. The issue of return and repatriation is high on the migration agenda in countries around the world. Children are caught up in collective expulsions, and can be returned to their own or transit countries in the absence of an individual determination of the lawfulness of this action or of the protection needs of the child. Returns of children can be carried out with high levels of violence and the disproportionate use of force. Returns can also lead to the separation of families, as parents are deported to countries of origin while their children remain in the host country.

46. Yet, the ability of States to return children in the context of migration is constrained by a number of factors. Most important in this respect is the principle of non-refoulement. The Committee on the Rights of the Child has asserted that return of a child should in no cases be contemplated to a country where there are substantial grounds for believing that there is real risk of irreparable harm to the child. The Committee has advised that such a risk could originate from both State and non-State actors, be directly intended or as an indirect consequence of action or inaction, and has noted in addition that States should first conduct a risk assessment of the adequacy of food or health services to which the child is being returned (general comment No. 6). Moreover, the Special Rapporteur on the human rights of migrants has recommended the principle of non-deportation of unaccompanied children.

47. The principle of the best interests of the child, in addition to accompanying principles such as the right of the child to be heard, should be a primary consideration in any decision to return, and in decisions on the deportation of their parents.

48. While recognizing that in exceptional situations the return of children can be contemplated, the Committee on the Rights of the Child has emphasized that “non rights-

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Disputes, and the Process of Age Assessment, Immigration Law Practitioner’s Association” (May 2007).

<sup>36</sup> One NGO has noted that “the very status of young immigrants as children is regularly challenged by national immigration control authorities” (Platform for International Cooperation on Undocumented Migrants, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (Brussels, 2008), p. 6). Bhabha notes in addition that “these children’s youth is discounted because they are assumed to be ‘other’ than ‘our children’; hardened and prematurely matured by their life experiences” (Jacqueline Bhabha, “‘Un vide juridique?’ Migrant Children: the Rights and Wrongs”, in Carol Bellamy and Jean Zermatten (eds.), *Realizing the Rights of the Child* (Ruffer and Rub, 2007), p. 209).

<sup>37</sup> SCEP (fourth revised edition March 2010).

based arguments, such as those relating to general migration control, cannot override best interests considerations”.<sup>38</sup> This implies in turn that an effective mechanism to determine the best interests of the child should be in place before return can be contemplated.

49. International law prohibits collective expulsions, reasoning that there is a risk that such expulsions will be tainted with discrimination and arbitrariness, and will therefore be inherently unlawful.<sup>39</sup> Article 22 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families specifically prohibits the collective expulsion of migrant workers and members of their families, and provides some safeguards in case of expulsion. Regional instruments, such as the Protocol No. 4 to the European Convention for the Protection of Human Rights, similarly prohibit the collective expulsion of non-nationals.

## E. Detention

50. The absence of a child and adolescent perspective within migration-related detention policies means that children are often treated, and detained, as adults, including in punitive detention meant to deter future irregular arrivals. In some situations, children are placed in immigration detention as a substitute for care arrangements.

51. Children in immigration detention are often exposed to severely inadequate conditions, including deplorable living conditions, lack of adequate medical care (including psychological care), physical and sexual abuse and violence, overcrowding and inadequate nutrition. They can be detained along with unrelated adults, or arbitrarily separated from their parents or other family members. While all migrants can be detained in inappropriate facilities, such as prisons which house convicted criminals, children who are detained in immigration detention in addition rarely have access to adequate education, play and leisure facilities, and staff who are trained to respond to the specific needs of migrant children. Children in immigration detention will often be traumatized and have difficulty understanding why they are being “punished” despite having committed no crime.<sup>40</sup>

52. International law provides that the detention of children, including children in the context of migration, should generally be avoided.<sup>41</sup> The Special Rapporteur on the human rights of migrants has affirmed that it is never in the best interests of children to be detained.<sup>42</sup> Children should not be detained based on their migratory status or irregular entry to the country.<sup>43</sup>

53. Where it is deemed to be absolutely necessary, children should only ever be detained as a measure of last resort, this detention must always be justified in law, and it must be for the shortest possible period of time.<sup>44</sup> A maximum period of detention must be set in law. There should be a judicial review of the decision to detain, and the child must be able effectively to challenge the legality of their detention before a court or other competent body, and to have a prompt decision.<sup>45</sup>

<sup>38</sup> General comment No. 6, para. 86.

<sup>39</sup> Human Rights Committee, general comment No. 15 on the position of aliens under the covenant.

<sup>40</sup> International Organization for Migration, “Human Rights of Migrant Children”, *International Migration Law*, No. 15 (2008), p. 33.

<sup>41</sup> Convention on the Rights of the Child, art. 37. See also Committee on the Rights of the Child, general comment No. 10 on children’s rights in juvenile justice.

<sup>42</sup> A/HRC/11/7, para. 62.

<sup>43</sup> Committee on the Rights of the Child, general comment No. 6, para. 61.

<sup>44</sup> Convention on the Rights of the Child, art. 37(b).

<sup>45</sup> International Covenant on Civil and Political Rights, art. 9.

54. State authorities seeking to uphold the principle of family unity in situations of irregular migration should seek to address the situation of parents and families in ways that do not contemplate the detention of migrant children. The principle to be applied in such circumstances should be “care” rather than a punitive or disciplinary approach, and adequate alternatives to detention, such as community-based and casework-oriented models, should be contemplated in the first instance.<sup>46</sup>

55. The safeguards surrounding alternatives to detention should be as rigorous as those applied to situations of detention, including ensuring that the alternative measure is established in law, is non-discriminatory in purpose and effect, and is subject to judicial review, and that the migrant has access to legal counsel. States should always use the least restrictive means necessary as alternatives to 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; for example, children released from detention centres should be provided with appropriate alternative care, and not be left destitute on the streets.

56. In the rare instances where migrant children may be lawfully detained, international human rights standards assert that a number of fundamental safeguards must be applied. These are underlined by the principle that the migrant child must at all times be treated with humanity and dignity, in a manner which takes into account the particular needs of the child. Children must be allowed contact with their families and prompt access to legal counsel and interpretation. Adequate and culturally appropriate food, clothing and medical care should be provided in line with international standards, and every child must be able to access appropriate educational and recreation facilities.

## **F. Right to identity and the principle of family unity**

57. Children born to irregular migrant parents often are not registered at birth.<sup>47</sup> Irregular migrants who do not possess valid identity documents can be denied the right in law to register their children in the host country, or will not register their children in practice because of fears of being detected by the authorities and deported as a result. Administrative and practical obstacles to birth registration also include lack of knowledge of the language used in birth registration forms and procedures, and high registration fees. This can have serious consequences for the individual child, and leave him or her vulnerable to human rights violations for many years if not addressed.

58. Birth registration is the “official recording of the birth of a child by some administrative level of the State. It is a permanent and official record of a child’s existence”.<sup>48</sup> It is in addition an important means of securing other rights, such as the right to education and to health, to protection from child recruitment and from trafficking.<sup>49</sup> Children who are registered at birth can be protected from statelessness, and can also be protected from arbitrary actions by law enforcement authorities in host countries.

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<sup>46</sup> See Committee on the Rights of the Child, general comment No. 6. For a study on alternatives to the detention of children, see International Detention Coalition, “Children in Detention”. Available from <http://idcoalition.org/wp-content/uploads/2008/12/children-in-detention.pdf>.

<sup>47</sup> It is estimated that some 50 million births go unregistered each year, of which a significant proportion would be children born in the context of migration (Inter-Parliamentary Union, *Child protection: A handbook for parliamentarians* (SRO-Kundig, 2004), p. 42).

<sup>48</sup> *Ibid.*, p. 42.

<sup>49</sup> The Human Rights Committee has noted that birth registration can “reduce the danger of abduction, sale of or traffic in children” (general comment No. 17 on the rights of the child).

59. The right to an identity has been recognized in articles 7 and 8 of the Convention on the Rights of the Child and article 24 of the International Covenant on Civil and Political Rights. Registering their birth is a critical first step in ensuring the rights of all children in the context of migration. The Committee on the Rights of the Child has made clear that the right to be registered immediately after birth extends equally to “asylum-seeking, refugee or migrant children – irrespective of their nationality, immigration status or statelessness”. In order to fulfil adequately the right of the child to birth registration, the State must record the birth in the relevant civil register, and provide the child with a birth certificate which includes all relevant information (including the child’s name, place of birth, and all available information concerning the child’s mother and father), ideally free of charge, and easily available to all without discrimination.

60. Birth registration can facilitate the reunification of separated children with their parents and family members. Article 9 of the Convention on the Rights of the Child obliges States to ensure that children are not separated from their parents against their will. The principle of family unity has an important protective function for children in the context of migration, particularly in the situation of unaccompanied and separated children.<sup>50</sup> Family reunification also constitutes a key element of integration policies.

61. Yet, it is apparent that regulations have become more severe in various countries, imposing new restrictions that make family reunification more difficult.<sup>51</sup> The underlying assumption of policies in many States is that reunification should take place in the country of origin, yet general comment No. 6 of the Committee on the Rights of the Child makes clear that the best interests of the child should be the primary consideration, and reunification in the country of origin should not be pursued when there is “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child (para. 82). Article 10 of the Convention establishes that reunification must always be considered in light of the best interests of the child.

## **G. Access to social services:<sup>52</sup> Health**

62. Article 24 of the Convention provides that every child has the right to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health and urges States to “ensure that no child is deprived of his or her right of access to such health care services”. The Committee on Economic, Social and Cultural Rights notes the State obligation to respect the right to health by, “inter alia, refraining from denying or limiting equal access for all persons, including ... asylum seekers and illegal immigrants, to preventive, curative and palliative health services.”<sup>53</sup> In prohibiting discrimination based on nationality, the Committee notes, for example, that all children within a State, including those with an undocumented status, have the right to receive affordable health care.<sup>54</sup>

63. 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; the

<sup>50</sup> The family has been recognized as the natural and fundamental group unit of society in inter alia art. 23 of the International Covenant on Civil and Political Rights.

<sup>51</sup> Global Migration Group, “Fact-Sheet on the Impact of the Economic Crisis on Migration and Children’s Rights” (October 2009).

<sup>52</sup> See report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, E/2010/89 (forthcoming).

<sup>53</sup> Committee on Economic, Social and Cultural Rights, general comment No. 14 on the right to the highest attainable standard of health (art. 12).

<sup>54</sup> Committee on Economic, Social and Cultural Rights, general comment No. 20.

requirement of immediate payment or proof of payment can also impede access to the health service; the use of health care and services as an instrument of immigration control policies such as the duty to report undocumented migrants by health professionals; fear of deportation or detention of themselves or their families; and, finally, 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.

## H. Access to social services: Housing

64. Migrant children and their families can often be found living in substandard housing, whether because they cannot pay high rents, because their legal status prevents them from renting legally or because they have joined diaspora communities that live in run-down and spatially segregated parts of the city. Children who work, including domestic workers, may live in employer-provided accommodation which is overcrowded and unsanitary.<sup>55</sup>

65. Article 27 of the Convention on the Rights of the Child recognizes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development, and calls on States to provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. The Committee on Economic, Social and Cultural Rights has stated that "the right to adequate housing applies to everyone" and that "individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors."<sup>56</sup>

66. The Committee has expressed concern that migrant families are "disproportionately concentrated in poor residential areas characterised by low-quality, poorly maintained large housing complexes" and recommended the "effective implementation of existing legislation to combat discrimination in housing, including discriminatory practices carried out by private actors".<sup>57</sup>

67. The European Committee of Social Rights has ruled that irregular migrant children should not be evicted from reception centres following failed asylum proceedings, observing that States are required to provide adequate shelter to all children in the territory, and that any other solution would run counter to the respect for their human dignity and not take account of the particularly vulnerable situation of children.<sup>58</sup>

## I. Access to social services: Education

68. Children in the context of migration can face practical and legal obstacles to realizing their right to education. Fears that their irregular situation will be reported can deter enrolment, as can an inability to pay fees and buy uniforms and school materials. Migrant children can also face xenophobia and racism in the classroom, or pressure from their families to earn an income, leading to high dropout rates.

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<sup>55</sup> Save the Children, *Children on the Move* (UK, 2007).

<sup>56</sup> Committee on Economic, Social and Cultural Rights, general comment No. 4 on the right to adequate housing.

<sup>57</sup> Committee on Economic, Social and Cultural Rights, concluding observations on France, E/C.12/FRA/CO/3.

<sup>58</sup> *Defence for Children International vs. The Netherlands*, case No. 47/2008, 20 October 2009.

69. In recognising the primary importance of education for the development and protection of children, the Convention on the Rights of the Child provides, in article 28, that primary education should be universally available for free “to all”, and that States should encourage the development of different forms of secondary education, including general and vocational education, making them available and accessible to every child. In addition, the Convention provides that educational and vocational information and guidance should be available and accessible to all children. Article 30 of the Convention on the Protection of All Migrant Workers and Members of Their Families, which applies to all migrant workers and their families, regardless of their status, states that: “each child of a migrant worker shall have access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the State of employment”.

70. The Committee on the Elimination of Racial Discrimination has called on States to “avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education”.<sup>59</sup>

71. The Inter-American Court of Human Rights has asserted that access to education is one of the special protection measures with which State parties are obliged to comply, also in the case of children in the context of migration.<sup>60</sup>

## J. Migrant children and work

72. Just as most adult migrants are involved in some way in the world of work, a significant proportion of children on the move are working and will require protection. While some children migrate on their own in search of work, others will start working in the country of destination as a way of supporting their families, and still others will resort to work when their parents or primary caregivers migrate, leaving them behind. It is important to recognize that “work” and “exploitation” are not necessarily synonymous<sup>61</sup> and that protecting the rights of children who work, alongside robust efforts to prohibit harmful work, could make for more effective policy. Such protection should include setting a minimum age for admission to employment (see below), protecting children from violence, upholding the right to education, safeguarding leisure and ensuring the right to health of the child including occupational health protections.

73. The ILO has adopted two conventions of relevance to the situation of migrant children who work. Convention No. 138 commits States to abolishing child labour and raising progressively the minimum age for admission to employment. It further states that the minimum age for employment should “not be less than 15 years” and that all children should be protected from hazardous work (which is defined as work “likely to jeopardise the health, safety or morals of young people”). The Convention on the Rights of the Child similarly requires States to specify a minimum age for admission to employment. ILO Convention No. 182 defines the worst forms of child labour, to which no child should be exposed, including forms of slavery, debt bondage, involvement in prostitution, and hazardous work. The latter has been interpreted to include “work for long hours ... or work

<sup>59</sup> Committee on the Elimination of Racial Discrimination, general recommendation No. 30.

<sup>60</sup> See Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico vs. Dominican Republic*, Judgement of 8 September 2005, para. 185.

<sup>61</sup> “Human Rights of Migrant Children”, p. 52.

where the child is unreasonably confined to the premises of the employer”, which is intended to refer to domestic workers, or workers who live and work in factories and sweatshops.<sup>62</sup> All of the provisions of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families apply equally to child migrant workers, even though the Convention does not explicitly refer to the situation of children who migrate on their own for work.

74. The Committee on the Rights of the Child has called on States to “regulate the working environment and conditions for adolescents who are working”.<sup>63</sup> Further elaborating on this issue in general comment No. 12, the Committee notes that, in the case of working children who are younger than the age permitted by ILO Conventions: “they should be included in the search for a solution, which respects the economic and socio-cultural constraints as well as the cultural context under which these children work”.<sup>64</sup>

## **K. Protection of children left behind in countries of origin**

75. The Special Rapporteur on the human rights of migrants has stated that the term “children left behind” refers to “children raised in their home countries or in their countries of habitual residence who have been left behind by adult migrants responsible for them”.<sup>65</sup>

76. The impact of being left behind on children is hard to generalize, as some children will benefit from the migration of their parents, including those who receive remittances that enable them to go to school, improve their housing situation or access better health services. Others, however, could suffer destitution and official neglect, physical and sexual abuse from relatives and foster carers, and psychological trauma from the experience of being “abandoned” by one or both parents. Children left behind could suffer social stigmatization, debt and pressure from moneylenders and smugglers and be forced to take on social and family roles far beyond their age and maturity.

77. The Special Rapporteur has noted that a key factor in determining the impact of migration on children left behind will be the extent to which the responsible State has implemented specific child protection policies for such children.<sup>66</sup> Targeted policies should address the socio-economic situation of such children, protect them from exploitation and violence (including domestic violence), and enable their voice to be heard. Where appropriate, the State should appoint a legal guardian for such children.

78. The situation of children left behind in the context of migration is also of relevance to family reunification policies in countries of destination. Where possible and in their best interests, States should enable children to join their parents who have migrated.<sup>67</sup> Such reunification opportunities should not be contingent on the migration status of the parents.

<sup>62</sup> ILO, Recommendation No. 190 on the Worst Forms of Child Labour, 1999. In addition, article 32 of the Convention on the Rights of the Child protects children from hazardous work and work that would interfere with their education, morals and health. Article 10, paragraph 3, of the ICESCR provides similar protection.

<sup>63</sup> Committee on the Rights of the Child, general comment No. 4 on adolescent health and development.

<sup>64</sup> Committee on the Rights of the Child, general comment No. 12 on the right of the child to be heard.

<sup>65</sup> A/HRC/11/7, para. 45.

<sup>66</sup> *Ibid.*, para. 48.

<sup>67</sup> Article 9, paragraph 1, of the Convention on the Rights of the Child accordingly asserts that “States Parties shall ensure that a child shall not be separated from his or her parents against their will”, while Article 10, paragraph 1, calls on States to examine requests for family reunification in a “positive, humane and expeditious manner”. The Committee of the Rights of the Child has, in its concluding

## V. Recent practice, including joint efforts and strategies, to protect the rights of the child in the context of migration

79. Governments, international organizations, national human rights institutions, NGOs and other stakeholders have put in place a variety of initiatives at various levels to protect the rights of children in the context of migration.<sup>68</sup> The following sections provide a brief and non-exhaustive overview of some recent practice in this regard.<sup>69</sup>

### A. General

80. The following are examples of recent practice on general issues related to children in the context of migration:

(a) Article 40 of the Ecuador Constitution recognizes the right of all individuals to migrate, and provides that no person shall be identified nor considered as illegal due to his or her migration status;

(b) New legislation passed in New Zealand in 2009 (following a review of the Immigration Act) defines a child as a person under 18 years of age, in line with the Convention on the Rights of the Child. The legislation also requires that children be given the opportunity to express their views and for these to be taken into account in proceedings affecting them;

(c) In 2006, Argentina put in place the Patria Grande regularization programme, which granted either temporary or permanent residence to a total of 776,742 undocumented migrants from the Common Market of the South (MERCOSUR) countries;

(d) The United Nations Children's Fund (UNICEF), the Department of Economic and Social Affairs and the Special Unit for South-South Cooperation have created the United Nations Global Migration Database, which includes all publicly available data on international migrant stocks, separated out by age and sex as well as by country of birth and citizenship in order to facilitate research and policymaking on issues related to children in the context of migration.

### B. Economic, social and cultural rights

81. The following are examples of recent practice on economic, social and cultural rights:

(a) Trinidad and Tobago has established universal access to health care for all migrants in its territory.

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observations, regularly called on States to facilitate family reunification in the best interests of the child. See, for example, CRC/C/15/Add.248, as well as section VII of general comment No. 6.

<sup>68</sup> Such initiatives are complemented by regional consultative processes (see IOM, "RCPs by Region" available from <http://www.iom.int/jahia/Jahia/policy-research/regional-consultative-processes/rcps-by-region>), and the multilateral Global Forum on Migration and Development at the international level.

<sup>69</sup> Many of the following initiatives are derived from input received for this study from States and other stakeholders. See <http://www2.ohchr.org/english/issues/migration/consultation/index.htm> for reference. See in particular UNICEF, Examples of Good Practice in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration, (draft of 18 May 2010), also available on the migration page of the OHCHR website.

(b) In France the State Medical Assistance (*Aide Médicale de l'Etat*) allows irregular migrants and their children, who have been residing in France for more than three months and whose income is below a certain threshold, to access publicly subsidized health care upon compliance with certain conditions;

(c) There are explicit references to the right to education for irregular migrants in the legislation of Belgium, Italy and the Netherlands. In the Netherlands, specific legislation regarding both primary and secondary school prohibits officials from investigating a child's migration status before admission to school.

### **C. Detention**

82. Below are examples of recent practice on detention of migrant children:

(a) In 2005, most children and their family members were released from Australian immigration detention centres and the Migration Act was amended to affirm "as a principle" that a minor should only be detained as a measure of last resort;

(b) In May 2010, the new United Kingdom Government announced an end to the policy of detaining migrant and asylum-seeking children in detention centres;

(c) Panama has included in its legislation a prohibition on detaining migrants who are less than 18 years of age;

(d) The Bolivarian Republic of Venezuela has explicitly included several alternatives to detention in its migration legislation including periodic reporting, directed residence and provision of bail (which takes account of the economic condition of the migrant).

### **D. National jurisprudence**

83. The following show recent practice in national jurisprudence:

(a) The Constitutional Court of Spain has upheld the right of the child to be heard in the context of unaccompanied children facing repatriation or deportation;<sup>70</sup>

(b) The High Court of South Africa (Transvaal Division) prevented the deportation in 2004 of a group of unaccompanied migrant children detained in a repatriation centre. The Court noted that the detention of such children was unlawful and should cease immediately, observing that "furthermore, the way in which these children are being deported is not unlawful, it is shameful".<sup>71</sup>

### **E. Regional jurisprudence**

84. Below are some examples of regional jurisprudence:

(a) In *FIDH v. France*,<sup>72</sup> the European Committee of Social Rights examined a complaint based on articles 13 (right to health care) and 17 (rights of the child) of the European Social Charter, and held that legislation or practice which denies entitlement to

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<sup>70</sup> Case No. 183/2008 of 22 December 2008.

<sup>71</sup> Case No. 22866/04 of 13 September 2004.

<sup>72</sup> Complaint No. 13/2003.

medical assistance to foreign nationals (particularly children), within the territory of a State Party, even if they are there illegally, is contrary to the Charter;

(b) In *Yean and Bosico v. Dominican Republic*,<sup>73</sup> the Inter-American Court of Human Rights pronounced on the situation of children born in the Dominican Republic to migrant parents in respect of birth registration and the right to education. The Court ruled that the migratory status of a person is not transmitted to their children, and that the discriminatory application of nationality and birth registration laws and regulations rendered certain children stateless, unable to access other critical rights to education, a lawfully registered name, and equal protection before the law.

## F. Policy coherence at the national, regional and international levels

85. The following are recent developments in ensuring policy coherence at all levels:

(a) In 2003 a working group on the education of migrant children was set up by the Hungarian Ministry of Education and Culture. This group includes all relevant ministries, international organizations, academic experts, NGOs, teachers, and directors of schools. The aim of the working group is to share best practices, exchange information, and coordinate actions in relation to migrant children;

(b) The Federal Migration Service of Russia has joined with the Office of the High Commissioner for Refugees (UNHCR), the United Nations Educational, Scientific and Cultural Organization (UNESCO), UNICEF and NGOs to provide social support to conflict-affected migrant children. Joint actions have been undertaken to provide humanitarian aid to child victims and create conditions for their social and psychological rehabilitation;

(c) Several Government agencies in Mexico (in particular the Foreign Ministry, the Migration Institute and the National Welfare Agency), together with international agencies, developed an integrated model of protection for unaccompanied migrant children through an inter-institutional roundtable on unaccompanied children and migrant women. In 2007, the Government of Mexico appointed 68 child protection officers;

(d) On 6 May 2010, the European Commission adopted the Action Plan<sup>74</sup> on Unaccompanied Minors (2010–2014), which aims to increase the protection of unaccompanied children entering the European Union. The action plan includes a commitment to the standards of the Convention on the Rights of the Child, such as the principle of the best interests of the child, and highlights the need to support the development of child protection systems in countries of origin;

(e) The Council of the Baltic Sea States has established a network of national contact points who meet regularly in order to build systems to respond to the needs of all separated and unaccompanied children arriving in the region;<sup>75</sup>

(f) National human rights institutions in the Asian region adopted the Seoul Guidelines on 11 November 2008, during the International Conference on Human Rights and Multicultural Society. This document underlines specific actions to promote and protect the right of migrant workers;

<sup>73</sup> Judgement of 8 September, 2005 (Inter-Am Ct. H.R., (Ser. C) No. 130 (2005)).

<sup>74</sup> European Commission, Communications from the Commission to the European Parliament and the Council – Action Plan on Unaccompanied Minors (COM (2010)213/3).

<sup>75</sup> See <http://www.childcentre.info/contactpoints/index.html>.

(g) UNHCR has developed the Guidelines on Formal Determination of the Best Interests of the Child<sup>76</sup> in the context of its mandate, which provide practical guidance on how to determine the best interests of children. The best interests determinations are undertaken through the establishment of a determination panel, and through putting in place standard operating procedures;

(h) The Global Migration Group is a group of United Nations and other agencies which aims to encourage better coordinated approaches to the issue of international migration, including through mainstreaming human rights approaches to migration. The group places a specific focus on the impact of migration on children.<sup>77</sup>

## VI. Conclusions and recommendations

86. **The protection of the rights of all children in the context of migration is a matter of utmost importance. While recognizing that children have particular vulnerabilities and needs and that they may be subject to discrimination, violence and abuse in the context of migration, the situation of children should not be artificially separated from that of their adult parents and families. The best way to protect the rights of the child in this context is to ensure that migration policies in general do not criminalize migrants, are non-discriminatory in purpose and effect, address the entire process of migration from a child and gender perspective, are premised on and respectful of human rights norms and standards, and are evidence-based and coordinated between all relevant stakeholders.**

87. **To this end, the High Commissioner recommends that effective measures are put in place in order to ensure the protection of the human rights of all children in the context of migration, including:**

(a) **States should integrate the rights and participation of children in the formulation, implementation and monitoring of all relevant legislation and administrative regulations, including childhood policies and plans on access to essential services, as well as migration policies. Where relevant, national human rights institutions and ombudspersons should be given a mandate to monitor, promote and protect the rights of children in the context of migration;**

(b) **All State officials and private personnel who come into contact with children in the context of migration, including border control authorities and personnel in detention centres, should be adequately trained to apply a child-sensitive and rights-based approach, which takes account of the specific vulnerability, needs and rights of children on the move. The principles of the Convention on the Rights of the Child should be an integral part of this training;**

(c) **States should avoid and repeal laws and administrative regulations that require public officials (including in the fields of service provision, local police and the judiciary) to report the presence of irregular migrants to migration authorities, as well as legislation that criminalizes the provision of assistance to irregular migrants. States should take measures to ensure durable solutions to the situation of irregular migrant children, including consideration of regularization programmes, through an integrated and protective rather than punitive approach;**

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<sup>76</sup> UNHCR, *UNHCR Guidelines on Formal Determination of the Best Interests of the Child*, May 2006. Available from <http://www.unhcr.org/refworld/docid/447d5bf24.html>.

<sup>77</sup> See [http://www.globalmigrationgroup.org/migration\\_and\\_children.htm](http://www.globalmigrationgroup.org/migration_and_children.htm).

(d) States and other relevant stakeholders should prioritize the collection of age and gender-disaggregated data on the human rights situation of children in the context of migration, while ensuring that such data-collection activities are not used for immigration enforcement purposes;

(e) States should strive to achieve policy coherence on migration at the national, regional and international levels, including through ensuring coordinated child protection policies and systems across borders that are in full compliance with international human rights standards.

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