

THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF MIGRANTS IN AN IRREGULAR SITUATION



UNITED NATIONS



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HUMAN RIGHTS
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New York and Geneva, 2014

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HR/PUB/14/1
UNITED NATIONS PUBLICATION
Sales No. E.14.XIV.4
ISBN 978-92-1-154205-9
e-ISBN 978-92-1-056767-1
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FOREWORD	1
INTRODUCTION	3
I. GENERAL PRINCIPLES	22
A. Equality and non-discrimination	23
B. State obligations with respect to economic, social and cultural rights.....	33
II. THE RIGHT TO HEALTH	38
A. Legal and practical barriers that prevent irregular migrants from enjoying the right to health	40
B. Policy and legal framework: the right to health of irregular migrants	49
III. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING, INCLUDING HOUSING, WATER AND SANITATION, AND FOOD	60
A. Legal and practical barriers that prevent irregular migrants from enjoying the right to an adequate standard of living	64
B. Policy and legal framework: the right to adequate housing of irregular migrants.....	70
C. Policy and legal framework: the right to water and sanitation of irregular migrants	73
D. Policy and legal framework: the right to food of irregular migrants	75

IV. THE RIGHT TO EDUCATION	80
A. Legal and practical barriers that prevent irregular migrants from enjoying the right to education	82
B. Policy and legal framework: the right to education of irregular migrants	87
V. THE RIGHT TO SOCIAL SECURITY.....	96
A. Legal and practical barriers that prevent irregular migrants from enjoying the right to social security	99
B. Legal and policy framework: the right to social security of irregular migrants	102
VI. THE RIGHT TO WORK AND THE RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK	110
A. Legal and practical barriers that prevent irregular migrants from enjoying the right to work and the right to just and favourable conditions of work.....	112
B. Legal and policy framework: the right to work and the right to just and favourable conditions of work of irregular migrants	115
CONCLUSION	126
FURTHER READING	136

FOREWORD

Today, there are more than 232 million international migrants in the world. If they came together to form a country, it would be the fifth most populous country on the planet. Yet, this remains a largely invisible population. Many migrants, particularly those who are in an irregular situation, tend to live and work in the shadows, afraid to complain, denied rights and freedoms that we take for granted, and disproportionately vulnerable to discrimination and marginalization.

In 2010, under the leadership of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the international organizations making up the Global Migration Group expressed their deep concern about the human rights of international migrants in an irregular situation in a landmark joint statement. The Group observed that migrants in an irregular situation were more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process. They often face prolonged detention or ill-treatment and, in some cases, enslavement, rape or murder. They are more likely to be targeted by xenophobes and racists, victimized by unscrupulous employers and sexual predators, and can easily fall prey to criminal traffickers and smugglers. Rendered vulnerable by their irregular status, these men, women and children are often afraid or unable to seek protection and relief from the authorities in countries of origin, transit or destination. Clearly, the irregular situation in which international migrants may find themselves should not deprive them either of their humanity or of their human rights.

International human rights law provides that everyone, without discrimination, must have access to the fundamental human rights provided in the international bill of human rights. Where differential treatment is contemplated, between citizens and non-citizens or between different groups of non-citizens, this must be consistent with international human rights obligations, undertaken for a legitimate objective, and the course of action taken to achieve this objective must be proportionate and reasonable.

Migrants in an irregular situation are not criminals. The evidence shows that they do not migrate with the objective of cheating the social security system or misusing the services of the country of destination. They are more likely to be working in a hospital than unfairly using its facilities. They tend to work in sectors that are dirty and dangerous, often doing jobs that local workers are unwilling to do. Indeed, Governments have an interest in promoting and protecting the human rights of all migrants, including irregular migrants, because no society can develop to its true potential when legal, social or political barriers prevent entire sectors of that society from contributing to it.

This publication offers a rich resource for policymakers in Governments, national human rights institutions, civil society, lawyers, judges and migrants themselves to understand the scope and content of the human rights of migrants in an irregular situation. Through a specific focus on economic, social and cultural rights, it seeks to challenge common assumptions about the entitlement of migrants in an irregular situation to such fundamental human rights as the right to health, to education, to an adequate standard of living, to social security, and to just and favourable conditions of work. Irregular migrants are human beings and as human beings they are protected by international human rights law.



Navi Pillay
United Nations High Commissioner for Human Rights

INTRODUCTION

More people are on the move than at any time in history; there are now some 232 million international migrants around the world.¹ The search for better living and working conditions, growing inequalities between and within countries, discrimination and other human rights violations, poverty, environmental degradation, conflict and violence, as well as demands from labour markets, continue to push and pull migrants across international borders. Estimates suggest that migrants who are in an irregular situation represent 15 to 20 per cent of all international migrants,² i.e., 30 to 40 million people worldwide. Contrary to some popular perception, such migrants do not move only between the South and the North; over recent decades South-South migration has increased and research suggests that many of these migrants are in an irregular situation.³

The majority of migrants in irregular situations enter their countries of destination via regular channels and only subsequently acquire irregular

¹ United Nations Department of Economic and Social Affairs, Population Division, *Trends in International Migrant Stock: The 2013 Revision* (United Nations database, POP/DB/MIG/Stock/Rev. 2013), available from www.unmigration.org.

² International Organization for Migration (IOM), *World Migration Report 2010: The Future of Migration – Building Capacities for Change* (Geneva, 2010). Available from http://publications.iom.int/bookstore/free/WMR_2010_ENGLISH.pdf. However, it is very difficult to accurately count the numbers of irregular migrants on a national, regional or international level. The 2009 *Human Development Report* makes the point that most estimates of migrant numbers are derived from censuses and that “there are good reasons to suspect that censuses significantly undercount irregular migrants, who may avoid census interviewers for fear that they will share information with other government authorities”. See United Nations Development Programme (UNDP), *Human Development Report 2009: Overcoming barriers – Human Mobility and Development* (Basingstoke, United Kingdom, Palgrave Macmillan, 2009), p. 23.

³ Many factors explain this. Some are common to all regions of the world: regular migration can be subject to strict conditions; immigration rules are unclear; high fees are charged for regular migration; there is weak enforcement of border controls and large informal employment sectors. D. Ratha and W. Shaw, “South-South migration and remittances”, Working Paper No. 102 (Washington D.C., World Bank, 2007), pp. 26–27.

status, for instance by overstaying their permits.⁴ Only a small minority crosses the border clandestinely. Yet, much popular and even official discourse on irregular migration is dominated by a security paradigm that seeks to “combat” or “fight” irregular migration, often through harsh border control measures and criminalizing irregular migrants.

Definitions

While there is no universally accepted definition of the term, “irregular migration” tends to refer to the movement of international migrants who enter or stay in a country without correct authorization. Other terms commonly used to describe migrants in an irregular situation are “undocumented”, “unauthorized”, “unlawful” and even “illegal”.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states:

For the purposes of the present Convention, migrant workers and members of their families:

- (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;
- (b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article (art. 5).

The Global Migration Group, an inter-agency body composed of 16 United Nations and other international entities working on migration, defines an “irregular migrant” as “every person who, owing to undocumented entry

⁴ In 2005 the Global Commission on International Migration estimated that only 2.5 to 4 million migrants, out of a global total of around 200 million at the time, crossed international borders without authorization every year. “Migration at a glance”, 2005, available from <http://web.mnstate.edu/robertsb/308/Migration%20at%20a%20glance.pdf>.

or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country's admission rules and any other person not authorized to remain in the host country."⁵

Words matter

In 1975 the United Nations General Assembly adopted resolution 3448 (XXX), in which it requested "the United Nations organs and the specialized agencies concerned to utilize in all official documents the term 'non-documented or irregular migrant workers' to define those workers that illegally and/or surreptitiously enter another country to obtain work".

In its general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families expressed the view that the term "in an irregular situation" or "non-documented" is the proper terminology when referring to their status. The use of the term "illegal" to describe migrant workers in an irregular situation is inappropriate and should be avoided as it tends to stigmatize them by associating them with criminality.

"People who enter or work in countries without legal authorization have been labelled illegal, clandestine, undocumented or irregular. 'Illegal migrants' ... has a normative connotation and conveys the idea of criminality." (International Labour Office, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Geneva, 2004)).

The Parliamentary Assembly of the Council of Europe, in its resolution 1509 (2006), explains that it prefers to use the term "irregular migrant" to other terms such as "illegal migrant" or "migrant without papers". This term is more neutral and does not carry, for example, the stigmatization of the term "illegal".

This publication will use the term "irregular migrants" to cover all categories of international migrants in an irregular situation, including undocumented migrants (noting that not all irregular migrants lack documents) and rejected asylum seekers.

⁵ Global Migration Group, *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights* (2008), p. 7.

Data

Irregular migration is a complex phenomenon and data on irregular migration and irregular migrants tend to be limited. Most official data systems fail to capture either the number or the circumstances of migrants, and many international data on migration do not accurately account for irregular migrants. Some data are available on those irregular migrants who are detained or otherwise subject to State action—e.g., arrests at border control points, numbers in immigration detention and return figures—but this is rarely indicative of the total irregular migrant population. Irregular migrants are very rarely included in population censuses, which remain the main statistical source of information about migrant populations.

The demand for and the use of indicators in human rights are part of a broader process of systematic work to implement, monitor and realize rights. Together with national human rights action plans, baseline studies and rights-based approaches to development and good governance, the oversight work of United Nations human rights mechanisms, and regional and national human rights institutions, indicators provide concrete, practical tools for enforcing human rights and measuring their implementation. There is a recognition that one has to move away from using general statistics and instead progress towards identifying specific indicators for use in human rights.

Source: *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations publication, Sales No. 13.XIV.2). This publication addresses the link between human rights and statistics, and proposes a set of tools to improve national statistical systems and ensure a more systematic implementation and monitoring of human rights.

To establish whether they are meeting their treaty obligations, and to ensure that their conduct is not creating inequalities in the enjoyment of human rights, States are obliged to monitor the effects of their policies and actions, including their social policies. To do so, they have a duty to gather disaggregated data.⁶ Indeed, Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and

⁶ Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health. The collection of statistical data should be disaggregated by sex, nationality and other descriptors.

Treatment of Migrant Workers of the International Labour Organization (ILO) explicitly directs States to collect information on the presence of irregularly employed male and female migrant workers.⁷

The Committee on the Rights of the Child has noted that lack of data on children in the context of migration hinders the design, implementation and monitoring of public policies that protect migrant children's economic and social rights. For instance, no reliable figures exist on the number of children in an irregular situation. The Committee has recommended that addressing the absence of national figures and estimates on irregular migrants, particularly irregular migrant children, should be made a higher priority by all pertinent duty bearers, including with regard to: strengthening disaggregated data collection, with safeguards to prevent the abuse of such data; ensuring that households affected by migration are identified in local statistical and data systems as well as nationally representative living standards, expenditure and labour force surveys; and ensuring that the responsibility for monitoring the situation of migrant children is shared by all countries involved, i.e., countries of transition and destination in addition to countries of origin.⁸

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has also expressed concern at the lack of data on the situation of irregular migrants, including on school enrolment, because this may prevent States from assessing and addressing the situation of migrant children effectively.⁹

⁷ The Convention states: "Each Member for which this Convention is in force shall systematically seek to determine whether there are illegally employed migrant workers on its territory and whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations" (art. 2.1).

⁸ See Committee on the Rights of the Child, "Report of the 2012 Day of general discussion on the rights of all children in the context of international migration", paras. 63–67.

⁹ CMW/C/DZA/CO/1, para. 20.

In cooperation with Caritas, the public health service of the city of Reggio Emilia, Italy, provides outpatient care and medical treatment to foreigners. The *Centro per la salute della famiglia straniera* (Centre for foreign families) has a cultural mediation service and provides services to specific groups, including assistance to women and children as well as obstetric services.

The Centre keeps precise statistics on its patients, using a code to identify patients and maintain patient records while preserving anonymity. The Centre shares its database with Caritas's medical centre *Querce di Mamre*, which offers specialist care in 11 areas (dental care, general care, woman and child care, surgical services, neurology, urology, cardiology, ophthalmology, orthopaedics, ear, nose and throat, and dermatology). The services of both centres target mainly migrants in an irregular situation.

Pathways into irregularity

The form that irregular migration takes is influenced by a complex mix of factors, involving the interests of individual migrants and employers, wider economic interests, political interests, security concerns, and law and normative frameworks. In 2005, the Global Commission on International Migration noted that: "The issue of irregular migration is inextricably linked to that of human security. Many of the people who migrate in an irregular manner do so because their own countries are affected by armed conflict, political instability and economic decline."¹⁰ Around the world, legal channels for migration are generally insufficient and those that do exist are often hard to access.¹¹ Individuals with fewer resources are disproportionately affected by the absence of regular channels and barriers obstructing their use.

There are many "pathways" into irregularity. Migrants, including rejected asylum seekers, may be unable to return to their countries of origin for fear of human rights violations. Cumbersome and expensive bureaucratic

¹⁰ Global Commission on International Migration, "Migration in an interconnected world: new directions for action", October 2005, p. 33. Available from www.queensu.ca/samp/migrationresources/reports/gcim-complete-report-2005.pdf.

¹¹ Franck Düvell, "Paths into irregularity: the legal and political construction of irregular migration", *European Journal of Migration and Law*, vol. 13, No. 3 (2011).

procedures can cause the unintended loss or withdrawal of regular status. In countries where work and residence permits are tied to employment, migrants are likely to become irregular when they escape abusive employers. In some circumstances, a migrant may find that she is in both a regular and an irregular situation, for example if she entered a country on a visa to join family members but is subsequently compelled for financial reasons to find a job despite not having a work permit. Migrants may make the conscious decision to seek out irregular channels of entry in order to reunite with family or seek employment. Children often find themselves in an irregular situation because their status is linked to that of their parents, and children born to migrant parents in their countries of destination often inherit their irregular status.

Research tells us that the majority of irregular migrants will have entered the country of destination legally and only subsequently will have fallen into an irregular situation. Some will have overstayed their permits having been unable to maintain a regular presence, while others will have lapsed into irregularity due to bureaucratic obstacles or will have been driven into irregularity trying to escape exploitation and abuse by their employers. Some irregular migrants will have protection needs that they have been either unable or unwilling to articulate to State authorities, or that have been dismissed in flawed asylum procedures.

Human rights are not a matter of charity, nor are they a reward for obeying immigration rules. Human rights are inalienable entitlements of every human being, wherever they are and whatever their status.

Source: Navi Pillay, United Nations High Commissioner for Human Rights, "Equal rights for all migrants: a call for ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", address to the Graduate Institute of International and Development Studies, Geneva, 14 December 2011.

Vulnerability of irregular migrants

Regardless of how they acquired irregular status, irregular migrants are disproportionately exposed to human rights violations. In 2010, the Global Migration Group expressed its deep concern about the human rights of international migrants in an irregular situation around the globe,

concluding that they are more likely to face discrimination, exclusion, abuse and exploitation. The Group noted that the irregular situation in which international migrants may find themselves should not deprive them of either their humanity or their human rights.¹²

However, across the world, irregular migrants face many violations of their fundamental human rights. They are often subject to arbitrary and prolonged detention owing to restrictive migration detention policies and can be subject to inadequate conditions in detention. By law or administrative regulation, many are denied access to public health care, adequate housing and accommodation, education, and essential social security. Irregular migrant children may be unable in law or practice to attend school. Irregular migrants are frequently ineligible to receive adequate health care or decent accommodation, and may not be allowed to exercise their right to freedom of association. Many feel unable to inform the police when they are victims of crime or do not send their children to school, because they are afraid of being deported.

Furthermore, forced to remain at the margins of society and often excluded from the formal economy, most irregular migrants work in low-skilled and unregulated sectors of the labour market, in jobs that are often dirty, dangerous and difficult. They may join other family members who already work in these sectors. Their conditions of work are often dangerous and they have little or no protection of their labour rights. They are often subject to exploitative conditions, including violence, torture and forced labour, with little recourse to remedies owing to their irregular situation.

Yet, national strategies or plans of action on public housing, health care or education rarely consider the situation and needs of vulnerable irregular migrants. Such policies rarely take into account the essential contributions that migrants make to society and the economy, or the many ways in which they may be denied their human rights.

¹² Statement of the Global Migration Group on the human rights of migrants in an irregular situation, 30 September 2010.

State authorities also often assume that the guarantee of economic, social and cultural rights requires them to provide free health care, water, education, food and other goods and services. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has pointed out, however, that the human rights framework does not always require the State to provide social assistance, noting that: “As the Universal Declaration of Human Rights states, everyone has the right to social security in the event of unemployment, sickness, old age or other lack of livelihood in circumstances beyond his or her control. However, this does not always mean an entitlement to a handout. Social security should prevent people from living in desperate situations and help them get back on their feet with a view to giving them opportunities to be free, contributing members of society.”¹³ This requires States to contemplate a range of measures, from providing benefits to dismantling the social barriers that obstruct the full participation of everyone in economic and social life.

Migrants are frequently condemned, often without basis, for taking jobs from local people, overburdening public health systems and jumping housing queues.¹⁴ Human rights mechanisms have expressed their concern about the current resurgence of political parties with xenophobic ideologies and programmes that incite discrimination and violence against migrants, blaming them for insecurity and socioeconomic problems.¹⁵ Widespread misperceptions about the scale and nature of migration can contribute to prejudice and xenophobia. The fact that today South-South migration is almost as common as South-North migration, and that about one third of all migrants originate from and are living in the global South, seldom makes it to the front pages

¹³ OHCHR, *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights*, p. 21.

¹⁴ These myths are clearly refuted by studies that have analysed statistical data on irregular migrants around the world. See, for example, IOM, *World Migration Report 2011: Communicating Effectively about Migration* (Geneva, 2011), pp. 27–29. Available from http://publications.iom.int/bookstore/free/WMR2011_English.pdf.

¹⁵ “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere” (A/HRC/20/33), para. 28.

of newspapers.¹⁶ On the other hand, surveys of public opinion have found a consistent overestimation of the absolute numbers of migrants in destination societies.¹⁷

Irregular migration has risen to the top of the political agenda in countries and regions across the world, and migrants are becoming unwittingly implicated in internal disputes about national identity.¹⁸ Fears over foreigners stealing benefits, jobs and security are rarely just fears about migrants and immigration. The reality is that there are usually fewer irregular migrants in communities than people fear, and they are typically less likely to claim benefits than the resident population. The debate on migration, and irregular migration more specifically, is thus increasingly characterized by proxy fears about unemployment, the viability of welfare systems and other aspects of globalization.

A major issue is how to confront widespread adverse public perceptions, opinions and resentment and xenophobia against foreigners, particularly migrant workers, especially where they are commonly portrayed as unfairly competing for scarce employment and housing, unjustly or illegally drawing on public welfare resources, and associated with criminality.

Source: Report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on its seventh and eighth sessions (A/63/48), annex VI, para. 13.

¹⁶ United Nations Department of Economic and Social Affairs, Population Division, "Migrants by origin and destination: the role of South-South migration", Population Facts, No. 2012/3, June 2012. It is important to remember nevertheless that xenophobia is prevalent in host countries in the South as well as in the North.

¹⁷ A study of eight migrant receiving countries (Canada, France, Germany, Italy, Netherlands, Spain, United Kingdom and United States) found that, in all of them, respondents were inclined to overestimate significantly the migrant population. For example, Americans, on average, estimated a foreign-born population of 37.8 per cent, while it is actually only 12.5 per cent (*Transatlantic Trends 2010*). See also IOM, *World Migration Report 2011*, p. xiv.

¹⁸ ILO et al., *International Migration, Racism, Discrimination and Xenophobia* (August 2001), p. 1.

The global economic and financial crisis has exacerbated the tendency of many States to limit avenues for regular migration (including family reunification), sometimes making irregular channels the only alternative for migration. Such policy decisions do not take into account evidence from around the world which suggests that, in general, migration does not have a negative economic impact on destination countries.¹⁹

Criminalization of irregular migration

Under international law, irregular entry and stay are administrative misdemeanours rather than criminal offences and should be sanctioned accordingly; of themselves they involve no crimes against persons, property or national security. The Committee on Migrant Workers asserted in its general comment No. 2 (2013) that “crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes *per se* against persons, property or national security” (para. 24). The Special Rapporteur on the human rights of migrants concurs that “irregular migration is not a crime. State authorities have increasingly had recourse to the language of crime when they speak of irregular migration, with some States resorting to criminalization of irregular migration and/or of helping migrants in an irregular situation. Crossing borders may be in violation of the law, but it is an abstract violation of the law, since moving from one country to another does not *per se* endanger any person, nor affect any property.”²⁰

¹⁹ Bimal Ghosh, *The Global Economic Crisis and Migration: Where Do We Go from Here?* (Geneva, IOM, 2011). A recent study in the United Kingdom found that migrants who had arrived since 2000 were less likely to receive benefits or to live in social housing than native residents. In addition, from 2001 to 2011, migrants made a considerable net contribution to the country’s fiscal system and thus helped to relieve the fiscal burden on native workers. See Christian Dustmann and Tommaso Frattini, “The fiscal effects of immigration to the UK”, Discussion Paper Series, CDP No. 22/13 (London, Centre for Research and Analysis of Migration, November 2013).

²⁰ François Crépeau, Special Rapporteur on the human rights of migrants, statement to the General Assembly, New York, 21 October 2011.

Some States, both countries of origin and of destination, have developed laws and policies to protect the rights of irregular migrants. According to the 2008 Constitution of Ecuador, migration is a human right. Article 40 explicitly states that no person can be deemed “illegal” because of his or her migratory status.

The criminalization of migrants who enter a country or remain in it irregularly exacerbates their social exclusion and pushes them to live in even more precarious conditions.²¹ While States enjoy a sovereign prerogative to manage their borders, it is important to note that human rights law limits its exercise.

The principle of non-refoulement, for example, bars States from removing from their territory any person, regardless of nationality or status, to a place where he or she would be at risk of persecution, torture or other serious human rights violations.²² It continues to be debated, for example, whether returning people to countries in which they may not have access to adequate health care constitutes inhuman or degrading treatment. In this context, the view of the Committee on Migrant Workers, as stated in its general comment No. 2 (2013), is that “this principle covers the risk of torture and cruel, inhuman or degrading treatment or punishment, including inhumane and degrading conditions of detention for migrants or lack of necessary medical treatment in the country of return, as well as the risk to the right to life It also applies to situations where individuals would not be protected from onward refoulement. The Committee is of the view that migrants and members of their families should be protected in cases where expulsions would constitute arbitrary interference with the right to family and private life” (para. 50). The European Court of Human Rights, in its most recent jurisprudence, appears to suggest that the expulsion of persons with a life-threatening medical condition or a terminal illness who

²¹ See, for instance, “Criminalisation of migration in Europe: human rights implications”, Issue Paper, CommDH/IssuePaper (2010) 1 (Strasbourg, France, Council of Europe, Commissioner for Human Rights, 4 February 2010). Available from <https://wcd.coe.int/ViewDoc.jsp?id=1579605>.

²² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3) and Convention Relating to the Status of Refugees (art. 33).

could not continue treatment in their country of origin would amount to inhuman and degrading treatment contrary to article 3 of the European Convention on Human Rights only under exceptional circumstances.²³

The Committee on the Elimination of Discrimination against Women highlighted, in its general recommendation No. 26 (2008) on women migrant workers, that “undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation. They may be exploited as forced labour, and their access to minimum labour rights may be limited by fear of denouncement. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centres, where they are vulnerable to sexual abuse, and then deported” (para. 22).

Women migrant domestic workers face additional risks related to their gender, including gender-based violence. The Committee on Migrant Workers noted in its general comment No. 1 (2011) on migrant domestic workers that these risks and vulnerabilities are further aggravated for irregular migrant domestic workers, not least because they often risk

²³ The European Court of Human Rights judged in 1998 that persons with a life-threatening medical condition or a terminal illness who could not continue treatment in their country of origin might not be returned because this would hasten death in distressing circumstances, which in turn would amount to a form of inhumane treatment, contrary to article 3 of the European Convention on Human Rights. See *D. v. United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997; and *BB v. France*, Application No. 39030/96, Commission’s report of 9 March 1998. However, the most recent jurisprudence of the Court appears to suggest that this principle applies only in exceptional circumstances. See *Ndangoya v. Sweden*, Application No. 17868/03, Judgement of 22 June 2004, and *Amegnigan v. the Netherlands*, Application No. 25629/04, Judgement of 25 November 2004. Both applications were found inadmissible. In *N. v. the United Kingdom*, Application No. 26565/05, Judgement of 27 May 2008, the Court ruled by a majority that the expulsion of a seriously ill HIV-positive Ugandan national would not give rise to a violation of article 3. The Court argued that the high threshold was not met for a case such as this, in which the “alleged future harm would emanate not from intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country” (para. 43).

deportation if they contact State authorities to seek protection from an abusive employer. The Committee further recommended that States should incorporate a gender perspective and develop remedies for the gender-based discrimination faced by women migrant domestic workers (paras. 7 and 60).

Constraints on the rights of adult migrants negatively affect the rights of their children. According to the United Nations Children's Fund (UNICEF), "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."²⁴

Protection of the family

There is universal consensus that the family, as the fundamental unit of society, is entitled to respect, protection, assistance and support (Universal Declaration of Human Rights, art. 16.3, and International Covenant on Economic, Social and Cultural Rights, art. 10.1). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families protects all migrant workers and members of their family against arbitrary or unlawful interference with family life (art. 14). A child's right to family life is established in the Convention on the Rights of the Child (preamble and arts. 3, 7–10, 16 and 18). It obliges States to ensure that children are not separated from their parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child. The right to family life has an important protective function for children in the context of migration, particularly for unaccompanied and separated children, and is relevant in admission, detention and expulsion procedures.

The underlying assumption of many policies in relation to migration and family is that reunification or indeed family life itself should occur only in the country of origin of the irregular migrant. Most migration experts, on the other hand, believe that restrictions based on that assumption are likely to increase the irregular entry of children seeking to reunite with their parents, and extend the

²⁴ UNICEF and National University of Lanus (Argentina), "Economic, social and cultural rights of migrant children and children born to migrant parents: challenges, good practices and recommendations", draft paper, March 2010. Available from www.ohchr.org/Documents/Issues/MHR/Consultation2010/3a.UNICEF_ESCR_Migrants.pdf.

irregular residence of some children in countries of destination.^a They recognize that, in the absence of regular opportunities to migrate, many individuals—including children—feel compelled to migrate in precarious and dangerous circumstances to reunite with their family members and may evade immigration controls to do so. Moreover, many children who are born in countries of destination to irregular migrants are at risk of losing their parents and their family life if their parents are deported.

In its general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, the Committee on the Rights of the Child reaffirmed that the best interests of the child should be the primary consideration, including in issues of family reunification. Reunification in the country of origin should not be pursued if there is a “reasonable risk” that return would lead to the violation of the child’s rights (para. 82). In its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee on the Elimination of Racial Discrimination called on State parties to avoid expulsions of non-citizens, and especially long-term residents, where it would result in disproportionate interference with the right to family life (para. 28). The Committee on the Rights of the Child also recommended in its report of the 2012 Day of general discussion on the rights of all children in the context of international migration held in February 2013 that “States should ensure that their migration policies, legislation and measures respect the right of the child to family life and that no child is separated from his/her parents by State action or inaction unless in accordance with his/her best interests. Such measures should inter alia include positive, humanitarian, and expeditious attention to family reunification applications; options for regularization of migration status wherever possible; and family reunification policies, at all stages of migration, for enabling children left behind to join their parents (or parents to join their children) in transit and/or destination countries” (para. 83).

Respect for the right to family life requires States to refrain from actions that cause families to separate, and to take positive measures to uphold the unity of the family and reunite family members who have been separated. States are also obliged to take special measures to trace and reunite parents with their unaccompanied or separated children. The Special Rapporteur on the human rights of migrants has advised countries of origin and of destination to develop strategies that will achieve family reunification within a reasonable time frame.^b

^a Committee on the Rights of the Child, “2012 Day of general discussion on the rights of all children in the context of international migration”, Background paper, August 2012, p. 22.

^b A/HRC/11/7, para. 87.

Outline of the present publication

This publication aims to fill a significant knowledge gap on the human rights of irregular migrants. While acknowledging the range of human rights concerns related to irregular migrants, it specifically sets out the legal and policy frameworks in relation to the economic, social and cultural rights of irregular migrants, highlighting the guidance provided by international human rights law, as well as related legal frameworks such as international labour law. The Office of the United Nations High Commissioner for Human Rights has described economic, social and cultural rights as “those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education.”²⁵

The publication seeks to describe barriers faced by irregular migrants in the exercise of these rights as well as trends and national policies, highlighting where possible examples of promising practice from around the world. These examples of State practice are necessarily non-exhaustive, but aim to shine a light on laws, policies and other initiatives that are relevant to the human rights situation of irregular migrants.

The first chapter deals with general principles and in particular the principle of equality and non-discrimination, and considers the nature of States’ obligations with regard to economic, social and cultural rights. The following chapters then analyse five rights: to health; to an adequate standard of living, including to housing, food, water and sanitation; to education; to social security; and to work. Each chapter sets forth the scope and content of the right under international human rights law starting with the universal standard as reflected in the International Bill of Human Rights and then the legal frameworks specifically related to irregular migrants. Highlighted in each chapter are the “minimum core obligations”²⁶ that

²⁵ *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights*, p. 1.

²⁶ In its general comment No. 3 (1990) on the nature of States parties’ obligations, the Committee on Economic, Social and Cultural Rights argues that State parties have “minimum core obligations” under the Covenant to ensure a basic level of enjoyment of each economic, social and cultural right. The Committee notes that “a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential

the Committee on Economic, Social and Cultural Rights has identified in respect of each right, as well as the recommendations and guidance of the United Nations human rights mechanisms²⁷ and the views of regional human rights systems. Each chapter also briefly considers the legal and practical barriers that irregular migrants face, and all chapters end with key messages to States and other stakeholders.

At the outset, it is important to acknowledge that migrants who enter, live and work in a regular situation can also be vulnerable to discrimination and human rights violations. In countries around the world migrants in both regular and irregular situations are subjected to the same treatment. However, in the light of their particular vulnerability, the intention of this publication is to shed light on the situation of irregular migrants and dispel persistent myths about their entitlements under international human rights law. In addition, given the specific vulnerability of children, their situation is highlighted throughout the publication.²⁸

primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*" (para. 10). Note that the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights also reaffirm this principle.

²⁷ These include the treaty bodies established to monitor States' compliance with international human rights treaties, and the special rapporteurs and other independent experts appointed by the former Commission on Human Rights and its successor, the Human Rights Council, to investigate and report on pressing human rights challenges.

²⁸ In this context it is important to note that the publication includes within the broad category of "children" the children of irregular migrants who may be citizens of the host State or otherwise have a regular status, but who do not fully enjoy their human rights on account of their parents' status.

Recent developments regarding the human rights of irregular migrants

International policies on migration and irregular migration have evolved in recent years:

On 27 August 2013, the Committee on Migrant Workers adopted its general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families.

In it, the Committee emphasized that, whatever the modalities of their stay, the irregular situation of migrant workers can never deprive them of their fundamental rights as protected under Part III of the Convention.

General comment No. 2 (2013) guides State parties in their conduct towards irregular migrant workers with specific respect to, inter alia, non-discrimination, protection against violence, protection from arbitrary arrest and detention, protection against inhumane treatment, protection in expulsion proceedings, protection against labour exploitation, the right to social security, the right to urgent medical care and the right to education.

Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families gives the Committee the competence to receive and consider individual communications. This complaint mechanism will become operational once 10 State parties have made the required declaration under this article.

* * *

The entry into force on 5 May 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is an important development. Although the Universal Declaration of Human Rights promised respect for all human rights for all people more than 60 years ago, for a long period economic, social and cultural rights were not given the same attention or status in law. The Optional Protocol addresses this gap and recognizes their justiciability on an equal footing with civil and political rights. Practically, with regard to the human rights of irregular migrants, it:

- Provides irregular migrants with an international accountability mechanism for addressing violations of their rights;
- Enables the Committee on Economic, Social and Cultural Rights to interpret economic, social and cultural rights in the context of specific cases, thereby clarifying their content and providing guidance to States and courts.

An international complaints mechanism provides an incentive to strengthen the national protection of economic, social and cultural rights and will provide a robust standard for the protection of the rights of all migrants. It will require State parties to provide remedies in specific cases, offer guidance to domestic courts and other human rights protection mechanisms, and analyse the substantive content of these rights and the related obligations of States. International case law can also inform national and regional jurisprudence.

I. GENERAL PRINCIPLES

A. Equality and non-discrimination

The principles of equality and non-discrimination lie at the heart of international human rights law and are directly related to that of universality, which affirms that every human being has fundamental rights. According to the Universal Declaration of Human Rights, “all human beings are born free and equal in dignity and rights” (art. 1) and “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind” (art. 2). The International Covenant on Economic, Social and Cultural Rights guarantees to “everyone” the rights it contains, including the rights to work, to just and favourable conditions of work, to trade union freedoms, to social security, to an adequate standard of living, to health, and to education.²⁹

Discrimination is prohibited by the International Covenant on Economic, Social and Cultural Rights under all circumstances. Under the Covenant, States have an immediate and absolute obligation in this matter. However, even though this principle is firmly established in international human rights law, misconceptions about its application to non-nationals impede the full implementation of economic, social and cultural rights. Irregular migrants in particular often face discrimination, even when this is specifically prohibited under the relevant legislation or regulations.

Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socioeconomic inequality, often because of entrenched historical and contemporary forms of discrimination.

Source: Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 1.

²⁹ The Committee on Economic, Social and Cultural Rights has defined discrimination as: “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.” General comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 7.

Human rights law provides that every person, without discrimination, must have access to the fundamental human rights set out in the two Covenants on human rights. States are obliged to ensure that any differences of treatment between citizens and non-citizens or between different groups of non-citizens serve a legitimate objective, and any course of action they take to achieve such an objective must itself be proportionate and reasonable.³⁰ States should thus ensure that their laws, regulations and administrative practices do not discriminate against migrants.

In support of this position, the Committee on Economic, Social and Cultural Rights has stated that “the philosophy of the Covenant [is] based on the principle of non-discrimination”.³¹ Any difference of treatment must pursue a legitimate aim that is compatible with the nature of the rights enshrined in the Covenant and must meet the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the objective a State seeks to realize and the measures it takes or avoids taking to achieve that objective.³²

The situation of children and other vulnerable groups that can be discriminated against on multiple grounds (such as persons with disabilities, women at risk or older migrants) should receive particular scrutiny. For example, in its general comment No. 20 (2009), the Committee on Economic, Social and Cultural Rights noted that the right of all children to education, adequate food and affordable health care should be fully protected (para. 30).

³⁰ See also the Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgement of 8 September 2005, Series C, No. 130, para. 155. “The obligation to respect and ensure the principle of ... non-discrimination is irrespective of a person’s migratory status in a State. In other words, States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender, age or any other cause.”

³¹ E/C.12/1995/17, para. 16.

³² See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13.

Birth registration: the “right to have rights”

A legal identity is often a prerequisite for accessing a number of fundamental rights. Children of migrants in an irregular situation, particularly those born in a host State that does not recognize their existence, are vulnerable throughout their lives. According to the Convention on the Rights of the Child, children should be registered “immediately after birth”, and shall have the right, from birth, to a name and to acquire a nationality (art. 7.1). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that “each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality” (art. 29). Irrespective of the migration status of their parents, States are obliged to ensure that children are provided with birth certificates and other identity documents.

Similarly, the Committee on Migrant Workers, in its general comment No. 2 (2013), noted that State parties are obliged to ensure that children of migrant workers are registered soon after birth, irrespective of the migration status of their parents, and provided with birth certificates and other identity documents (para. 79).

The right to be registered at birth determines whether the child will be able to access, in law and in practice, other human rights. Accordingly, violation of this right can lead to a series of harmful consequences for unregistered children. According to the Committee on the Rights of the Child, in its general comment No. 7 (2005) on implementing child rights in early childhood, “comprehensive services for early childhood begin at birth. The Committee notes that provision for registration of all children at birth is still a major challenge for many countries and regions. This can impact negatively on a child’s sense of personal identity and children may be denied entitlements to basic health, education and social welfare”. To ensure the rights to survival, development and access to quality services for all children (art. 6), the Committee “recommends that States parties take all necessary measures to ensure that all children are registered at birth. This can be achieved through a universal, well-managed registration system that is accessible to all and free of charge ... all children should be registered at birth, without discrimination of any kind (art. 2). The Committee also reminds States parties of the importance of facilitating late registration of birth, and ensuring that children who have not been registered have equal access to health care, protection, education and other social services” (para. 25).

To give practical effect to the right to birth registration, States should not require migrants to present a residence permit in order to register a child, as this would effectively deprive migrant children in an irregular situation of their right to birth registration, which can also deny them access to education, health services, employment, housing and other rights. Non-compliance by migrants with the obligation to register their child at birth should never justify the child's exclusion from education or other services.

The principle of non-discrimination is affirmed by all the core international human rights instruments and by the Charter of the United Nations. The degree to which it is recognized to be a key element of human rights protection led the Inter-American Court of Human Rights to assert that it "forms part of general international law" and "has entered the realm of *jus cogens*". It therefore applies to all States whether or not they are a party to a specific international treaty.³³ The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both prohibit discrimination in every circumstance.³⁴ In its general recommendation No. 30 (2004), the Committee on the Elimination of Racial Discrimination asked all State parties to ensure that laws prohibiting racial discrimination cover non-citizens, regardless of their immigration status, and that their implementation has no discriminatory effects on them (para. 7).

International human rights law therefore narrowly restricts the circumstances in which States may legitimately permit differences of treatment between

³³ Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants, 17 September 2003, Series A, No. 18, paras. 101 and 173 (4).

³⁴ The International Covenant on Economic, Social and Cultural Rights states: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (art. 2.2). The International Covenant on Civil and Political Rights states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (art. 2.1).

citizens and non-citizens or between different groups of non-citizens (such as regular and irregular migrants), including with regard to economic, social and cultural rights, and affirms that any differences of treatment should be objective and reasonable.³⁵ While States enjoy a certain margin of discretion in assessing whether and to what extent differences in otherwise similar situations justify different treatment, they must justify how such different treatment, based exclusively on nationality or legal status, is compatible with the principle of non-discrimination.

National origin is expressly included among the prohibited grounds of discrimination in all universal human rights instruments that contain a non-discrimination provision, except the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also considers nationality to be a prohibited ground of discrimination (art. 7).

The Committee on Economic, Social and Cultural Rights has recognized that discrimination varies according to context and evolves over time. It has stated that a flexible approach is needed to capture forms of differential treatment that cannot be justified reasonably or objectively and are comparable in nature to prohibited grounds of discrimination. Legal and immigration status are less often listed explicitly as a prohibited ground of discrimination in the core instruments. However, the Committee has affirmed that Covenant rights apply to everyone, including non-nationals such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, *regardless of legal status and documentation* [emphasis added].³⁶

³⁵ Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13; and European Court of Human Rights, *Gaygusuz v. Austria*, Application No. 17371/90, Judgement of 16 September 1996. See also Pia Oberoi, "Defending the weakest: the role of international human rights mechanisms in protecting the economic, social and cultural rights of migrants", *International Journal on Multicultural Societies*, vol. 11, No. 1 (2009).

³⁶ Prohibited grounds include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See International Covenant on

Similarly, the Committee on the Elimination of Racial Discrimination stated, in its general recommendation No. 30 (2004), that differences of treatment based on citizenship or immigration status will constitute discrimination if the criteria for different treatment, judged in the light of the objectives and purposes of the Convention, are not applied in pursuit of a legitimate aim or are not proportional to its achievement (para. 4).

The Committee on the Rights of the Child, in its general comment No. 6 (2005), noted that “the enjoyment of rights stipulated in the Convention ... [must] be available to all children ... irrespective of their nationality, immigration status or statelessness” (para. 12).

Non-discrimination in practice

The prohibition of discrimination covers both *formal* as well as *substantive* discrimination.³⁷ States must ensure that their constitutions, as well as domestic laws and policies, do not discriminate on prohibited grounds against a particular individual or group. They must also adopt measures to prevent, alleviate or eliminate the occurrence of conditions or attitudes that cause or perpetuate discrimination with respect to the Covenant’s rights. In its general comment No. 2 (2013), the Committee on Migrant Workers averred that merely addressing *de jure* discrimination will not ensure *de facto* equality. It asked State parties to protect the rights of all migrant workers under the Convention by adopting positive measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate *de facto* discrimination against them (para. 19).

In addition, the Committee on Economic, Social and Cultural Rights has noted that in practice eliminating discrimination requires States to give appropriate attention to groups of individuals who have suffered historical or persistent prejudice. It is not sufficient merely to formally

Economic, Social and Cultural Rights, art. 2.2; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), paras. 27 and 30.

³⁷ Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 8.

compare the treatment of individuals regardless of context. It is important to highlight here that, in view of their particular vulnerability, exclusion and disadvantage, such individuals and groups could include irregular migrants and irregular migrant communities. The High Commissioner has noted in this context that: "Treating all persons equally in formal terms can literally be a death sentence to those labouring silently, daily, under the yoke of structural discrimination".³⁸

States have also been called on to address both *direct* and *indirect* discrimination. A law, policy or practice may appear neutral, but have a disproportionate impact on the rights of migrants. Imposing a rule that children enrolling for school must show a birth certificate, for example, discriminates against irregular migrant children who do not possess such documents or cannot easily obtain them. Fee-based medical systems that have the effect of excluding irregular migrants from health care might also be discriminatory.³⁹

The International Covenant on Civil and Political Rights (art. 2.1) prohibits discrimination in all circumstances with respect to the rights it covers. In addition, it requires States to ensure equal protection under the law, a provision that may be invoked independently of other substantive guarantees.⁴⁰ The Human Rights Committee has made clear that the principle of equal protection, without discrimination, applies to all State legislation (not only matters covered by the Covenant), and has consistently

³⁸ Navi Pillay, United Nations High Commissioner for Human Rights, "The equality imperative", statement at the Leadership Meeting on Addressing Inequalities in the Post-2015 Development Agenda, Copenhagen, 19 February 2013. Available from www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13024&LangID=e.

³⁹ See Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, "Undocumented migrant children in an irregular situation: a real cause for concern", Doc. 12718, 16 September 2011.

⁴⁰ "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (art. 26). See also Human Rights Committee, general comment No. 18 (1989) on non-discrimination, para. 12.

reaffirmed that it applies to legislation that touches on economic, social and cultural rights.⁴¹ In its general comment No. 15 (1986) on the position of aliens under the Covenant, the Committee explains that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and non-nationals (para. 2).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families contains a general provision on the prohibition of discrimination with respect to the rights it covers.⁴² The rights to equal conditions of work, to social security, to urgent medical care and to education, among others, are applicable to all migrant workers and members of their families, whether they are documented or in an irregular situation. Part IV of the Convention guarantees certain additional rights to documented migrants and migrants in a regular situation.

The International Convention on the Elimination of All Forms of Racial Discrimination states that special measures are not to be considered discriminatory when they are taken for the sole purpose of securing adequate advancement of certain groups of individuals and the achievement of full equality.⁴³

⁴¹ See, for example, *J. Vos v. Netherlands*, communication No. 786/1997, Views adopted on 29 July 1999; *Pauger v. Austria*, communication No. 415/1990, Views adopted on 26 March 1992; *Carlos Orihuela Valenzuela v. Peru*, communication No. 309/1988, Views adopted on 14 July 1993; *Hendrika S. Vos v. Netherlands*, communication No. 218/1986, Views adopted on 29 March 1989; *Blom v. Sweden*, communication No. 191/1985, Views adopted on 4 April 1988; and *Oulajin and Kaiss v. Netherlands*, communication Nos. 406/1990 and 426/1990, Views adopted on 23 October 1992.

⁴² "States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status" (art. 7).

⁴³ Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, para. 21.

Limitations to the principle of universal access to human rights

The International Covenant on Civil and Political Rights contains two exceptions to the principle of universality: irregular migrants do not enjoy political rights or, with certain important caveats, freedom of movement.⁴⁴ Any other differences of treatment between nationals and non-nationals, including irregular migrants, must be based on reasonable and objective criteria.⁴⁵

The International Covenant on Economic, Social and Cultural Rights also identifies an exception to the general rule of equal and universal access. Its article 2.3 states that:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

However, it is important to note that article 2.3 must be narrowly construed, may be relied upon only by developing countries and refers only to economic rights.⁴⁶ Therefore, States may not treat citizens and non-citizens differently with respect to social and cultural rights. The Committee

⁴⁴ The Covenant reserves to citizens the right to vote and take part in public affairs (art. 25), and grants the right of freedom of movement to foreigners provided they are lawfully in a country (art. 12). The Human Rights Committee nevertheless made clear in its general comment No. 15 (1986) that all foreigners may enjoy the protection of the Covenant, including in relation to entry and residence, when issues of discrimination, inhuman treatment or respect for family life arise (para. 5). It is also important to note that the Covenant guarantees to everyone without discrimination the right to leave any country, including his or her own, and to enter his or her own country (art. 12.2 and 4).

⁴⁵ Human Rights Committee, *F. H. Zwaan-de Vries v. The Netherlands*, communication No. 182/1984, Views adopted on 9 April 1987, para. 13.

⁴⁶ It should be noted here that there is no universal understanding of the content of "economic rights". While the right to work may be seen as the clearest example of such a right, it may also be considered a social right. In its general comment No. 11 (1999) on plans of action for primary education, the Committee stated that "the right to education ... has been variously classified as an economic right, a social right and a cultural right. It is all of these" (para. 2).

on Economic, Social and Cultural Rights affirmed in its general comment No. 20 (2009) that a lack of available resources cannot be considered as an objective and reasonable justification for difference in treatment “unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority” (para. 13).

The Covenant’s article 4 is also relevant in this respect:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

According to the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, article 2.3 should therefore be interpreted narrowly.⁴⁷ On the grounds that article 4 was primarily intended to protect the rights of individuals and not to limit rights that affect their subsistence or survival or the integrity of the person, the Limburg Principles suggest that “promoting the general welfare” should be “construed to mean furthering the well-being of the people as a whole”. Such guidance would not limit the fundamental rights of migrants. Under the Covenant, State interventions that restrict or limit rights are permissible only to promote the “general welfare” (rather than, for example, immigration objectives or border controls).

⁴⁷ The drafting history of the Covenant indicates that this article was drafted specifically to protect the rights of nationals of newly independent former colonies with respect to groups of resident non-nationals (holding the nationality of the former colonial power) who controlled important sectors of these countries’ economies. The Limburg Principles therefore state that, for the purposes of this article, the term “developing countries” should be restricted to States that acquired independence from colonial rule. See E/CN.4/1987/17, annex, paras. 42–44.

B. State obligations with respect to economic, social and cultural rights

States that are a party to the International Covenant on Economic, Social and Cultural Rights are obliged to respect, protect and fulfil the economic, social and cultural rights of individuals under their jurisdiction. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment by such individuals of their economic, social and cultural rights. The obligation to *protect* requires States to prevent third parties from interfering with the enjoyment by such individuals of their economic, social and cultural rights. Finally, the obligation to *fulfil* requires States to adopt the measures necessary to create conditions in which these rights can be fully realized.

The Covenant's article 2.1 states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

States therefore have a duty to make use of as many resources as they can make available to gradually achieve economic, social and cultural rights. The article recognizes that a lack of resources can impede their realization, and that some rights can be achieved only over a longer period. At the same time, a lack of resources does not justify indefinite inaction or postponement of implementing measures. A State that is constrained by a lack of resources still has a duty to "take steps", including steps to protect the most disadvantaged, vulnerable and marginalized groups in society. In many countries, such groups include migrants, especially irregular migrants.

States therefore have certain immediate obligations in relation to economic, social and cultural rights. Specifically, they have a duty to:

- Eliminate *discrimination*.
- *Take steps* to realize economic, social and cultural rights.
- Meet *minimum core obligations*.
- Avoid adopting *retrogressive measures*.

The prohibition of discrimination has been discussed above.

States are obliged to take *targeted steps to achieve economic, social and cultural rights*, and should use all appropriate means to do so, including legislative, administrative, judicial, economic, social and educational measures, provided their actions are consistent with Covenant rights.⁴⁸ States have broad discretion with respect to their choice of means; however, it is for the Committee on Economic, Social and Cultural Rights to determine whether the measures a State introduces are adequate and appropriate and comply with Covenant obligations.⁴⁹

Legislative measures alone may not be sufficient. If its legislation breaches the Covenant, a State is required to change that legislation without delay.⁵⁰ In addition (reflecting the principles of indivisibility and interdependency), the Committee held, in its general comment No. 3 (1990), that when Covenant rights are incorporated in national legislation, access to legal remedies for violation should be provided (para. 5). To comply with article 2.3 (a) of the International Covenant on Civil and Political Rights, and ensure that economic, social and cultural rights are implemented fully in practice, judicial or other effective remedies must be available without discrimination.

The Committee on Economic, Social and Cultural Rights provided in its general comment No. 3 (1990) that State parties have an obligation to meet *minimum essential levels* of each of the rights in the Covenant for

⁴⁸ E/CN.4/1987/17, annex, para. 17.

⁴⁹ Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), paras. 2 and 4.

⁵⁰ E/CN.4/1987/17, annex, para. 18.

all those under their jurisdiction as a matter of priority (para. 10). This means that, for example, they should have access to essential foodstuffs, essential health care, basic shelter and housing, and at least free primary education. In addition, even when resources are severely constrained, vulnerable members of society must be protected. In this respect, the Committee has observed that the cost of targeted programmes to protect the basic rights of such groups need not be high.

There is a strong presumption under international law that *retrogressive measures* taken in relation to economic, social and cultural rights constitute a violation of the Covenant. In order for such measures to be justified, the Committee held in its general comment No. 19 (2007) on the right to social security that a State that deliberately adopts retrogressive measures must prove that it introduced them after carefully considering all alternatives, that affected groups genuinely participated, and that the measures taken will not result in discrimination (para. 42). Concerns have been raised that, in the wake of the global economic crisis and associated austerity measures, States have legislated limitations on previously available health-care benefits for migrants, which could be considered contrary to the obligation to desist from taking retrogressive measures that have an impact on health. For example, a 2012 reform in Spain limited previously more expansive access to health care for adult irregular migrants to emergency services and care for pregnant women only.⁵¹

⁵¹ Royal Legislative Decree 16/2012 of 20 April 2012 on urgent measures to ensure the sustainability of the national health-care system and improve the quality of its services, in force since 1 September 2012. The European Committee of Social Rights considers that this denial of access to health care for adult foreigners (aged over 18 years) present in the country irregularly is contrary to article 11 of the European Social Charter, noting that “the economic crisis cannot serve as a pretext for a restriction or denial of access to health care that affects the very substance of the said right” (Conclusions on the application by Spain of the European Social Charter, in particular art. 11 (2013)).

Treaty-monitoring bodies and other human rights mechanisms have consistently described irregular migrants as a vulnerable group entitled to particular protection when States implement their treaty obligations.⁵² It has been widely recognized that irregular migrants are inevitably at risk of violations owing to their irregular status in the country of destination, and are disproportionately vulnerable to discrimination, exclusion and various forms of abuse.⁵³

Key messages

- Irregular migrants are entitled under international human rights law to enjoy all economic, social and cultural rights.
- States are prohibited from discriminating against irregular migrants on the grounds of their nationality or legal status.
- States are entitled to apply legitimate distinctions (between nationals and non-nationals, or between regular and irregular migrants), as long as they can show in each individual case that such a distinction pursues a legitimate aim and that the means applied to achieve this aim are proportionate.
- States are obliged to take targeted steps to enable irregular migrants to enjoy their economic, social and cultural rights.
- Retrogressive measures taken in relation to the economic, social and cultural rights of irregular migrants are prohibited.
- Irregular migrants are entitled to particular protection of their economic, social and cultural rights as a vulnerable group.

⁵² See, for example, Committee on Migrant Workers, general comment No. 1 (2011), paras. 7 and 21.

⁵³ See the statement of the Global Migration Group on the human rights of migrants in an irregular situation.

II. THE RIGHT TO HEALTH

Content and specific components

Article 12 of the International Covenant on Economic, Social and Cultural Rights is considered to contain the fullest and most definitive articulation of the right to health. It protects the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

States that are a party to the Covenant have an obligation to ensure the provision of: equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; essential drugs; and appropriate mental health treatment and care. They also have an obligation to prevent, treat and control epidemic, endemic, occupational and other diseases. Under article 12.2 (d), they must create “conditions which would assure to all medical service and medical attention in the event of sickness”.

The Committee on Economic, Social and Cultural Rights stated in its general comment No. 14 (2000) that the right to health includes the right to timely and appropriate health care, and to the underlying determinants of health such as: access to safe, drinkable water; adequate sanitation; an adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information, including on sexual and reproductive health.

The Committee also described a State’s health obligations in terms of availability, accessibility, acceptability and quality. With respect to *availability*, States must ensure that functioning health-care facilities and services and the underlying determinants of health are available in sufficient quantity. *Accessibility* requires States to ensure that facilities and services are physically accessible and affordable, without discrimination. In addition, health information must be obtainable (subject to confidentiality of personal data). With respect to *acceptability*, health facilities, goods and services should be respectful of medical ethics and culturally appropriate. Finally, they should be of *good quality*.

The Committee indicated that the **core obligations** under this right oblige State parties to:

- (a) Ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

- (b) Ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) Ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) Provide essential drugs, as from time to time defined under the World Health Organization (WHO) Action Programme on Essential Drugs;
- (e) Ensure equitable distribution of all health facilities, goods and services;
- (f) Adopt and implement a national public health strategy and plan of action ...; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups (para. 43).

A. Legal and practical barriers that prevent irregular migrants from enjoying the right to health

For irregular migrants, in both countries of transit and destination, it is usually very difficult to access almost all forms of health care and health services, including maternal and infant care, emergency care, medication, and treatment for chronic diseases and mental health problems. In addition, the health of irregular migrants is frequently endangered by the precarious and unsafe conditions in which they live and work, as well as when they are in immigration detention.

Irregular migrants' access to health care is impeded both by a lack of adequate legislation and by their own fear that they may be reported and detained or expelled. In some countries, public health concerns underlie policy decisions to provide certain services to irregular migrants, notably vaccination and prenatal care and treatment of communicable diseases.

It has been recognized that migrants, including irregular migrants, often have better health indicators than local or host populations (the so-called healthy migrant effect).⁵⁴ However, for a variety of reasons, their state

⁵⁴ B. Gushulak, P. Pace and J. Weekers, "Migration and health of migrants", in *Poverty and Social Exclusion in the WHO European Region: Health Systems Respond*, Th. Koller, ed. (Copenhagen, WHO Regional Office for Europe, 2010), p. 258.

of health often deteriorates over time. First of all, irregular migrants may face numerous hardships, including detention, unsatisfactory housing, poor access to water and sanitation, difficult working conditions, and the stress and insecurity caused by their situation.⁵⁵ Secondly, their mental health may be affected by the social isolation they experience as a result of being separated from family and social networks, as well as by job insecurity, difficult living conditions and exploitative treatment. Finally, many irregular migrants experience sexual and gender-based violence, become vulnerable to illness, or lose access to essential health documentation in the course of the often long and precarious journeys they make to reach their countries of destination. The Special Rapporteur on the right to health has noted that irregular migrants “may face extreme health risks during transit owing to hazardous conditions such as being cramped or hidden in boats or trucks. They may also face physical and sexual violence during transit.”⁵⁶

It has also been recognized that irregular migrants are among the particularly vulnerable groups that have been “subject to additional obstacles in the context of access to medicines owing to their uncertain legal status, cultural and linguistic differences and exclusion from health insurance schemes and social security systems”.⁵⁷

In most circumstances, a person’s eligibility to health care beyond emergency treatment is linked to some form of proof of status: evidence of legal residence, insurance, employment, administrative registration, etc.⁵⁸ In Turkey, for example, access to the most basic services, including health services, depends on possessing a foreigner identity number that migrants

⁵⁵ C. Wyssmüller and D. Efonyi-Mäder, “Undocumented migrants: their needs and strategies for accessing health care in Switzerland – country report on people & practices”, Swiss Forum for Migration and Population Studies, 2011, p. 15. Available from <http://research.icmpd.org/1354.html>.

⁵⁶ A/HRC/23/41, para. 3.

⁵⁷ “Expert consultation on access to medicines as a fundamental component of the right to health” (A/HRC/17/43), para. 34.

⁵⁸ European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg, 2011), pp. 73–74.

in an irregular situation cannot obtain.⁵⁹ In Costa Rica, no irregular migrant can be assured of receiving health care because the procedure for obtaining it requires a residence card or a work permit, even though the Constitutional Court has consistently ruled that all inhabitants must be guaranteed access to health services, regardless of their immigration status or their eligibility to join the social security system.⁶⁰

By contrast, the regulations in some countries grant irregular migrants access to certain forms of health care. Argentina's Migration Law (2004), for example, grants all migrant workers access to health services, irrespective of their status.⁶¹

For irregular migrants in many countries, cost is the main barrier. Irregular migrants are often charged up front for medical services and required to pay hospital fees based on their nationality or immigration status in cases where nationals do not have to pay.⁶² While in many countries emergency care cannot be refused at the point of need, in some, irregular migrants are still expected to pay the full cost after treatment; a prospect which can deter and delay access significantly and endanger life.⁶³

⁵⁹ "UN Special Rapporteur on the human rights of migrants concludes second country visit in his regional study on the human rights of migrants at the borders of the European Union: Visit to Turkey", 29 June 2012. Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12307&LangID=E.

⁶⁰ Inter-American Commission on Human Rights, *Nicaragua v. Costa Rica*, interstate case 1-06, Report No. 11/07, 8 March 2007, para. 112.

⁶¹ CMW/C/ARG/CO/1, paras. 27–28.

⁶² "Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante" (A/HRC/14/30), para. 31.

⁶³ FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 75. According to FRA, of the 19 European Union (EU) countries that provide access to emergency medical care, 11 require migrants to pay for it. Another European study noted that, according to staff in accident and emergency departments, many irregular migrants found it difficult to access health care to which they were entitled because, for example, they had to pay extra costs or could not afford essential follow-up medicines. See Marie Davurin and others, "Health care for irregular migrants: pragmatism across Europe – a qualitative study", *BMC Research Notes*, vol. 5, No. 99 (2012). Available from www.biomedcentral.com/1756-0500/5/99.

But other obstacles are also significant. Medical practitioners are sometimes required to certify the need for treatment and patients may be asked to meet certain conditions in advance (e.g., show identification, provide proof of residence or demonstrate that they have sufficient financial resources).

In many cases, health staff and migrants lack information on the health-care entitlements of migrants in an irregular situation. This problem is partly linked to the complexity of both legal regulations and access procedures for migrants in an irregular situation. In addition, migrants may not understand the medical information that they receive and rarely have access to qualified interpreters.⁶⁴

Asociación Salud y familia in Catalonia, Spain, works with public authorities and with other non-governmental organizations (NGOs) to help migrants access health-care services and navigate the health system. The project also informs health-care organizations about regulations that grant irregular migrants access to health care. *Salud y familia* has a safe motherhood programme for migrant women and their families in Catalonia, and an information and welcome programme for newly arrived migrant families, and provides access to intercultural mediators at its offices and in 5 hospitals and 19 primary care centres.

Migrants, especially those in an irregular situation, may be referred to NGOs or private health-care providers. In Sweden, NGOs have opened clinics where health professionals volunteer to treat irregular migrants; the first opened in 1996 and clinics are now available in Sweden's four largest cities, providing medical, psychological and dental services.⁶⁵ In the Republic of Korea, irregular migrants can receive emergency care free of charge and hospitals are able to claim reimbursement from the

⁶⁴ "Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante" (A/HRC/17/33), para. 36.

⁶⁵ In June 2012, following sustained advocacy by civil society, the Swedish Government announced plans to extend the provision of health care to irregular migrant children on an equal basis with Swedish children. Entitlements for adults are being extended only to urgent care, as is the case for adult asylum seekers. "Sweden to give illegal immigrants healthcare", *Local*, 28 June 2012. Available from www.thelocal.se/41702/20120628/.

Government. However, owing to the lengthy reimbursement procedure, it is common practice for hospitals to ask irregular migrants to pay up front, an insurmountable barrier for many. If the migrant cannot pay, NGOs often sign a declaration agreeing to take financial responsibility for the medical treatment.⁶⁶ While such good practices can certainly improve irregular migrants' access to health, it is important to note that reliance on alternative care providers can also result in the creation of parallel health systems and in the delivery of substandard health care to migrants. Lack of access to official services may also force migrants to adopt alternative health strategies, such as self-medication.

In some countries, social services and health-care professionals are obliged to report irregular migrants to the immigration authorities. For example, irregular migrants in Germany cannot easily apply to the welfare office for a medical card or reimbursement of non-emergency services for this reason. By law, irregular migrants are granted the same access to health care as asylum seekers. However, coverage is limited to emergency services because the procedure to reimburse the costs of emergency care is confidential, while that for non-emergency care is not.⁶⁷

Even where migrants are entitled by law to access health care, they may face many financial and practical barriers, owing to problems of communication, inadequate referral systems, the refusal of some general practitioners to provide care, lack of knowledge of relevant legislation on the part of health-care providers, and failure to recognize the specific health needs of irregular migrants. These all represent evident practical barriers to health care.

Elsewhere, health professionals can extend to irregular migrants health policies that are designed to improve migrants' access to care or quality

⁶⁶ Irene Kohlmann, presentation at the International forum on migrants' right to health in the eyes of human rights: migrants' health and civil society responses – developing strategies in human rights perspectives, Seoul, 25–27 September 2009.

⁶⁷ FRA, *Fundamental Rights of Migrants in an Irregular Situation*, pp. 74–75.

Many migrants in the United Kingdom do not register with a general practitioner (GP), because they are unaware of their eligibility or because they are wrongly turned away. While GPs can choose whether or not to accept new patients, individuals seeking to register do not legally have to prove their identity or immigration status. Consequently, migrants should be able to register for primary care irrespective of their immigration status. With several partner organizations, the Mayor of London has published a leaflet explaining how excluded groups, and particularly migrants in an irregular situation, could access primary health care in London.

of care. Examples of such initiatives are the “Checking for Change” programme in Scotland, United Kingdom, and the “Migrant-Friendly Hospitals” network, which is sponsored by the Directorate-General for Health and Consumers of the European Commission. Such initiatives can increase health professionals’ awareness of migrants’ health needs as well as improve the care that irregular migrants receive.

The general stigma attached to mental illness, together with a lack of awareness or understanding of it in many societies, means that the mental health needs of irregular migrants are often neglected. Irregular legal status and constant fear of detection and deportation, inadequate living conditions, social exclusion and lack of communication with family and social networks, as well as abusive employment conditions, can all adversely affect the mental health of irregular migrants.⁶⁸

Many countries grant irregular migrant children only the same health care that irregular migrant adults are entitled to receive. Children, thus, face the same legal and practical barriers to enjoying the right to health as adults. Unaccompanied or separated children are sometimes granted more favourable conditions of treatment than children who migrate in an irregular manner with their families.

⁶⁸ See H. Murphy, “Migration, culture and mental health”, *Psychological Medicine*, vol. 7, No. 4 (November 1977); D. Bhugra, “Cultural identities and cultural congruency: a new model for evaluating mental distress in immigrants”, *Acta Psychiatr Scand*, vol. 111, No. 2 (February 2005).

Additional practical barriers are the fear of migrant children or their parents of being reported, lack of interpreters and lack of awareness. Many children in irregular situations are not enrolled in schemes for low-income children that provide health care regardless of ability to pay, because their parents are afraid of being reported to the authorities. In some countries, a parent in an irregular situation may find it difficult to obtain a birth certificate for his or her child, which can also deprive the child of health care. Common barriers include strict documentation requirements, inappropriate refusal owing to lack of awareness of entitlements and fear of detention, particularly in countries where public officials have a duty to report irregular migrants.⁶⁹ The irregular status of parents, and their poor working or economic conditions, may also affect the health and welfare of migrant children.

In general, it is important to recall that inadequate health care has long-lasting effects on a child's development. A particular concern is childhood immunization. Failure to vaccinate children can have long-term effects on their health.⁷⁰

With regard to women and girls, the Special Rapporteur on the human rights of migrants has recognized that migrant women and girls often experience pregnancy-related and gynaecological health problems that are more severe than those of the host population. Inadequate access to prenatal care may increase the incidence of premature births, pre-eclampsia and other complications.⁷¹

The Committee on the Elimination of Discrimination against Women, in its general recommendation No. 26 (2008), highlighted the vulnerability of women migrants to ill health, particularly in relation to sexual and reproductive

⁶⁹ In Germany, for example, irregular children may be reported except if they are receiving emergency care. See FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 79.

⁷⁰ "Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration" (A/HRC/15/29), para. 63.

⁷¹ A/HRC/14/30, para. 31.

health, noting that “women migrant workers may face mandatory pregnancy tests followed by deportation if the test is positive; coercive abortion or lack of access to safe reproductive health and abortion services, when the health of the mother is at risk, or even following sexual assault; absence of, or inadequate, maternity leave and benefits and absence of affordable obstetric care, resulting in serious health risks” (para. 18).

Migrants may also have to submit to mandatory testing for other conditions such as HIV/AIDS or tuberculosis, although the justification for such screening has been questioned both from a human rights and a public health perspective.⁷² Attempts to avoid or circumvent such mandatory testing have been recognized as a pathway to irregular status. In addition, the Special Rapporteur on the right to health has observed that “migrants who test positive for HIV may remain in an irregular situation, making them more vulnerable to abuse by employers and less likely to access medical treatment”.⁷³

Immigration detention

Many States currently approach migration governance primarily from an enforcement, criminalization or border control perspective, and have developed policies that lead to the administrative detention of migrants at some point in the immigration process. Yet, research is increasingly questioning the deterrent effect of such detention, at the same time as its deleterious effects on the health of migrants are becoming more apparent.

The deterioration of the mental and physical health of irregular migrants is often linked to detention conditions, including prolonged detention. Migrants in detention are particularly vulnerable because they are entirely reliant on public or private detention managers to provide or facilitate their

⁷² Particularly in the light of the complexity and diversity of contemporary migration flows and the fact that diseases may be latent or may be present but have not yet manifested symptoms. See H. Hogan and others, “Screening of new entrants for tuberculosis: responses to port notifications”, *Journal of Public Health*, vol. 27, No. 2 (June 2005); and R. Coker, “Compulsory screening of immigrants for tuberculosis and HIV”, *British Medical Journal*, vol. 328 (7 February 2004).

⁷³ A/HRC/23/41, para. 33.

access to health care and services. There are reports of life-threatening detention conditions for migrants in some countries; detention conditions can often be substantially inferior to those provided to non-migrant detained populations.⁷⁴ There may not be any health-care services in immigration detention centres or they may be difficult to access and of poor quality.

One study found that the physical health of migrants deteriorates in proportion to the length of detention: one quarter of those who had been detained for one month, but 72 per cent of those detained for four to five months, reported poor health.⁷⁵ Long-term administrative detention is linked to mental health problems, partly owing to lack of access to mental health care and services.⁷⁶ The Special Rapporteur on the human rights of migrants has denounced that:

mental and physical health of migrant detainees is often neglected. Doctors and nurses are not always available and may not have the authority to properly treat their patients, inter alia when they need hospitalization. Furthermore, reproductive health care for women, especially pregnant women, is not available in all places of detention.⁷⁷

Children are especially vulnerable in detention, particularly in the context of inhuman and degrading detention conditions.⁷⁸ The Special Rapporteur on the human rights of migrants has expressed concern that migrant children suffering from serious medical conditions as well as children with disabilities are routinely kept in detention. He found that the health concerns of migrant children in detention were exacerbated by

⁷⁴ Human Rights Watch, *Rights on the Line: Human Rights Watch Work on Abuses against Migrants in 2010* (2010).

⁷⁵ Jesuit Refugee Service, *Becoming Vulnerable in Detention* (June 2010), p. 9.

⁷⁶ K. Robjant, R. Hassan and C. Katona, "Mental health implications of detaining asylum seekers: a systematic review", *British Journal of Psychiatry*, vol. 194, No. 4 (April 2009).

⁷⁷ "Report of the Special Rapporteur on the human rights of migrants, François Crépeau" (A/HRC/20/24), para. 25.

⁷⁸ Human Rights Watch, *The EU's Dirty Hands* (2011). See also European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011, paras. 229–234.

inadequate medical services and treatment.⁷⁹ Detention centres tend to be run by police or prison authorities or private security companies, without appropriate training in the human rights of either children or migrants or the provision of health services.

B. Policy and legal framework: the right to health of irregular migrants

The principle of non-discrimination, affirmed inter alia in the Universal Declaration of Human Rights (art. 2) and the International Covenant on Economic, Social and Cultural Rights (art. 2.2), guarantees irregular migrants the right to health. The Committee on Economic, Social and Cultural Rights, in its general comment No. 14 (2000), explicitly stated that States have an obligation to ensure that all persons, including migrants, have equal access to preventive, curative and palliative health services, regardless of their legal status and documentation (para. 34). In similar terms, referring to article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination, in its general recommendation No. 30 (2004), recommended that States should respect the right of non-citizens to health, inter alia by refraining from denying or limiting their access to preventive, curative and palliative health services (para. 36).

In Trinidad and Tobago, all migrants are entitled to health care, regardless of their status.

Source: A/HRC/15/29, para. 81 (a).

The obligations in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are more restrictive. Its article 28 entitles all migrant workers and members of their families to urgent medical care, which must be granted on the same basis as to nationals and cannot be refused because of any irregularity with respect to stay or

⁷⁹ A/HRC/14/30, para. 38.

employment. The Committee on Migrant Workers, in its general comment No. 2 (2013), acknowledged in this connection that, when read together with other international human rights instruments, this article may create broader obligations for State parties to both instruments (para. 72).

Emergency medical care

Most countries grant irregular migrants access to emergency medical care only. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that migrant workers and family members should be able to receive “any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health”, regardless of “any irregularity with regard to stay or employment” (art. 28).

In many (perhaps most) countries, applicable legislation does not define clearly when a condition qualifies as an emergency and the decision therefore falls to the health-care professional providing treatment.^a While this situation can provide a degree of flexibility to enable doctors to extend treatment to migrants, it can also lead to arbitrary selection, discrimination and lack of accountability.^b In Switzerland, the Federal Tribunal has said that article 12 of the Federal Constitution, according to which every person has the right to assistance when in need, implies that all persons should have access to “basic medical care”. In practice, however, the services that municipalities and cantons offer vary widely.^c In Poland, medical rescue teams provide emergency care free of charge, but hospital emergency departments do not necessarily do so, because no legislation establishes who will bear the costs.^d Liability to pay the full or partial cost of medical care can also block access to emergency medical care. In the United States, the Emergency Medical Treatment and Labor Act requires hospitals to screen and stabilize all individuals, including irregular migrants, who seek care in an emergency room, regardless of their ability to pay.

Human rights experts have questioned whether States that permit irregular migrants to receive only emergency health care violate their human rights obligations and whether such restrictions can be justified from a public health perspective. Vulnerable groups, including children, the elderly and pregnant women, require unrestricted access to emergency health services. According to the Special Rapporteur on the human rights of migrants:

While States have developed different criteria for what constitutes emergency health care, this regrettably does not address the fundamental issue of not conditioning health care to a person’s immigration status. In this regard,

mere commitment to emergency care is unjustified not only from a human rights perspective, but also from a public health standpoint, as a failure to receive any type of preventive and primary care can create health risks for both migrants and their host community.^e

The Committee on Migrant Workers noted, in its general comment No. 2 (2013), that although medical care need not necessarily be free of charge, equality of treatment requires that the same rules for payment of fees or exemption from payment should apply to migrant workers and members of their families as to nationals. State parties should prohibit the charging of excessive fees to migrant workers in an irregular situation or requiring immediate payment or proof of payment before the service is delivered. Urgent medical care should never be withheld owing to the inability to pay (para. 73).

In its resolution 1637 (2008) on Europe's boat people: mixed migration flows by sea into southern Europe, the Parliamentary Assembly of the Council of Europe called on States to "guarantee to irregular migrants, refugees and asylum seekers not only emergency health care, which includes essential treatment that cannot reasonably be delayed and necessary care such as vaccinations and follow-up, but also basic health care, including essential dental care", and added that "psychological assistance should also be provided for those with particular needs, such as victims of torture and violence, including sexual violence".

- ^a *The NowHereland* project has identified three categories of health-care entitlement for irregular migrants in Europe: "no access", "partial access" (explicit entitlements for specific services and/or groups) and "full access". *NowHereland* aims to create a knowledge base for good practices in delivering health care to undocumented migrants in Europe. For more information, see www.nowhereland.info/.
- ^b In the United Kingdom, reports allege that some patients have been referred to overseas visitors managers and refused "immediately necessary" or "urgent" treatment, despite guidance that decisions on urgent care must be taken by a doctor. See D. Biswas and others, "Access to health care for undocumented migrants from a human rights perspective: A comparative study of Denmark, Sweden, and the Netherlands", *Health and Human Rights*, vol. 14, No. 2 (December 2012).
- ^c V. Bilger and others, *Health Care for Undocumented Migrants in Switzerland: Policies – People – Practices* (International Centre for Migration Policy Development, 2011).
- ^d Platform for International Cooperation on Undocumented Migrants (PICUM), "PICUM Submission to the CRC General Comment on the right of the child to the highest attainable standard of physical and mental health", 6 January 2012.
- ^e A/HRC/14/30, para. 28.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families stipulates that, with regard to their conditions of work, migrant workers shall enjoy, in respect of health, treatment that is not less favourable than that provided to nationals (art. 25). With respect to health entitlements connected to their work, irregular migrants should, therefore, be treated on the same terms as nationals. The 2011 ILO Convention concerning decent work for domestic workers (No. 189) guarantees that “every domestic worker has the right to a safe and healthy working environment” and States are enjoined in this regard to ensure the occupational safety and health of domestic workers (art. 13.1).

In Switzerland, under the Health Insurance Law, insurance companies are obliged to accept all applicants for the basic package of benefits irrespective of residence status. The basic package includes outpatient and inpatient medical treatment, prescribed medication, care during pregnancy and childbirth, as well as treatment in the event of accidents. Additionally, all persons gainfully employed, including irregular migrants, must be insured by their employer for work-related accidents and occupational diseases.

Since 2009, under the Health Insurance Act, health service providers in the Netherlands can seek reimbursement for 80–100 per cent of the cost of care, depending on the treatment concerned. In principle, many services are available to irregular migrants as a result of this scheme. The list covers primary, secondary and tertiary care, including pre- and postnatal care, psychiatric care, youth health, and screening and treatment for HIV and other infectious diseases.

The Committee on Economic, Social and Cultural Rights, in its general comment No. 14 (2000), held that a core obligation in relation to the right to health is that States must draw up and implement a national public health strategy and plan of action to protect, respect and fulfil the right to health of disadvantaged and marginalized individuals and groups. It is evident that the latter could in many countries include irregular migrants.

Compulsory testing for certain conditions such as HIV, tuberculosis and pregnancy as part of immigration policy is inconsistent with the right

The Committee of Ministers of the Council of Europe urged member States to adopt a series of specific measures to effectively protect the health rights of migrants, declaring that “unnecessarily complex or laborious procedures for obtaining health service provision should be simplified”, and stated that individuals or agencies responsible for health care should not be required to inform the authorities when irregular migrants come to them for help. The following recommendations provide the building blocks for a national strategy on health for migrants.

The Committee of Ministers recommends that States should:

- (a) In accordance with national legislation regarding the collection and use of personal data, collect information on the demographic, social, educational and economic characteristics of migrants and their legal situation in the host country;
- (b) Systematically monitor migrants’ state of health and investigate the causes of discrepancies;
- (c) Review all policies and practices affecting migrants’ living and working conditions in order to minimize risks to their health;
- (d) Having regard to the organization, general principles and financial capacities of the social security system of the member State concerned, provide migrants with adequate entitlements to use health services and ensure that these entitlements are known and respected;
- (e) Promote knowledge among migrants about issues concerning health and the health system, and take measures to increase the accessibility of health services;
- (f) Overcome language barriers by appropriate measures, including interpreting services and access to translated information materials wherever necessary;
- (g) Improve the adaptation of health service provisions to the needs, culture and social situation of migrants.

Source: Recommendation CM/Rec(2011)13 on mobility, migration and access to health care.

to health, as it breaches requirements of informed consent and fails to respect the rights to autonomy, privacy, dignity and confidentiality of health information. Any limit on the right to health and informed consent, including those carried out ostensibly in the interest of public health, should

be based on scientific evidence, be the least restrictive option available, and respect human dignity, rights and freedoms.⁸⁰

In order to address the barriers imposed by placing duties on health professionals to report the presence of irregular migrants, the Committee on Migrant Workers, in its general comment No. 2 (2013), affirmed that “States parties should not use health care as an instrument of immigration control, which would effectively prevent migrant workers in an irregular situation from contacting public health-care providers out of fear of deportation. States shall not require public health institutions to report or otherwise share data on the migration status of a patient to immigration authorities, and health-care providers should also not be required to do so” (para. 74).

In order to give effect to the prohibition on using health care as an instrument of immigration control, the Committee on Migrant Workers, in its general comment No. 2 (2013), holds that State parties should not conduct immigration enforcement operations on or near facilities providing medical care, as this would limit migrant workers and members of their families from accessing such care (para. 74). The European Union Agency for Fundamental Rights has similarly asserted that migrants in an irregular situation seeking medical assistance should not be apprehended at or next to medical facilities.⁸¹

In 2008, the World Health Assembly recommended that States should promote migrant-sensitive health policies and non-discriminatory access to health promotion, disease prevention and care for migrants, identifying and filling gaps in health service delivery.⁸²

States have specific obligations to children in relation to the right to health. Under the International Covenant on Economic, Social and Cultural Rights,

⁸⁰ “Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (A/64/272), paras. 30–31.

⁸¹ FRA, “Apprehension of migrants in an irregular situation: fundamental rights considerations”, principle 2.

⁸² World Health Assembly, Health of migrants, document WHA61.17.

Argentina's Migration Law 25.871 of 2004 provides irregular migrants access to health care. It stipulates a broad set of rights that are also granted to migrants in an irregular situation. Its article 8 affirms that all foreigners shall enjoy the rights to health and social assistance, and that no foreigners who need medical attention shall be barred or restricted in any manner whatsoever, irrespective of their migratory situation. The same article requires health-care providers to advise irregular migrants on how to regularize their situation. To ensure lack of documentation does not bar their access to health services, Decree No. 616/2010 stipulates that the Ministry of Health shall establish norms and take other measures to ensure that migrants, including irregular migrants, have access to health and social assistance (art. 8). Those who need medical attention can prove their identity using documentation issued by their country of origin or their consulate.

they must make "provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a)). Additionally, the Committee on Economic, Social and Cultural Rights determined, in its general comment No. 14 (2000), that States should ensure prenatal and postnatal health care for mothers (para. 14).

The Committee on the Rights of the Child has asked State parties to ensure that all children in the context of migration have equal access to basic services and benefits, such as health care, regardless of their or their parents' migration status, making their rights explicit in legislation. According to the Committee, attention should be paid to addressing the gender-specific impact of reduced access to services, such as sexual and reproductive health rights.⁸³ The Committee has further recognized that unaccompanied and separated children have the same right to access health care as children who are nationals.⁸⁴ The Committee has called upon States to ensure and implement adequate and accessible measures for addressing trauma experienced by children during migration. Special care should be taken to make mental health services available to all children, including in the context of conducting the child's best interests assessment, evaluation and determination.⁸⁵

⁸³ "Report of the 2012 Day of general discussion", para. 86.

⁸⁴ General comment No. 6 (2005).

⁸⁵ "Report of the 2012 Day of general discussion", para. 89.

In August 2013, the Government of Thailand made a low-cost health insurance policy available to all migrants, regardless of their status. In addition, a special insurance policy costing 365 baht per year (about US\$ 12) was also made available for migrant children up to seven years of age. The package is the same as that received by Thai citizens covered by the widely praised Universal Health Coverage Scheme, including access to immunization services and antiretroviral drugs. Migrant parents can buy a policy for their children who are aged over seven at the same rate as adults (2,200 baht or about US\$ 70 per year).

The European Committee of Social Rights has held that a restriction which provided health care to children only if they had been a resident in France for a fixed period or were in a life-threatening situation violated the rights of irregular migrant children.⁸⁶ Finding that health care is a prerequisite for the preservation of human dignity, the Committee determined that legislation which denies entitlement to medical assistance to migrant children, regardless of status, is contrary to the European Social Charter.

The Committee on the Elimination of Discrimination against Women, in its general recommendation No. 26 (2008), noted that women often suffer from inequalities that threaten their health. They may be unable to access health services, including reproductive health services, because insurance or national health schemes are not available to them, or they may have to pay unaffordable fees. The Committee observed that women have health needs different from those of men, and called in particular on State parties to ensure non-discrimination against migrant women during pregnancy, including access to safe reproductive health services as well as to affordable obstetric care (paras. 17–18).

Right to health in the context of expulsion and immigration detention

The detention and expulsion of irregular migrants may be barred on grounds of health. The Human Rights Committee has concluded that a State that fails to release a migrant who acquires a serious medical condition owing to prolonged detention may be considered to have violated article 7 of

⁸⁶ *International Federation of Human Rights Leagues (FIDH) v. France*, complaint No. 14/2003.

the International Covenant on Civil and Political Rights, which prohibits torture and cruel, inhuman and degrading treatment. Deportation of such a person “to a country where it is unlikely that he would receive the treatment necessary for the illness caused” would amount to a violation of the same article.⁸⁷ The European Court of Human Rights has concluded that a State would breach article 3 of the European Convention on Human Rights were it to expel a critically ill person to his country of origin where he would receive no nursing or medical care and had no family willing or able to care for him or provide him with food, shelter or social support.⁸⁸

The European Court of Human Rights has declared that a State that decides to expel a migrant or members of his family must consider the impact on the children involved and take account of any negative effects on their well-being, in order to comply with its obligations under article 8 of the European Convention on Human Rights.⁸⁹

In addition, both the European Court of Human Rights and the Inter-American Court of Human Rights have confirmed that States are obliged to protect the health and well-being of detained individuals by providing regular medical attention and adequate specialized care.⁹⁰ If detention causes serious medical conditions, detainees should be released.

The Committee on the Rights of the Child has stated that children should not be criminalized or subject to punitive measures because of their or their parents’ migration status and recommended that States should expeditiously and completely cease the detention of children on the basis

⁸⁷ *Mr. C. v. Australia*, communication No. 900/1999, Views of 28 October 2002, paras. 8.4–8.5.

⁸⁸ *D. v. the United Kingdom*, Application No. 30240/96, Judgement of 2 May 1997.

⁸⁹ *Zakayev and Safanova v. Russia*, Application No. 11870/03, Judgement of 11 February 2010.

⁹⁰ See, for instance, European Court of Human Rights, *Tehrani and others v. Turkey*, Applications Nos. 32940/08, 41626/08 and 43616/08, Judgement of 13 April 2010, para. 83, and Inter-American Court of Human Rights, *Vélez Loor v. Panama*, Judgement of 23 November 2010, Series C, No. 218, para. 220.

of their immigration status.⁹¹ The Human Rights Committee has similarly observed that the best interest of the child must be the primary and guiding consideration and that, consequently, a less intrusive measure than detention should be used when dealing with children.⁹²

The Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention of the Office of the United Nations High Commissioner for Refugees (UNHCR), which are also relevant by analogy to irregular migrants, provide that a medical and mental health examination should be offered to asylum seekers as promptly as possible after arrival, and conducted by competent medical professionals. While in detention, asylum seekers should receive periodic assessments of their physical and mental well-being.⁹³

⁹¹ "Report of the 2012 Day of general discussion", paras. 78–81.

⁹² *Bakhtiyari v. Australia*, communication No. 1069/2002, Views of 29 October 2003.

⁹³ Guideline 8 (vi). See also the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and, for standards by analogy, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

Key messages

- National legislation should grant irregular migrants access to adequate health care, including preventive, curative and palliative health services, and protect their access to the underlying determinants of health.
- At a minimum, all migrants, including irregular migrants, should have the same access to emergency medical care as nationals.
- Irregular migrants should have access to essential drugs and medicines. All children in this context should receive timely immunization against major infectious diseases.
- Health-care institutions should be prohibited from reporting data on the legal status of their patients to immigration authorities. Health-care providers should be clearly informed that they are not required to do so. Migrants should receive specific assurances that they will not be reported to immigration authorities if they seek medical help. Immigration enforcement operations should not be conducted in or near health-care institutions.
- The provision of timely, affordable and non-discriminatory access to preventative, curative and rehabilitative mental health services and education forms part of the normative content of the right to health, and should be available to migrants in irregular situations, in particular to individuals at particular risk in this regard such as victims of torture, trauma and violence.
- States should protect the health and well-being of individuals in detention by providing regular medical attention and adequate specialized care, including mental health services. Detainees who acquire serious health conditions in detention should be released.
- Deportation of an irregular migrant that would interrupt life-saving medical treatment could amount to inhuman and degrading treatment and should be avoided.

III. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING, INCLUDING HOUSING, WATER AND SANITATION, AND FOOD

Content and specific components

According to the International Covenant on Economic, Social and Cultural Rights, “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent” (art. 11.1).

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”. The primary responsibility for securing this right lies with parents. However, State parties must take appropriate measures to assist parents, and others responsible for the child, to implement it. Their duty includes providing material assistance and support programmes “particularly with regard to nutrition, clothing and housing” (art. 27).

The components of the right to an adequate standard of living are interrelated and linked to the right to the highest attainable standard of health, as well as the dignity inherent in every human being. The language of the Universal Declaration reflects this: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (art. 25.1). The specific content of the right to an adequate standard of living must therefore be understood, *inter alia*, in the context of the right to social security.

The most important components of the right to an adequate standard of living—the rights to adequate housing, to water and sanitation, and to food—are considered in more detail below.

The right to adequate housing

According to the Committee on Economic, Social and Cultural Rights, the right to housing should not be interpreted narrowly in terms of shelter (walls and a roof) but understood as the right to live in security, peace and dignity.

The Committee has identified certain aspects of the right to adequate housing that must be taken into account when evaluating whether it has been fulfilled:

- (a) *Legal security of tenure.* ... States parties should ... take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;
- (b) *Availability of services, materials, facilities and infrastructure.* An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;
- (c) *Affordability.* ... States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases ...;
- (d) *Habitability.* Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well ...;
- (e) *Accessibility.* Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. ... Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;
- (f) *Location.* Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities ...;
- (g) *Cultural adequacy.* The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing

The right to water and sanitation

The human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.^a The Committee on Economic, Social and Cultural Rights has noted that “the human right to water is indispensable for leading a life in human dignity” and “is a prerequisite for the realization of other human rights”. The Committee has further advised that an adequate supply of safe drinking water is necessary to health and closely linked to the rights to adequate housing and adequate food.

The Committee has indicated that the **core obligations** under this right mean that State parties must:

- (a) Ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease;
- (b) Ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
- (c) Ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
- (d) Ensure personal security is not threatened when having to physically access to water;
- (e) Ensure equitable distribution of all available water facilities and services;
- (f) Adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, ... the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
- (g) Monitor the extent of the realization, or the non-realization, of the right to water;
- (h) Adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;

- (i) Take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.

The right to food

The International Covenant on Economic, Social and Cultural Rights guarantees the right of every individual to an adequate standard of living, including adequate food, and recognizes the fundamental right of everyone to be free from hunger (art. 11). The right to adequate food can be considered to have been achieved only when “every man, woman and child, alone or in community with others, have physical and economic access ... to adequate food or means for its procurement.”

The Committee has indicated that the right to adequate food requires States to ensure:

- (a) The *availability* of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture. Availability refers to the possibilities for feeding oneself through producing or procuring food;
- (b) The *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights. Accessibility encompasses both physical and economic accessibility.
 - See Human Rights Council resolution 15/9 on human rights and access to safe drinking water and sanitation. See also General Assembly resolution 64/292 on the human right to water and sanitation.

Sources: Committee on Economic, Social and Cultural Rights, general comments No. 4 (1991) on the right to adequate housing, No. 15 (2002) on the right to water and No. 12 (1999) on the right to adequate food.

A. Legal and practical barriers that prevent irregular migrants from enjoying the right to an adequate standard of living

For irregular migrants it is often very difficult to achieve an adequate standard of living. The insecure conditions in which most of them live mean that they rarely have access to adequate housing, food, water and sanitation—and poor access to one of these rights tends to undermine their enjoyment of other rights. Particularly in urban areas, where irregular migrants tend to live, many are compelled, by law or circumstance, to live

in segregated, run-down and poorly maintained residential areas, with poor services and facilities.

The Special Rapporteur on the human rights of migrants highlighted the particular challenges faced by irregular migrants in accessing adequate housing, noting that, because of restrictions in their access to housing in the private market or to public housing, irregular migrants are often homeless or living in crowded, unsafe and unsanitary conditions.⁹⁴

Adequate housing

Irregular migrants cannot easily rent private property of good quality. This is particularly true in countries that criminalize irregular migration, because renting accommodation to irregular migrants may be a criminal offence. For example, the European Union requires its member States to punish any person who, for financial gain, intentionally assists a non-national to reside in a member State in breach of its residence laws with respect to foreigners.⁹⁵

Irregular migrants face numerous other barriers to housing, even when they are legally entitled to rent. Landlords may be obliged to report the presence of foreigners to the police; tenants may need to register with the local population office or tax authorities; to complete a lease, tenants may be required to submit documents that, as irregular migrants, they do not possess or cannot obtain (e.g., residence permit, social security number, proof of income, labour contract). The Special Rapporteur on adequate housing has affirmed that irregular migrants' salaries and irregular working conditions usually hamper their access to the housing market on the same footing as locals.⁹⁶

⁹⁴ A/HRC/14/30, para. 47.

⁹⁵ EU Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, art. 1.1 (b). According to FRA, the following EU countries punish the renting of accommodation to irregular migrants: Cyprus, Denmark, Estonia, Greece and Italy. In several other EU countries, individuals who rent accommodation to irregular migrants can be punished for committing general offences on the facilitation of irregular entry or stay. FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 61.

⁹⁶ A/65/261, paras. 30 and 31.

Problems in finding accommodation often push irregular migrants to accept housing that is in poor condition, unhygienic, overcrowded or overpriced. Sometimes migrants even take turns sleeping in the same bed.⁹⁷ In some countries, employers have to provide housing for their employees. In such cases, the accommodation provided is often inadequate or employers take high fees for housing out of the workers' pay.⁹⁸ Domestic workers who live in their employers' homes can be forced to accept very poor living conditions, often sleeping in hallways or closets.

In other cases, irregular migrants live in shacks, derelict or unfinished buildings or even in the open air. In a number of countries, access to homeless shelters is restricted to nationals or to documented migrants.⁹⁹ Even when irregular migrants are admitted, rules that oblige shelters to report their clients to the authorities may in practice prevent migrants from using their services.

According to the Special Rapporteur on adequate housing, "lack of information about housing alternatives and schemes, bureaucratic procedures, regulations in the housing sphere and tenants' rights often combine to make it difficult for migrants to pursue adequate housing even when national and local legislation does not prevent them from doing so".¹⁰⁰ Access to social housing is nearly impossible in many countries. Poor understanding of the local language and lack of access to interpretation services are a further barrier to adequate housing for many irregular migrants.

The Committee on the Elimination of Racial Discrimination, in its general recommendation No. 30 (2004), recognized that the location of migrants' housing may increase their marginalization (para. 32). The Committee

⁹⁷ On "hot beds", see "Report of the United Nations High Commissioner for Human Rights" (E/2010/89), para. 37, and "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, on his mission to Spain" (A/HRC/7/16/Add.2), para. 74.

⁹⁸ E/2010/89, para. 37.

⁹⁹ FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 64.

¹⁰⁰ A/65/261, para. 31.

on Economic, Social and Cultural Rights has expressed concern that in France, for example, “persons belonging to racial, ethnic and national minorities, especially migrant workers and persons of immigrant origin, are disproportionately concentrated in poor residential areas characterized by large, low-quality and poorly maintained housing complexes, limited employment opportunities, inadequate access to health-care facilities and public transport, underresourced schools and high exposure to crime and violence”.¹⁰¹

Forced evictions particularly affect very vulnerable groups, including irregular migrants. They often occur without adequate notice, prior consultation or the provision of alternative accommodation. After such evictions, irregular migrants may become homeless and may be pushed into areas where they have no access to basic services or sources of livelihood. They may also face detention as well as arbitrary deportation to their countries of origin. The Special Rapporteur on the human rights of migrants has recognized that forced evictions not only undermine migrants’ right to housing but negatively affect their enjoyment of the rights to health, food, water and education.¹⁰²

It is frequently reported that local authorities refuse to accept irregular migrants in centres for the homeless or destitute, and provide no assistance to them, except in the most extreme cases of vulnerability (e.g., new mothers), and then for limited periods only. Consequently, migrant children are often forced to live with their parents in poor or unhealthy conditions (dilapidated and overcrowded dwellings, abandoned factories, riverine shacks, etc.).¹⁰³ Housing solutions are sometimes offered to a child, but not to the family, placing the child and the family in an unacceptable dilemma.

¹⁰¹ E/C.12/FRA/CO/3, paras. 21, 41 (c) and 43.

¹⁰² A/HRC/14/30, para. 52.

¹⁰³ PICUM, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (Brussels, 2008), p. 74.

It is also a serious concern that, when children in an irregular situation reach the age of majority, they cannot regularize their situation and may in addition be excluded from access to social support.¹⁰⁴

Minimum subsistence (food and water)

States often fail to ensure that irregular migrants have access to the minimum resources they need for subsistence, including adequate amounts of food and safe water.

Migrant domestic workers who live with their employers are in a particularly vulnerable situation with respect to food, especially when they are in an irregular situation. Employers sometimes use food deprivation to punish or mistreat their domestic workers. They may also be given insufficient food or food of poor quality, with consequences for their health. Irregular migrants may not have access to food assistance (such as food stamps) by law or because they fear detection and deportation if they attempt to claim their entitlement from the authorities.

Living conditions in immigration detention

As noted previously, the situation of irregular migrants who are in immigration detention is frequently a concern. Migrants deprived of their liberty are fully dependent on the State for food and water, and can be forced to live in inadequate conditions.

The Special Rapporteur on the human rights of migrants drew attention to the fact that detained migrants often lack access to adequate food.¹⁰⁵ Food can also have important cultural connotations for some migrants, and the Special Rapporteur noted that many detention facilities do not make adequate arrangements to provide culturally appropriate foods to migrants.¹⁰⁶

¹⁰⁴ For example, in the Netherlands the Government decided to cease financial and housing support to unaccompanied migrant children when they reach the age of 18. Human Rights Watch, *World Report: 2012 – Events of 2011* (New York, 2012), p. 453.

¹⁰⁵ E/CN.4/2003/85/Add.4, para. 61.

¹⁰⁶ E/CN.4/2003/85, para. 53.

Mexico's Ley de Migración (2011) ensures that migrants in detention centres (*estaciones migratorias*) enjoy an adequate standard of living. Article 107 lists specific standards that must be provided, including:

1. Medical, psychological and legal aid.
2. Adequate food, including three meals a day of sufficient quality. Meals should meet the special needs of children, adolescents, the elderly, pregnant or breastfeeding women, persons with specific health conditions, and other vulnerable people, and respect religious traditions.
3. Separate facilities for men and women. Children should join their mothers or fathers or other persons accompanying them, except if this is not in the children's best interest.
4. Adequate space; accommodation should not be overcrowded.
5. Recreational, sports and cultural facilities.

The Working Group on Arbitrary Detention has also raised the poor conditions in which irregular migrants are held in many detention centres. In its report on a mission to Malaysia, it reported that the immigration detention centre suffered from overcrowding, insufficient access to drinking water and poor sanitation. It also noted allegations of inadequate food and lack of ventilation. The unsanitary and overcrowded conditions facilitated the transmission of communicable diseases, particularly skin diseases.¹⁰⁷

In relation to Guatemala, the Committee on Migrant Workers has expressed concern about the inadequate conditions in migrants' shelters. It noted particularly the lack of open spaces and ventilation, and the limited basic social services.¹⁰⁸

The Inter-American Court has argued that the poor conditions of detention to which an irregular migrant was subjected, including extensive overcrowding, inadequate sanitation facilities and poor health-care services, constituted cruel, inhumane and degrading treatment. In the same judgement, the Court considered that the absence of minimum conditions

¹⁰⁷ A/HRC/16/47/Add.2, para. 81.

¹⁰⁸ CMW/C/GTM/CO/1, paras. 24–25.

to ensure sufficient drinking water within a detention centre constitutes a failure of the State's duty to guarantee fundamental rights to those under its control.¹⁰⁹

B. Policy and legal framework: the right to adequate housing of irregular migrants

The Committee on Economic, Social and Cultural Rights has urged State parties to meet their core obligations under the Covenant and ensure that the minimum essential level relating to the rights to housing, health and education is respected, protected and fulfilled for irregular migrants.

The Committee explicitly stated, in its general comment No. 4 (1991), that "the right to adequate housing applies to everyone" and that ensuring the right to adequate housing is essential to the inherent dignity of every human person (paras. 6, 7 and 9). In addition, the International Convention on the Elimination of All Forms of Racial Discrimination provides for "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... the right to housing" (art. 5 (e) (iii)). The Committee on Economic, Social and Cultural Rights has further recommended "the effective implementation of existing legislation to combat discrimination in housing, including discriminatory practices carried out by private actors."¹¹⁰

The autonomous community of Catalonia in Spain developed a plan for the right to housing in 2004-2007 which, unlike the State plan, included migrants as one of the groups that require specific measures.

Source: A/HRC/7/16/Add.2, para. 77.

¹⁰⁹ *Vélez Loor v. Panama*, paras. 227 and 216.

¹¹⁰ E/C.12/FRA/CO/3, para. 41 (c).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families does not explicitly recognize that irregular migrants have a right to housing.¹¹¹ An analysis of the Convention in the light of other universal human rights instruments, taking account of the universal prohibition of non-discrimination, nevertheless indicates that State parties have at least some obligation under the Convention to ensure that housing is available to migrants in an irregular situation.¹¹²

In addition, its article 10, which prohibits inhuman and degrading treatment, should induce States to take positive measures to ensure that irregular migrants are not forced to live in housing conditions that are inhuman or degrading and contrary to human dignity.

The Committee on the Elimination of Racial Discrimination stated, in its general recommendation No. 30 (2004), that State parties must “remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the [area] of ... housing” and that they must “guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices” (paras. 29 and 32).

¹¹¹ The right to adequate housing is expressly recognized only in article 43 (d), which stipulates that documented migrants or migrants in a regular situation shall enjoy the same treatment as nationals with regard to “access to housing, including social housing schemes, and protection against exploitation in respect of rents”.

¹¹² In this context, general comment No. 2 (2013) of the Committee on Migrant Workers is instructive: “The Committee notes that the Convention provides only for a minimum standard of protection. Article 81, paragraph 1, states that nothing shall prevent States parties from granting more favourable rights or freedoms than those set out in the Convention to migrant workers and members of their families, including those in an irregular situation, by virtue of the law and practice of, or any bilateral or multilateral treaty in force for, the State party concerned. The Committee is of the view that a State’s obligation under the Convention must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party. Although separate and freestanding, these treaties are complementary and mutually reinforcing” (para. 7).

According to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, migrant workers, including those in an irregular situation, should not be treated less well with regard to their conditions of work than nationals of the State in which they are employed (art. 25). This is relevant to the situation of migrant workers whose housing is provided by their employers, including domestic workers. ILO Convention No. 189 provides that if they reside in the household, domestic workers are entitled to decent living conditions that respect their privacy (art. 6).

The European Committee of Social Rights has assessed the housing rights of irregular migrants against the standard of non-discrimination and has recognized that extremely poor housing conditions may have a negative impact on their enjoyment of the right to life and dignity. In a case concerning Italian emergency security measures that targeted Roma and Sinti migrants (including migrants in both regular and irregular situations), the Committee concluded that Italy had violated different provisions of the Revised Charter, notably the right to housing (art. 31), the right to protection against poverty and social exclusion (art. 30), the right of families to social, legal and economic protection (art. 16), and the right of migrants to protection and assistance (art. 19).¹¹³ It emphasized the impact of social exclusion on access to health care and of inadequate housing on health.

The Special Rapporteur on adequate housing has stated that “the provision of housing should not be denied to undocumented migrants ... they must be afforded a minimum level of housing assistance that ensures conditions consistent with human dignity”.¹¹⁴ According to the Special Rapporteur on the human rights of migrants, “States should, at a minimum, provide migrants in irregular situations at risk of homelessness with a level of housing which ensures their dignity and allocate resources to shelters which provide assistance to migrants in irregular situations.”¹¹⁵ The Office

¹¹³ *Centre on Housing Rights and Evictions (COHRE) v. Italy*, complaint No. 58/2009, Decision of 25 June 2010.

¹¹⁴ A/65/261, para. 93.

¹¹⁵ A/HRC/14/30, para. 88.

of the United Nations High Commissioner for Human Rights has noted that national housing strategies rarely include migrants, and will practically never include irregular migrants.¹¹⁶

The European Committee of Social Rights has recognized that children in an irregular situation and undocumented children have the right to housing. In *Defence for Children International (DCI) v. the Netherlands*, it declared that the right to housing is directly linked to the rights to life, social protection and respect for human dignity and to the protection of the child's best interest, regardless of the child's residence status. In order to prevent homelessness, States have an obligation to provide shelter to children, regardless of status, as long as they are in the State's jurisdiction.¹¹⁷

C. Policy and legal framework: the right to water and sanitation of irregular migrants

While water has not been explicitly recognized as a self-standing human right in international treaties, international human rights law entails specific obligations related to access to safe drinking water. These obligations also require States to progressively ensure access to adequate sanitation, as a fundamental element for human dignity and privacy, but also to protect the quality of drinking-water supplies and resources.¹¹⁸ In its general comment No. 15 (2002), the Committee on Economic, Social and Cultural Rights specified that States have a particular obligation "to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services" (para. 15).

¹¹⁶ OHCHR and United Nations Human Settlements Programme (UN-Habitat), *Fact Sheet No. 21/Rev.1: The Right to Adequate Housing*, p. 25.

¹¹⁷ Complaint No. 47/2008, Decision of 20 October 2009. In relation to evictions, the Committee noted that since "no alternative accommodation may be required by States, eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect for their human dignity" (para. 63).

¹¹⁸ OHCHR, UN-Habitat and WHO, *Fact Sheet No. 35: The Right to Water*, p. 3.

Other international instruments recognize the right to water and sanitation. The Convention on the Elimination of All Forms of Discrimination against Women stipulates that State parties shall ensure that women exercise their right to “enjoy adequate living conditions, particularly in relation to ... sanitation ... and water supply” (art. 14.2 (h)). The Convention on the Rights of the Child requires State parties to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water” (art. 24.2 (c)).

In 2006, the Sub-Commission on the Promotion and Protection of Human Rights adopted guidelines for the realization of the right to drinking water and sanitation. These guidelines define the right to sanitation as the right of everyone to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.¹¹⁹ In its resolution 64/29, the United Nations General Assembly recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”. In 2011, the Human Rights Council adopted resolution 18/1 on the human right to safe drinking water and sanitation.

To verify whether they are achieving the right to water, States should take the following factors into account: the availability of water supply for personal and domestic uses;¹²⁰ the quality of the water available;¹²¹ and the degree to which water is accessible. The third measure should assess the extent to which water is physically accessible and affordable, access to it is free of discrimination, and information on water issues can be obtained.

¹¹⁹ E/CN.4/Sub.2/2005/25. See also *Fact Sheet No. 35: The Right to Water*, pp. 4–5.

¹²⁰ According to the Committee on Economic, Social and Cultural Rights, availability implies that “the water supply for each person must be sufficient and continuous for personal and domestic uses” and “the quantity of water available for each person should correspond to [WHO] guidelines”. General comment No. 15 (2002), para. 12 (a).

¹²¹ According to the Committee on Economic, Social and Cultural Rights, this requirement implies that “the water required for each personal or domestic use must be safe, therefore free from microorganisms, chemical substances and radiological hazards that constitute a threat to a person’s health” and “should be of an acceptable colour, odour and taste for each personal or domestic use”. *Ibid.*, para. 12 (b).

In its general comment No. 15 (2002), the Committee on Economic, Social and Cultural Rights explicitly listed migrants among the groups that should be considered particularly vulnerable or marginalized with respect to the right to water, considering that “States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees” (para. 16).

D. Policy and legal framework: the right to food of irregular migrants

The Committee on Economic, Social and Cultural Rights highlighted in its general comment No. 12 (1999) the close link between the right to food and the inherent dignity of the human person and recognized that the right to food is indispensable to the fulfilment of other human rights enshrined in the International Bill of Human Rights (para. 4). Core obligations related to the right to health asserted by the Committee in its general comment No. 14 (2000), for example, include access to “the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone” (para. 43 (b)).

The right to food is also recognized in the Convention on the Rights of the Child, which requests State parties to ensure that all children have access to adequate nutrition, including through material assistance and support programmes where necessary (art. 27.3).

The prohibition of discrimination and the right to equality require States to guarantee irregular migrants the right to food. The Committee on Economic, Social and Cultural Rights, in its general comment No. 12 (1999), stated that “any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a

violation of the Covenant” (para. 18). The Special Rapporteur on the right to food has made the same point: “Discrimination in access to food on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status cannot be justified under any circumstances, including low levels of resources”.¹²²

The Committee recommended, in its general comment No. 12 (1999), that resources such as water and food should be distributed in priority to the most vulnerable or marginalized population groups, even in the face of “severe resource constraints” (paras. 28 and 38). The Special Rapporteur on the right to food underlined that States have a direct obligation to ensure that detained persons, including migrants, have the right to adequate food, because they are unable to feed themselves.¹²³ As irregular migrants are also in a vulnerable position in this connection, States should ensure their access to food is secured.

The needs of children should also be prioritized. The Committee on Economic, Social and Cultural Rights, in its general comment No. 20 (2009), recognized explicitly 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” (para. 30).

Adequate information on food is essential to realize the right to food. In the case of irregular migrants, employers may play a role in ensuring the provision of such information. The Special Rapporteur on the human rights of migrants underlined that labour contracts should “contain all other relevant information (workplace, duration, salary, working hours and the conditions of stay, including residency documents and work permit, suitable and sanitary living quarters, adequate food and medical services and information on where to find assistance in case of problems)”.¹²⁴

¹²² E/CN.4/2002/58, para. 41.

¹²³ *Ibid.*, para. 46.

¹²⁴ A/HRC/14/30/Add.2, para. 106 (d).

The Food and Agriculture Organization of the United Nations (FAO) has issued Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security. They assist States to implement the right to adequate food. In particular, guideline 12.5 invites States “to take appropriate steps and suggest strategies to contribute to raise awareness of the families of migrants in order to promote efficient use of the remittances of migrants for investments that could improve their livelihoods, including the food security of their families”.

The UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention stipulate that food of nutritional value suitable to age, health and cultural/religious background is to be provided in detention. Special diets for pregnant or breastfeeding women should be available. Facilities in which the food is prepared and eaten need to respect basic rules on sanitation and cleanliness.¹²⁵ These standards should be applicable to all detained migrants, irrespective of their migration status.

¹²⁵ Guideline 8 (xi).

Key messages

- States should adopt measures to prevent and sanction discrimination against irregular migrants that undermines their right to an adequate standard of living, and should avoid the marginalization and social exclusion of migrants in an irregular situation, including because of the location of their accommodation.
- Renting accommodation to a migrant in an irregular situation should not be considered a criminal offence. Irregular migrants should be appropriately protected against the imposition of unreasonable or abusive rents.
- Homeless migrants should be granted access to appropriate shelters irrespective of their nationality or status. Shelters should not be required to report their clients to the authorities.
- States should adopt legal and administrative measures to ensure legal security of tenure and avoid forced evictions of irregular migrants, particularly if no adequate alternative accommodation is provided.
- States should ensure that all migrants are able to meet their minimum subsistence needs and have adequate access to food, safe water and sanitation, irrespective of their immigration status.
- States should ensure that the living conditions in detention centres are not contrary to the human rights and human dignity of migrants. In particular, facilities should not be overcrowded, unsanitary, or lack ventilation and open space, and at a minimum should provide adequate bedding, culturally acceptable food and safe water.

IV. THE RIGHT TO EDUCATION

Content and specific components

The International Covenant on Economic, Social and Cultural Rights recognizes that everyone has the right to an education towards the full development of the human personality and the sense of its dignity (art. 13.1). Its drafters also recognized the role of education in promoting “understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups”.

The Covenant lists the specific components of the right (art. 13.2): for instance, primary education should be compulsory and available free to all; all appropriate means should be used to make secondary education available and accessible; higher education should be accessible to all on the basis of capacity.

In its general comment No. 13 (1999) on the right to education, the Committee on Economic, Social and Cultural Rights stipulated that education, in all its forms and at all levels, should meet the following standards:

- (a) *Availability* - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party ...;
- (b) *Accessibility* - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
 - (i) *non-discrimination* - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds ...;
 - (ii) *physical accessibility* - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g., a neighbourhood school) or via modern technology (e.g., access to a “distance learning” programme);
 - (iii) *economic accessibility* - education has to be affordable to all ...;
- (c) *Acceptability* - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g., relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents ...;
- (d) *Adaptability* - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings (para. 6).

The Committee indicated that the **core obligations** under this right oblige State parties to:

- (a) Ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
- (b) Ensure that education conforms to the objectives set out in article 13.1 of the Covenant;
- (c) Provide free primary education for all;
- (d) Adopt and implement a national educational strategy;
- (e) Ensure free choice of education, subject to conformity with minimum educational standards (para. 57).

A. Legal and practical barriers that prevent irregular migrants from enjoying the right to education

For children of migrants in an irregular situation, school is an opportunity to integrate in the societies to which they or their parents have moved. Education may even make it possible for them to obtain a regular residence permit at the age of 18. In both France and Italy, for example, it is possible for children to be granted residence permits on majority if they fulfil conditions regarding length of residence in the country and school attendance.¹²⁶

For migrants in an irregular situation, the major barriers to enjoying the right to education are:

- Not having the documents required for enrolment.
- Reporting obligations.
- The access of police and other authorities to pupils' data.
- The enforcement practices of migration authorities.
- School fees and costs.
- Difficulties in obtaining a diploma.

¹²⁶ See PICUM, *Undocumented Children in Europe*, p. 11.

In countries around the world children in an irregular situation are unable to enjoy their right to education. Even where the right to education is generally recognized in law, its implementation is inconsistent, owing to persistent discriminatory practices in many States.¹²⁷ Irregular adolescents may not be entitled in law to access education beyond primary school. In some countries where national laws state only that “all children” enjoy the right to education, the entitlement of irregular children is only implied, and in some cases school administrators hesitate to provide access to such children. In Poland education for children between 6 and 18 years is a right and is compulsory, but children with irregular status cannot be counted for funding purposes, which has led to concerns that schools are declining to enrol such children.¹²⁸ The Turkish Constitution provides that no one shall be deprived of the right to education (art. 42); however, it also provides that primary education is compulsory for Turkish citizens only.

Lack of access to education can also be a reflection of the wider situation of irregular migrants in countries of destination. Where fear of xenophobic violence leads irregular migrants to shut themselves off from the community, children may be prevented from attending mainstream educational institutions. Fear of violence, hate crimes, hate speech, exclusion and other manifestations of xenophobia can have a severely negative effect on children, including when xenophobia is allowed to flourish in classrooms. In South Africa migrant children reported being regularly subjected to xenophobic comments by teachers or other pupils.¹²⁹

¹²⁷ “Neither the interviews nor the examination of the national legislation uncovered any case of direct discrimination in the legislation against undocumented children with regards to accessing education in the countries studied. ... Nevertheless, the level of protection given to foreign children and to undocumented children varies from country to country”, *ibid.*, p. 15. See also FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 87. FRA found that five European countries (Bulgaria, Hungary, Latvia, Lithuania and Sweden) in practice restricted the access of migrant children in an irregular situation to State schools.

¹²⁸ UNDP, *Human Development Report 2009*, p. 58.

¹²⁹ *Ibid.*

Irregular children are often expected to show evidence of their identity, residence, birth and sometimes their health or medical records before they can attend school. In Europe, five countries require some form of identity document, a dozen require proof of address or a local place of stay, and several request medical documentation. In some cases, children are also obliged to pass a language examination to attend a public school.¹³⁰ In Morocco, birth certificates and residence permits are required for school registration.¹³¹

The Committee on Migrant Workers has noted that Argentina's Migration Law guarantees the right to free access to all levels of education for all migrants. However, it expressed concern that, in practice, schools often refused to enrol migrant children if they lacked a national identity document.¹³²

In China, every resident must be registered under a household registration system (*hukou*) which provides a passport-like document (also called *hukou*). Schools require a copy of this document for enrolment and children without it have no access to education.¹³³

The Committee on Migrant Workers has also expressed concern that "a considerable number of migrant children, and notably children of irregular migrant workers, do not have access to the educational system in Ecuador and that this may be caused, inter alia, by the fact that there are a high number of children of migrant workers who are not registered at birth or afterwards, either because their parents fail to register them for fear of being deported or because their registration is refused on the ground of the irregular status of one or both parents".¹³⁴

¹³⁰ FRA, *Fundamental Rights of Migrants in an Irregular Situation*, pp. 87, 90–91.

¹³¹ Marie Diop, "Migration des enfants non accompagnés de l'Afrique de l'Ouest vers l'Afrique du Nord: Etat des lieux", January 2013, pp. 34–35.

¹³² CMW/C/ARG/CO/1, para. 27.

¹³³ Human Rights Watch, *Denied Status, Denied Education: Children of North Korean Women in China* (New York, 2008), p. 8.

¹³⁴ CMW/C/ECU/CO/1, para. 35.

In the worst cases, irregular children are simply not eligible to enrol in a public school.¹³⁵

A school administration's reporting obligations may discourage parents from sending their children to school for fear of being detected and removed. Disclosure of pupils' data to the police can have a similar effect. In Germany, the Federal Parliament abolished such an obligation to report on schools, nurseries and educational facilities in 2011, but not on other public services.¹³⁶ A law passed by the State of Alabama (United States) requires schools to check the immigration status of their pupils and it has significantly lowered the school attendance of foreign children.¹³⁷ The Special Rapporteur on the right to education has also noted with concern reports in various countries of the "practice of migrant children being detained by police on the grounds of their immigration status while travelling to school".¹³⁸

In relation to Algeria, the Committee on Migrant Workers stressed that, even where no legal obstacle prevents the registration of births or access to education of children of migrant workers in an irregular situation, in practice parents will tend to avoid contact with public authorities because they are afraid of sanctions and expulsion, and this can prevent children from effectively enjoying their basic rights.¹³⁹

¹³⁵ In some Canadian provinces, stateless children and undocumented migrant children are reported to be ineligible for schooling (see CERD/C/CAN/CO/18, para. 23). In China, undocumented migrant children are not guaranteed access to education in the Hong Kong Special Administrative Region (CRC/C/CHN/CO/2, para. 81). In Turkey, children or their legal guardians must have a work or residence permit to have access to education (see European Committee of Social Rights, Conclusions on the application by Turkey of the European Social Charter (Revised), in particular art. 17.2 (2011)).

¹³⁶ FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 91.

¹³⁷ Human Rights Watch, *No Way to Live: Alabama's Immigrant Law* (New York, December 2011), pp. 44–45.

¹³⁸ A/HRC/14/25, para. 61.

¹³⁹ CMW/C/DZA/CO/1, para. 20.

As already noted, even when national legislation does not explicitly prevent children in an irregular situation from attending school, they may suffer in practice from discrimination or the absence of affirmative measures that ensure their full integration in the school system.¹⁴⁰

Early childhood education is frequently denied to irregular migrant children as access to public preschools is not considered compulsory. In Italy, a measure preventing irregular children from being registered in preschools was found to be discriminatory and contrary to the right to education.¹⁴¹ Adolescents may be unable to take part in the training component of secondary education and internships are often considered work even when they are a compulsory part of the curriculum, presenting difficulties for irregular migrants. They may also be unable to take official exams and receive their final school-leaving certificate. These barriers both limit their full enjoyment of the right to education and make it difficult for them to progress from education to employment.

In addition, migrants in an irregular situation can face barriers to access good-quality education. The Special Rapporteur on the right to education observed that many migrants do not have access to good-quality education. He noted that migrant pupils in many countries face a far higher risk of marginalization with regard to education systems and opportunities than native pupils.¹⁴²

¹⁴⁰ A number of reports by human rights treaty bodies highlight the gap between law and practice. See, for instance, some of their concluding observations on reports submitted by Azerbaijan (CMW/C/AZE/CO/1, paras. 24–25); the Czech Republic (CRC/C/15/Add.201, paras. 54–55); Italy (CRC/C/ITA/CO/3-4, para. 59 (e)); Egypt (CMW/C/EGY/CO/1, paras. 20–21); and the Republic of Korea (CRC/C/KOR/CO/3-4, para. 68).

¹⁴¹ UNICEF, “Access to civil, economic and social rights for children in the context of irregular migration”, Written submission to the 2012 Day of general discussion on the rights of all children in the context of international migration of the Committee on the Rights of the Child, pp. 7–8 and 21. Available from www.unicef.org/socialpolicy/files/Access_to_Civil_Economic_and_Social_Rights_for_Children.pdf (accessed 11 March 2014).

¹⁴² A/HRC/14/25, paras. 34–35.

Concerns have also been expressed about irregular migrants being excluded from opportunities for learning over their lifetime, which might add to a cumulative process of marginalization. The Special Rapporteur on the right to education has noted that “legislative, policy and practical barriers, such as to community inclusion and participation in education, teach individuals that they are unwelcome and, moreover, ought to survive without inclusion.”¹⁴³

Finally, it should be noted that many migrant children who are in detention are denied their right to education. Children in detention rarely have access to adequate education, play and leisure facilities. Where some education is provided, it may be of poor quality. For example in Poland, civil society organizations have expressed concern that migrant children in detention do not go to school but instead attend limited-curriculum courses in the detention centres.¹⁴⁴

B. Policy and legal framework: the right to education of irregular migrants

The Committee on Economic, Social and Cultural Rights, in its general comment No. 13 (1999), recognized that education is the “primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities” (para. 1).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families stipulates that “each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned” (art. 30). The Convention explicitly extends this right to children in an irregular situation by recognizing:

¹⁴³ *Ibid.*, para. 62.

¹⁴⁴ Human Rights House Network, “Detention of migrant children must be put to stop, say NGOs”, press release, 19 December 2012. Available from <http://humanrightshouse.org/Articles/18983.html>.

Access to public preschool 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.¹⁴⁵

The Committee on Migrant Workers has made clear that this right covers both primary and secondary education. In its general comment No. 1 (2011), it stated that "States parties shall ensure that all migrant children, independently of their migration status, have access to free and compulsory primary education as well as to secondary education on the basis of equality of treatment with nationals of the State concerned ..." (para. 57). The Committee on the Rights of the Child, in its general comment No. 6 (2005), called upon State parties to ensure that access to education is maintained at all stages of the migratory process (para. 41).

Italy guarantees to migrant children the right to education, regardless of their status, on the same terms as Italian children. The 1998 Immigration Act integrates the right to education in national legislation. It provides for the compulsory education of migrant children, the teaching of Italian, and the promotion of the culture and language of the countries of origin of migrant children.

Belgium protects the right to education in its Constitution and in implementing legislation. Provided they are accompanying their parents or persons holding parental authority, minors residing unlawfully in the French-speaking territory shall be admitted to local schools. Head teachers shall also accept enrolments of unaccompanied minors. In such cases they must ensure that the minor takes the requisite steps to register with an institution in a position to exercise parental authority over him or her. In Flanders, too, a provision by the Flemish Minister of Education grants such children the right to attend school. Head teachers are not required to inform the police of the administrative status of children and their parents, and undocumented migrants will not be arrested in the vicinity of the school. This guarantee was extended to the entire Belgian territory through a circular letter signed by the Ministry of Interior on 29 April 2003, recalling that police services cannot enter schools in order to carry out deportations.

Source: PICUM, *Undocumented Children in Europe*, pp. 16–17.

¹⁴⁵ The principle was also reaffirmed by the Committee on Economic, Social and Cultural Rights in its general comments No. 20 (2009), para. 30, and No. 13 (1999), para. 34.

The Convention on the Rights of the Child provides that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s ... national ... origin ... or other status” (art. 2). In addition, the Convention against Discrimination in Education of the United Nations Educational, Scientific and Cultural Organization (UNESCO) requires States: “to give foreign nationals resident within their territory the same access to education as that given to their own nationals” (art. 3 (e)).

A number of treaty bodies have emphasized that the prohibition of discrimination in the treaties applies to children in an irregular situation and to their education. The Committee on Economic, Social and Cultural Rights, for example, in its general comment No. 13 (1999), confirmed

In the United States, the Supreme Court ruled in the landmark *Plyler v. Doe* case^a in 1982, that it was a violation of the Constitution to deny irregular migrant children free compulsory education under the same conditions as citizens and regular migrant children. The explicit legal ruling has been complemented by clear guidelines, for example produced by the National School Boards Association and the National Education Association,^b regarding legal issues and specific schools.^c A number of States have fully implemented this ruling to include access to other school-based services, such as free and reduced-price meals and educational assistance for children with learning disabilities.

^a “In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.” *Plyler v. Doe*, 457 U.S. 202 (1982).

^b The National School Boards Association and the National Education Association, *Legal Issues for School Districts related to the Education of Undocumented Children* (2009).

^c See, for example, J. Hunter and C.B. Howley, “Undocumented children in the schools: successful strategies and policies”, 1990. Available from www.ericdigests.org/pre-9217/children.htm (accessed 11 March 2014).

that “the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status” (para. 34).¹⁴⁶ To eliminate disparities in access to education for children in an irregular situation, States must adopt special measures addressing both direct and indirect discrimination. The Committee further noted, in its general comment No. 20 (2009), that “all children within a State, including those with an undocumented status, have a right to receive education” (para. 30).

The Convention on the Rights of the Child requires State parties to make educational and vocational information and guidance available and take measures to encourage regular attendance at schools (art. 28.1 (d)–(e)). The Committee on Economic, Social and Cultural Rights, in its general comment No. 13 (1999), affirmed that secondary education should be the “completion of basic education and consolidation of the foundations for lifelong learning and human development” (para. 12). Secondary education should prepare pupils for vocational and higher education opportunities.

Plan of action to give effect to the right to education

“Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”^o

The Committee on Economic, Social and Cultural Rights has noted that the plan must cover all of the actions which are necessary to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realization of the right. Participation of all sections of civil society in the drawing-up of the plan is vital and some means of periodically reviewing progress and ensuring accountability are essential.

^o International Covenant on Economic, Social and Cultural Rights, art. 14.

¹⁴⁶ See also CRC/C/THA/CO/3-4, para. 33.

In order to ensure the right to primary education, the Committee on Economic, Social and Cultural Rights, in its general comment No. 11 (1999), directed State parties to eliminate all direct costs of schooling, such as school fees, as well as alleviate the adverse impact of indirect costs, such as expenses for school materials and uniforms (para. 7).

The Committee on the Rights of the Child has called on States to provide effective safeguards in law and in practice on information sharing between civil registries, public-service providers and immigration authorities to ensure that this practice is not contrary to the best interests of the child and does not expose children or their families to potential harm or sanctions, including through issuing clear guidance for service providers and awareness-raising programmes on these safeguards among persons in irregular migration situations.¹⁴⁷ The Committee on Migrant Workers, in its general comment No. 2 (2013), specified that State parties shall not require schools to report or share data on the regular or irregular status of pupils or their parents to immigration authorities or conduct immigration enforcement operations on or near school premises, as this would limit access to education by children of migrant workers. State parties should also clearly inform school administrators, teachers and parents that they are not required to do so either and provide them with training on the educational rights of children of migrant workers (para. 77). Likewise, the common principles developed by the European Union Agency for Fundamental Rights to guide immigration law enforcement bodies on apprehension practices note that schools should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.¹⁴⁸

¹⁴⁷ "Report of the 2012 Day of general discussion", para. 87.

¹⁴⁸ FRA, "Apprehension of migrants in an irregular situation", principle 5.

The Bolivarian Republic of Venezuela guarantees the unrestricted right to education at all levels through its Constitution and migrants are entitled to free education from early childhood care to higher education. Furthermore, its schools are explicitly obliged to permit the registration of irregular migrant children.

On 5 July 2005, the Government of Thailand made education available to all people living in Thailand, including migrant children, regardless of their status, except displaced persons living in temporary shelters for whom schooling is provided. Since 2005, the Ministry of Education has directed schools to enrol all pupils, including those that do not have proper identification documents.

Sources: IOM, Thailand Migration Report 2011: *Migration for development in Thailand – Overview and tools for policymakers* (Bangkok, 2011), p. 97; and Committee on the Rights of the Child, “2012 Day of general discussion”, Background paper, annex II, available from www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/2012DGDBBackgroundPaperAnnexII.pdf (accessed 18 March 2014).

The Committee on the Rights of the Child strongly encourages States “to expeditiously reform legislation, policies and practices that prevent or discriminate against children affected by migration ..., in particular those in an irregular situation, from effectively accessing services and benefits such as ... education ..., among others.”¹⁴⁹ In its general comment No. 6 (2005), it furthermore identified several measures that should be taken to protect the access to education of separated and unaccompanied children. In particular, it affirmed that “every unaccompanied and separated child, irrespective of status, shall have full access to education in the country that they have entered Such access should be granted without discrimination and in particular, separated and unaccompanied girls shall have equal access to formal and informal education, including vocational training at all levels” (para. 41). “The unaccompanied or separated child should be registered with appropriate school authorities as soon as possible and get assistance in maximizing learning opportunities” (para. 42).

¹⁴⁹ “Report of the 2012 Day of general discussion”, para. 86.

Several international bodies have underlined that school attendance should not be subject to presentation of identity documents or residence or work permits. The Special Rapporteur on the right to education has stated that such requirements amount to direct discrimination against irregular migrants who seek to educate themselves or to train.¹⁵⁰

Human rights mechanisms have recommended that States should institute information campaigns in order to tackle discrimination which may prevent children from integrating fully in the school system. Such campaigns should be aimed both at public officials working on migration, especially at local level, as well as at the general public.¹⁵¹

All children residing in the Netherlands are legally required to attend school. This requirement extends to school-age children of asylum seekers and irregular migrants. Legislation explicitly prevents schools from sharing personal information with others (e.g., immigration authorities) and from refusing registration because of immigration status.

Source: UNICEF, “Examples of good practices in the implementation of the international framework for the protection of the rights of the child in the context of migration”, draft paper, 26 May 2010, p. 14. Available from www.ohchr.org/Documents/Issues/MHR/Consultation2010/2.Good_practices_Migration_children_UNICEF.pdf.

Quoting the Council of Europe’s Commissioner for Human Rights, the European Committee of Social Rights has also recognized that requiring residence or work permits to attend school hinders the provision of education to children in an irregular situation and that “the denial of access to education will exacerbate the vulnerability of an unlawfully present child.” It has stated that a child’s life is adversely affected by the denial of access to education and that every child, whatever his or her residence status, should be considered to fall within the scope of article 17.2 of the European Social Charter (Revised), which protects the right of children and young persons to free primary and secondary

¹⁵⁰ A/HRC/14/25, paras. 59 and 62.

¹⁵¹ CMW/C/AZE/CO/1, para. 25 (b), and CMW/C/EGY/CO/1, para. 21 (b).

education. The Committee has said that non-nationals should be granted access to schools for religious minorities.¹⁵²

The International Covenant on Economic, Social and Cultural Rights recognizes that parents or legal guardians have a right “to choose for their children schools, other than those established by the public authorities” and “to ensure the religious and moral education of their children in conformity with their own convictions” (art. 13.3). The Convention on the Rights of the Child sets out the objectives of children’s education (art. 29.1) and recognizes the importance of adopting measures to ensure “the development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own”. While noting that the right to the teaching of their mother tongue and culture extends only to children of migrant workers in a regular situation (under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 45.3), the Committee on Migrant Workers emphasized, in its general comment No. 2 (2013), that the right to respect for one’s cultural identity (art. 31) belongs to all migrant workers and members of their families, including children. Considering these two provisions together, along with article 29.1 (c) of the Convention on the Rights of the Child, which applies to all children, the Committee on Migrant Workers is of the view that State parties should ensure access for children of migrant workers in an irregular situation to native-language instruction if this is already available to children of documented migrant workers (para. 78).

The Committee on Economic, Social and Cultural Rights recalled, in its general comment No. 13 (1999), that “primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community” (para. 9).

¹⁵² Conclusions on Turkey (2011).

Key messages

- Migrant children in an irregular situation should have access to schooling on an equal basis with nationals. Relevant national legislation should state explicitly that the right to education is to be enjoyed by the children of migrants in an irregular situation.
- States should simplify the formalities for enrolling migrant children in school and should not require them to present documentation that migrants in an irregular situation cannot obtain.
- School administrators should not be required to report the presence of children in an irregular situation to immigration authorities or to communicate migrant pupils' data to the police. Immigration enforcement operations should not be conducted on or near school premises.
- All migrant children should have access to all levels of education whether formal or informal, including early childhood education and care and vocational training.
- All migrant children should be able to preserve their cultural identity, including through the teaching of their mother tongue and culture where possible.
- States should develop educational strategies which strengthen the capabilities of marginalized communities as a whole, while specifically addressing the educational needs of irregular migrants within such communities.

V. THE RIGHT TO SOCIAL SECURITY

Content and specific components

The International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to social security, including social insurance (art. 9). In its general comment No. 19 (2007) on the right to social security, the Committee on Economic, Social and Cultural Rights said that this right includes:

the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependants (para. 2).

The Committee also listed the conditions that need to be met to make the right effective. First, a system must be in place to cover the relevant social risks and contingencies. Second, it should cover at least the following nine branches of social security: health care; sickness; old age; unemployment; employment injury; family and child support; maternity; disability; and survivors and orphans. Third, benefits “must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care”. Lastly, benefits should be accessible. This implies that all persons should be covered by the system, especially individuals belonging to the most disadvantaged and marginalized groups. Accessibility also implies that qualifying conditions for benefits must be reasonable, proportionate and transparent.

The right to social security includes both contributory and non-contributory schemes. Contributory or insurance-based schemes generally involve “compulsory contributions from beneficiaries, employers and, sometimes, the State, in conjunction with the payment of benefits and administrative expenses from a common fund”. Non-contributory schemes include universal schemes as well as targeted programmes that assist people in need. The Committee recognized that non-contributory schemes will be required in almost all countries, “since it is unlikely that every person can be adequately covered through an insurance-based system”. Private and self-help schemes may also fall under the Covenant.

The Committee noted additionally that “States parties must take steps to the maximum of their available resources to ensure that the social security systems cover those persons working in the informal economy.” Such steps include: “(a) removing obstacles that prevent such persons from accessing informal social security schemes, such as community-based insurance; (b) ensuring a minimum level of coverage of risks and contingencies with progressive expansion over time; and (c) respecting and supporting social security schemes developed within the informal economy such as microinsurance and other microcredit-related schemes” (para. 34).

The Committee indicated that the **core obligations** under this right oblige State parties to:

- (a) Ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education;
- (b) Ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups;
- (c) Respect existing social security schemes and protect them from unreasonable interference;
- (d) Adopt and implement a national social security strategy and plan of action;
- (e) Take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups;
- (f) Monitor the extent of the realization of the right to social security (para. 59).

A. Legal and practical barriers that prevent irregular migrants from enjoying the right to social security

Social security, through its redistributive character, has been recognized as playing an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion. Reluctance to recognize the right of irregular migrants to social security can be due to a failure to take into account the contributions that migrants, including those who are in an irregular situation, make to the economy and to the social security schemes of the States in which they are employed. Yet, even those who do not participate directly often contribute to financing social protection schemes and programmes by paying indirect taxes.¹⁵³ Some employers exploit irregular migrant workers to lower their staff costs, by avoiding social security contributions and paying lower wages.¹⁵⁴

It has been estimated that workers with irregular status in the United States contribute close to \$6–7 billion to the social security system without receiving any benefits. One estimate shows that about 3.8 million households headed by irregular migrants generated \$6.4 billion in social security taxes in 2002.¹⁵⁵ The National Research Council has estimated that “undocumented immigrants” (irregular migrants) pay \$80,000 more in taxes per person than they consume in government benefits over their lifetimes.¹⁵⁶

¹⁵³ E/2010/89, para. 46.

¹⁵⁴ M. Jandl, C. Hollomey and A. Stepien, “Migration and irregular work in Austria: results of a Delphi-study”, International Migration Papers, No. 90 (Geneva, ILO and International Centre for Migration Policy Development, 2007), p. 25.

¹⁵⁵ E. Porter, “Illegal immigrants are bolstering social security with billions”, *New York Times*, 5 April 2005. Available from www.nytimes.com/2005/04/05/business/05immigration.html.

¹⁵⁶ National Research Council, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration*, James P. Smith and Barry Edmonston, eds. (Washington, D.C., National Academies Press, 1997).

In the United Kingdom, a 2008 labour force survey found that very few non-EU migrants in general access social security, which would indicate that the percentage of irregular migrants claiming such benefits was negligible.¹⁵⁷

Benefit	Percentage of non-EU migrants claiming the benefit
Income support (not as unemployed person)	4
Sickness or disability (excluding disabled person's tax credit)	2
State pension	2
Family-related benefits (excluding child benefits and tax credits)	0
Child benefits	14
Housing/council tax benefit (Great Britain), rent/rate rebate (Northern Ireland)	5
Unemployment-related benefits, national insurance credits	1
Other	1

Irregular migrants are unable to access social security schemes for three main reasons. First, in many cases they do not fulfil the necessary requirements. They may be expected, for example, to provide evidence of legal status and residency, or to prove that they have been affiliated for

¹⁵⁷ The authors of this study note accordingly that "irregular migrants are even less likely to [claim benefits] (almost by definition they are not entitled to do so). ... This suggests that the benefit cost imposed by irregular migrants on the [United Kingdom] is very small." Laura Chappell and others, "The impacts of irregular migration", Institute for Public Policy Research, 2011. Available from http://migration.etuc.org/en/docs_en/6%20The%20impacts%20of%20irregular%20migration.pdf.

a lengthy qualifying period. Second, many migrants lose effective access to social security rights because these are not sufficiently portable. Third, many irregular migrants work in sectors of the labour market that are not covered by social security or in which compliance with social security laws is poorly enforced.

The Special Rapporteur on the human rights of migrants noted that in many cases “migrant workers, both regular and irregular, ... are employed under precarious and discriminatory conditions, with temporary contracts that do not entitle them to access social security services”.¹⁵⁸ Their precarious situation is exacerbated by the fact that access to social security often conditions access to other essential rights.¹⁵⁹ Possession of a social security number is typically required to enrol in schools or stay in long-term shelters, for example. This penalizes irregular migrants who cannot enter the system.

The treaty bodies have expressed concern about the issue, including that many States of destination exclude irregular migrants from the public social security system and make no provision for migrants, even on a voluntary basis. With regard to Canada, for example, the Committee on the Elimination of Racial Discrimination has noted that “undocumented migrants and stateless persons, particularly those whose application for refugee status is rejected but who cannot be removed from Canada, are excluded from eligibility for social security and health care, as it requires proof of residence in one of the provinces in the State party”.¹⁶⁰ In its general comment No. 1 (2011), the Committee on Migrant Workers also recognized that, where domestic workers are excluded from social security programmes, it increases their vulnerability and their dependence on their employers (para. 24).

¹⁵⁸ “Report of the Special rapporteur on human rights of migrants, Jorge Bustamante: Mission to Japan” (A/HRC/17/33/Add.3), para. 70.

¹⁵⁹ See Committee on Economic, Social and Cultural Rights, general comment No. 19 (2007), para. 28.

¹⁶⁰ CERD/C/CAN/CO/18, para. 23.

On 18 July 2012, the German Federal Constitutional Court recognized that the Asylum Seekers Benefit Act (1993), which set significantly lower benefits, including benefits in kind rather than in cash, to certain categories of migrants (including migrants in an irregular situation and migrants subject to an enforceable order to leave), and to their spouses, registered partners and minor children, was unconstitutional.

Since 1993, moreover, the rate of payments to this group had not risen, despite considerable price increases and the fact that the period during which a person was entitled to benefit had been extended to four years.

The Government claimed these differences were necessary to combat irregular migration. The Court rejected this argument, which it considered irrelevant because it applied the test that every individual is entitled to a minimum standard of subsistence. The Court ruled that the Asylum Seekers Benefit Act was incompatible with the right to the standard of human dignity as set out in the German Constitution, which affirms the principle of the welfare state.

The Court's decision obliged parliament to revise the terms of the Asylum Seekers Benefits Act. Cash benefits increased and replaced benefits in kind.

Migrants experience particular difficulties in accessing non-contributory social assistance programmes that are universal or target specific needs. Some countries deny social assistance to irregular migrants altogether; others recognize entitlements only to minimal forms of aid. Many countries grant irregular migrants certain social assistance benefits: they usually include non-pecuniary aid for adults (such as food and clothing), and access to housing and assistance benefits for children.¹⁶¹

B. Legal and policy framework: the right to social security of irregular migrants

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 27) addresses social security and affirms the right of all migrant workers, irrespective of their status, to receive the same treatment as nationals "insofar as they fulfil the

¹⁶¹ O. Dupper, "Migrant workers and the right to social security: an international perspective", *Stellenbosch Law Review*, vol. 18, No. 2 (2007), p. 251.

requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties". The Convention also observes that the competent authorities in the State of origin and the State of employment may "establish the necessary arrangements to determine the modalities of application of this norm". If migrant workers are not entitled to a certain benefit, "the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances". This addresses the injustice that arises when migrants are obliged to contribute to a social scheme but are not entitled to receive its benefits. The Committee on Migrant Workers further directed in its general comment No. 2 (2013) that State parties should provide objective reasons in each case in which the reimbursement of contributions is deemed impossible, noting that "a decision not to reimburse contributions made by a migrant worker or family member must not discriminate on the basis of his or her nationality or migration status" (para. 69). The Committee has also considered that in cases of extreme poverty and vulnerability, State parties should provide emergency social assistance to migrant workers in an irregular situation and members of their families.¹⁶²

Highlighting the significance of the right to social security, the Committee on Economic, Social and Cultural Rights has noted its "central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights."¹⁶³ ILO similarly observes that social security is "the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children".¹⁶⁴

¹⁶² CMW/C/ARG/CO/1, para. 30.

¹⁶³ General comment No. 19 (2007), para. 1.

¹⁶⁴ ILO, *Introduction to Social Security*, 3rd ed. (Geneva, 1984), p. 3.

In March 2012, the metropolitan government of Seoul announced that it would provide medical aid to irregular migrants who are not entitled to social security and health insurance. Such aid is expected to cover surgery, hospital charges (to a certain level), interpretation and nursing services for up to a month depending on the patient's condition. Nursing services are expected to be available in languages other than Korean, such as Chinese, Thai and Mongolian.

Source: "Medical support set for undocumented migrants", *Korea Herald*, 7 March 2012. Available from www.koreaherald.com/national/Detail.jsp?newsMLId=20120307001296.

The Committee on Economic, Social and Cultural Rights said explicitly, in its general comment No. 19 (2007), that "where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country. A migrant worker's entitlements should also not be affected by a change of workplace" (para. 36). Furthermore, migrants should be entitled to access "non-contributory schemes for income support, affordable access to health care and family support". Restrictions on access to such schemes, including the requirement of a qualification period, should be reasonable and proportionate (para. 37). In the same guidance, the Committee also pointed out "the importance of establishing reciprocal bilateral and multilateral international agreements or other instruments for coordinating or harmonizing contributory social security schemes for migrant workers" (para. 56). It should be noted that the Committee did not specifically distinguish between regular and irregular migrants with respect to this issue.

Under ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers of 1975, irregular migrants have the right to equality of treatment with respect to social security to the extent that they have rights arising out of past employment (art. 9.1).¹⁶⁵ The ILO Committee

¹⁶⁵ By contrast, migrant workers or members of their families who are lawfully in a territory enjoy equality of opportunity and treatment in respect of social security (art. 10).

of Experts on the Application of Conventions and Recommendations has clarified that the benefits of article 9.1 do not appear to be conditional upon being legally employed or resident in the country at the time of the exercise of the right, since such conditions would deprive the provision of its principal effect. In addition, notably for the purpose of acquiring rights to long-term benefits, that paragraph should be understood “as covering also any period of legal employment in the country concerned which may have preceded the illegal employment, as well as past employment in another country which would normally be taken into consideration, on the basis of bilateral or multilateral international agreements”.¹⁶⁶

ILO Convention No. 189 of 2011 requests States to “take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity” (art. 14.1).

Approximately 12 million Mexican migrants live in the United States of America, many of them undocumented and without any health insurance. To support these migrants, Mexico developed the Comprehensive Health Care Strategy for Migrants, which includes an outreach programme to connect Mexicans and their families to health insurance in the States of Colorado and Washington, offering Mexican migrants in the United States low-cost insurance and basic primary health care through 65,000 clinics and a telephone outreach programme.

Source: IOM, “Empowerment of migrants by ensuring their health and well-being”, input to Global Forum on Migration and Development round table 3.1, background paper, November 2013, p. 6. Available from www.gfmd.org/iom-input-empowerment-migrants-ensuring-their-health-and-wellbeing.

¹⁶⁶ ILO, *General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Geneva, 1999), para. 308. Available from www.ilo.org/public/english/standards/relm/ilc/ilc87/r3-1b.htm.

The Committee on the Rights of the Child has stated that policies, programmes and measures to protect children from poverty and social exclusion must include children in the context of migration, regardless of their status. In this light, it stated that the capacity of national social protection systems to prevent and address all situations of vulnerability directly or indirectly related to migration should be strengthened and children affected by migration and their families made a specific target group of social policies and programmes in countries of origin, transit and destination, regardless of migration status and without discrimination of any kind. It also stated that social protection policies should include specific provisions to support, including through community-based social services, families and caregivers in migration situations in order to facilitate their child-rearing responsibilities. These should also include special services for children in alternative care and also focus on mitigating the psychosocial impact of migration on children.¹⁶⁷

Portable rights

Social rights need to be portable if migrants are to have adequate access to social benefits. Here, many migrants are multiply penalized. They often lose social security entitlements in their country of origin when they go abroad; at the same time their access to the social security system of their country of destination may be restricted; finally, they may lose entitlements in their country of adoption if they eventually return to their country of origin. The effectiveness of social security coverage for migrants consequently depends largely on the degree to which Governments sign agreements that make benefits portable.^a

The United Nations Secretary-General, in his report on international migration and development, stressed the need for international cooperation to ensure the portability of social rights, and pension benefits in particular, without distinction between regular and irregular migrants. Notably, he stated that “there is a need for more collaboration between countries of origin and countries of destination to enhance the portability of pension benefits and ensure that migrants are not penalized for working throughout their

¹⁶⁷ “Report of the 2012 Day of general discussion”, para. 88.

productive lives in more than one country. Best practices in this area include allowing the totalization of periods of contribution and ensuring that migrants receive a fair replacement rate from each of the pension systems to which they contributed.”^b

The ILO Multilateral Framework on Labour Migration recommends that States should enter into bilateral, regional or multilateral agreements to provide social security coverage and benefits, as well as portability of social security entitlements, including to migrant workers in an irregular situation (guideline 9.9).

^a See ILO, *International Labour Migration: A Rights-based Approach* (Geneva, 2010), pp. 111–113. Examples are the Caribbean Community (CARICOM) and Common Market Agreement on Social Security, and the general Convention on Social Security adopted by the Economic Community of West African States (ECOWAS).

^b A/60/871, para. 98.

At the regional level, the Parliamentary Assembly of the Council of Europe affirmed the following two principles: “social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and preserve human dignity”; and “irregular migrants who have made social security contributions should be able to benefit from these contributions or be reimbursed if expelled from the country, for example”. It also underlined the plight of vulnerable children, who “should be entitled to social protection, which they should enjoy on the same footing as national children”.¹⁶⁸

While to date, the European Court of Human Rights has made no specific decision on the access of irregular migrants to social benefits, it has determined that States are prevented from discriminating between nationals and non-nationals regarding their access to both contributory and non-contributory social protection entitlements.¹⁶⁹ In the *Gaygusuz* case, the European Court held that “very weighty reasons would have to be put forward before the Court could regard a difference of treatment

¹⁶⁸ Resolution 1509 (2006) on the human rights of irregular migrants, para. 13.3–4.

¹⁶⁹ *Koua Poirrez v. France*, Application No. 40892/98, Judgement of 30 September 2003, paras. 39, 46–50.

based exclusively on the ground of nationality as compatible with the Convention". It thus considered that the reasons offered by the State to justify a different treatment of nationals and non-nationals regarding the emergency advancement of contributory pension benefits were insufficient and that such disparate treatment was, therefore, discriminatory.¹⁷⁰ With regard to the payment of child benefits to non-nationals, the Court has condemned any difference in treatment between those with and those without a stable residence permit.¹⁷¹

The European Committee of Social Rights has explicitly recognized that emergency social assistance should be provided to "all persons requiring it, including those who are unlawfully present, for as long as their need for it persists and whenever the need arises".¹⁷² The Committee concluded that failure to provide such assistance would amount to a breach of article 13.4 of the European Social Charter, which protects the right of non-residents to emergency assistance.

The first Ibero-American Multilateral Agreement on Social Security was adopted at the XVII Summit of Heads of State and Governments, in Santiago de Chile in November 2007, and came into force in 2011. Its aim is to preserve the rights of Ibero-American migrant workers, ensuring that all workers retain their social rights and access to adequate social protection regardless of their legal status. The Agreement is the first international instrument of its kind within the Ibero-American community; it provides for the preservation of mobility rights and applies to cash benefits for disability, old age, survivors and occupational accidents and diseases, but excludes medical care provided under national legislation.

¹⁷⁰ *Gaygusuz v. Austria*, Application No. 17371/90, Judgement of 16 September 1996, paras. 42, 50 and 52.

¹⁷¹ *Niedzwiecki v. Germany*, Application No. 58453/00, Judgement of 25 October 2005, para. 33.

¹⁷² Conclusions on the application by Luxembourg of the European Social Charter, in particular art. 13.4 (2009).

Key messages

- When irregular migrants have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.
- All restrictions on migrants' access to non-contributory schemes, including qualification periods, should be non-discriminatory, reasonable, proportionate and justified in each individual case.
- Access to non-contributory social security schemes should be granted to migrants in an irregular situation, at least when it is necessary to alleviate poverty and preserve human dignity.
- States should take steps to ensure that their social security systems cover all people who work in the informal economy, including irregular migrants.
- Countries of origin and countries of destination should cooperate to make the social rights of migrants, including the rights of those in an irregular situation, more portable.
- All irregular migrant children and children of irregular migrants should be entitled to social protection on the same footing as the children of nationals.

VI. THE RIGHT TO WORK AND THE RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK

Content and specific components

The International Covenant on Economic, Social and Cultural Rights stipulates that “the States Parties ... recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right” (art. 6.1).

The Covenant also recognizes “the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular: ... fair wages and equal remuneration for work of equal value without distinction of any kind ...; a decent living for themselves and their families ...; safe and healthy working conditions; equal opportunity for everyone to be promoted in his employment ...; rest, leisure and reasonable limitation of working hours and periodic holidays with pay ...” (art. 7).

The Committee on Economic, Social and Cultural Rights has made clear that the right to work does not imply “an absolute and unconditional right to obtain employment”. It implies that a person may freely choose or accept work, “not being forced in any way whatsoever to exercise or engage in employment”, that a person may not be “unfairly deprived of employment”, and that he or she has “the right of access to a system of protection” guaranteeing access to employment.^a

The concepts of availability, accessibility, acceptability and quality make it possible to define more clearly States’ obligations with respect to the right to work. *Availability* requires a State to make available specialized services to assist individuals to find employment. *Accessibility* requires a State to ensure that its labour market is open to every person in its jurisdiction, without discrimination. *Acceptability* and *quality* require a State to ensure that everyone has access to just, favourable and safe working conditions.

The Committee has indicated that the **core obligations** under this right oblige State parties to:

- (a) Ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
- (b) Avoid measures that result in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;

- (c) Adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.

° General comment No. 18 (2005) on the right to work, para. 6.

A. Legal and practical barriers that prevent irregular migrants from enjoying the right to work and the right to just and favourable conditions of work

Migrants in an irregular situation are normally not permitted to work. In practice, however, many are employed irregularly, predominantly in the informal economy. Some of them even declare their work and pay taxes.¹⁷³ Most are in a situation of extreme vulnerability. They are at high risk of being exploited, often work in hard and sometimes inhumane conditions, and receive low wages compared to nationals or regular migrants for the same work. In one of many pathways into irregular status, recruitment agents may require migrants to sign fraudulent contracts or give them false information during the hiring process. Legislation may prevent migrants from changing jobs and tie them to one employer. In order to escape abusive conditions once in the country of employment, migrants could be compelled to enter an irregular situation.

Migrant workers across the world, especially those in an irregular situation, experience exploitation in numerous forms. The sectors in which many work, such as construction, agriculture, food processing and fisheries, domestic and care work, can be unregulated and unprotected. Irregular migrants are particularly vulnerable to forced labour and servitude,

¹⁷³ FRA, *Fundamental Rights of Migrants in an Irregular Situation*, pp. 47–48. The report cites Luxembourg's legislation on foreigners, which requires employers to pay undocumented workers their salaries as well as a social contribution. See also FRA, *Migrants in an Irregular Situation Employed in Domestic Work: Fundamental Rights Challenges for the European Union and its Member States* (Luxembourg, 2011), p. 22.

including debt bondage. The International Labour Organization estimates that there are 20.9 million persons worldwide in forced labour, including migrant workers.¹⁷⁴ Employers may pay below the minimum wage or impose excessive deductions, or force migrant workers to work long hours. In all sectors, irregular migrant workers can be subject in the workplace to physical and mental abuse, including sexual and gender-based violence.

Moreover, they may be unable to complain if employers withhold their pay and may have no access to remedies for unfair dismissal.¹⁷⁵ In general, it is difficult for them to assert their rights or seek redress for abuses because they are in an irregular situation and usually afraid of detection and expulsion. In addition, they may be subject to discrimination and barriers in relation to their access to justice and ability to seek remedies.

Irregular migrant workers are also frequently exposed to hazardous working conditions and, in general, various studies have demonstrated that occupational accident rates are higher among migrants than nationals. In 2011, the Sri Lanka Bureau of Foreign Employment received 9,994 complaints from overseas migrant workers, of which 2,992 concerned sickness or harassment; the deaths of 302 Sri Lankan migrant workers were reported in the same period.¹⁷⁶ A study in Austria found that some 30 per cent of migrant workers felt they were at high risk of accidents and injuries in the workplace compared with 13 per cent of Austrian nationals.¹⁷⁷

¹⁷⁴ "Forced labour is the term used by the international community to denote situations in which the persons involved—women and men, girls and boys—are made to work against their free will, coerced by their recruiter or employer, for example through violence or threats of violence, or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities." ILO, "ILO 2012 Global estimate of forced labour: Executive summary".

¹⁷⁵ See A/HRC/17/33/Add.3, para. 70. See also Haina Lu, "The personal application on the right to work in the age of migration", *Netherlands Quarterly of Human Rights*, vol. 26, No. 1 (2008), p. 68.

¹⁷⁶ Sri Lanka Bureau of Foreign Employment, *Annual Statistical Report of Foreign Employment: 2011*.

¹⁷⁷ European Foundation for the Improvement of Living and Working Conditions, "Employment and working conditions of migrant workers", 2007.

Irregular migrants are often unable to prove that they are in an employment relationship, because they have no contract or cannot prove how many hours they have worked.¹⁷⁸ In this context, many struggle to enjoy their right to compensation for withheld wages and are more vulnerable to employers withholding wages.

Furthermore, irregular migrants often fail to secure compensation for work-related accidents or injuries. In Thailand, the Workmen's Compensation Act of 1994 prevents them from receiving compensation because claimants must have a standard work permit or a passport proving legal entry to qualify for benefits under the Workmen's Compensation Fund.¹⁷⁹ In some European countries, irregular migrants seem not to have any right to claim compensation for work accidents.¹⁸⁰ Even when they do, pursuing a claim may be difficult, because they are afraid of being reported or cannot prove the work relationship or produce witnesses.¹⁸¹

Migrant children are especially vulnerable to hazardous working conditions. In relation to Thailand, the Committee on the Rights of the Child has observed that children of migrant workers often live in poor conditions and many work long hours in hazardous conditions.¹⁸² Similar concerns have been expressed by the Committee on Migrant Workers about migrant children working in Ecuador's banana plantations.¹⁸³ The ILO Committee of Experts on the Application of Conventions and Recommendations has noted, in respect of Albania's application of the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), that unaccompanied migrant children

¹⁷⁸ See, for example, FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 50.

¹⁷⁹ Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand* (New York, 2010), p. 73.

¹⁸⁰ Estonia, for example, in FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 51.

¹⁸¹ *Ibid.*, p. 52.

¹⁸² CRC/C/THA/CO/3-4, paras. 72-73.

¹⁸³ CMW/C/ECU/CO/1, para. 30.

were often exposed to serious risks, including maltreatment, physical and sexual abuse, and a range of illicit activities.¹⁸⁴

The Committee on Migrant Workers recognized, in its general comment No. 1 (2011), that domestic workers are particularly exposed to exploitation and conditions amounting to servitude. It underlined that at the heart of the vulnerability of domestic workers:

is isolation and dependence, which can include the following elements: the isolation of life in a foreign land and often in a foreign language, far away from family; lack of basic support systems and unfamiliarity with the culture and national labour and migration laws; and dependence on the job and employer because of migration-related debt, legal status, practices of employers restricting their freedom to leave the workplace, the simple fact that the migrants' workplace may also be their only shelter and the reliance of family members back home on remittances sent back from the domestic work (para. 7).

The Committee added that their vulnerability is aggravated if they are in an irregular situation, not least because they often risk deportation if they contact State authorities to seek protection from an abusive employer.

B. Legal and policy framework: the right to work and the right to just and favourable conditions of work of irregular migrants

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 25) states that all migrant workers shall be treated on an equal footing with nationals regarding remuneration, overtime, hours, weekly rest, holidays with pay, safety, health, termination of employment, and "any other conditions of work which, according to national law and practice, are covered by [these terms]". Migrant workers shall enjoy equal treatment in their "terms of

¹⁸⁴ Observation on Albania, adopted in 2008. See also in connection with Convention No. 182, the Committee's direct request to Kuwait adopted in 2012.

employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment". It shall be unlawful to derogate from the principle of equality even in private contracts.

The protection of all workers against exploitation and abuse is a core component of labour-related human rights, particularly in situations of vulnerability and a large power imbalance between workers and employers. International human rights law and international labour law converge on this matter.¹⁸⁵ The Committee on Economic, Social and Cultural Rights emphasized, in its general comment No. 18 (2005), that the right to work "is essential for realizing other human rights and forms an inseparable and inherent part of human dignity"; it contributes to the individual's survival and that of his or her family, and to an individual's development and recognition in the community (para. 1). Therefore, the Committee confirmed that the term "work" should be understood as "decent work", which implies respect "for the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration". The ILO Governing Body has identified eight ILO Conventions as fundamental to the rights of people at work and hence applicable to all workers.¹⁸⁶

¹⁸⁵ E/2010/89, para. 51.

¹⁸⁶ These are ILO Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182 covering freedom of association and collective bargaining, child labour, forced and compulsory labour, discrimination in respect of employment and occupation. In addition, the 1998 ILO Declaration on Fundamental Principles and Rights at Work includes the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation, and freedom of association and the effective recognition of the right to collective bargaining. Moreover, ILO Conventions Nos. 97 and 143 apply specifically to migrant workers. It should be noted that both include limitations regarding irregular migrant workers: Convention No. 97 provides for equal treatment in respect of such issues as remuneration and social security only to migrants lawfully within the territory (art. 6) and Convention No. 143 grants only that an irregular migrant should "enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits" (art. 9).

The principles of non-discrimination and equality of treatment have thus been recognized by both the international human rights and labour rights frameworks as fundamental principles in relation to the rights of irregular migrants.

In Taiwan Province of China, employers are prohibited from retaining the identity documents of migrant workers, such as their passports or residence permits. They may not withhold their pay or property, commit bodily harm, or violate any of their other rights. Employers who engage in such conduct may be prohibited from employing migrant workers.

Source: ILO, ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration (Geneva, 2006), annex II, para. 80.

The Committee on Economic, Social and Cultural Rights also affirmed, in its general comment No. 18 (2005), that:

The principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families (para. 18).

In the United States, national labour and employment legislation (on wages and hours, child labour, safety and health, union activity and employment discrimination, for example) covers all migrant workers, including those in irregular status. It is unlawful for an employer to retaliate against migrant workers by reporting them to the immigration authorities if they have sought remedies for violations of labour laws. The Government has successfully prosecuted employers on such grounds. Migrant workers in an irregular situation are entitled to remedies on the same terms as nationals with respect to work that they have already performed.

Source: ILO Multilateral Framework on Labour Migration, annex II, para. 69.

The Committee on the Elimination of Racial Discrimination held, in its general recommendation No. 30 (2004), that State parties should take measures “to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects” and “to prevent and redress the serious problems commonly faced by non-citizen workers” (paras. 33–34). Furthermore, the Committee recognized that, “while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated” (para. 35). The Committee on Migrant Workers similarly stated, in its general comment No. 2 (2013), that “while States parties may refuse migrant workers who do not have work permits access to their labour markets, once an employment relationship has been initiated and until it is terminated, all migrant workers, including those in an irregular situation, are entitled to equal conditions of work and terms of employment” (para. 62).

In a similar context, the Inter-American Court of Human Rights has affirmed that “on assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment.”¹⁸⁷

The EU Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work defines “worker” as “any person employed by an employer ...” (art. 3), implying no restrictions to national workers or migrant workers in a regular situation.

In the specific context of migrant workers, the Committee on Economic, Social and Cultural Rights has emphasized that State parties need to devise national plans and adopt other appropriate measures to respect

¹⁸⁷ Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants, para. 134.

and promote equality of treatment. This is particularly important in the case of irregular migrants. The Committee has also said that States must take appropriate legislative and other measures to reduce the number of workers outside the formal economy who do not enjoy adequate protection under the law. In a similar vein, the ILO Multilateral Framework on Labour Migration states that Governments should adopt measures to prevent abusive practices, migrant smuggling and trafficking in persons, and irregular labour migration. It also calls on Governments to: intensify measures for detecting and identifying abusive practices against migrant workers; grant migrant workers (regardless of status) access to remedies, including for breach of employment contracts and failure to pay wages; impose sanctions on abusive employers; and discourage misleading propaganda relating to labour migration.¹⁸⁸

The Committee on Economic, Social and Cultural Rights, in its general comment No. 18 (2005), recognized the vulnerability and exploitation that often accompanies employment in the informal economy, calling on State parties to “take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection. These measures would compel employers to respect labour legislation and declare their employees, thus enabling the latter to enjoy all the rights of workers”. In important guidance on ensuring that protection concerns dictate policy in this regard, the Committee directed States to ensure that these measures “reflect the fact that people living in an informal economy do so for the most part because of the need to survive, rather than as a matter of choice” (para. 10).

In the specific context of migrant children who work, the Committee on the Rights of the Child has recommended that States ensure their migration policies and measures take into account the Convention on the Rights of

¹⁸⁸ See its guidelines 11.2–4 and 11.11. Principle 8 affirms that “the human rights of all migrant workers, regardless of their status, should be promoted and protected” and that the applicable human rights are contained in the eight fundamental ILO Conventions and relevant United Nations human rights conventions. See also R. Cholewinski, “The human and labor rights of migrants: visions of equality”, *Georgetown Immigration Law Journal*, vol. 22, No. 2 (Winter 2008), p. 206.

the Child and ILO Conventions No. 138 concerning Minimum Age for Admission to Employment, No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, and No. 189 concerning decent work for domestic workers. It also recommended that States should consider establishing monitoring and reporting systems for identifying and remedying child rights violations taking place in work contexts, particularly in informal and/or seasonal situations.¹⁸⁹

Decent work

The Committee on Economic, Social and Cultural Rights, in its general comment No. 18 (2005), defined decent work as “work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment” (para. 7).

According to ILO, decent work requires these four elements:

1. **Creating jobs**—an economy that generates opportunities for investment, entrepreneurship, skills development, job creation and sustainable livelihoods.
2. **Guaranteeing rights at work**—to obtain recognition and respect for the rights of workers. All workers, and in particular disadvantaged or poor workers, need representation, participation and laws that work for their interests.
3. **Extending social protection**—to promote both inclusion and productivity by ensuring that women and men enjoy working conditions that are safe, allow adequate free time and rest, take into account family and social values, provide for adequate compensation in case of lost or reduced income and permit access to adequate health care.
4. **Promoting social dialogue**—involving strong and independent workers’ and employers’ organizations is central to increasing productivity, avoiding disputes at work and building cohesive societies.^o

^o See www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm (accessed 28 April 2014).

¹⁸⁹ “Report of the 2012 Day of general discussion”, para. 90.

Pressing concerns in relation to the employment of irregular migrant workers are their fundamental lack of decent work, including fraudulent or non-existent contracts, non-payment of wages and unfair dismissals. In this context, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides for all migrant workers, irrespective of their status, to enjoy equal treatment as nationals in respect of remuneration, other conditions of work and terms of employment (art. 25.1). The International Covenant on Economic, Social and Cultural Rights entitles everyone to fair wages and equal remuneration for work of equal value without distinction of any kind (art. 7). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of the migrant workers' irregularity in stay or employment (art. 25.3).

The Committee on Migrant Workers has requested State parties to require employers to explicitly state, in contracts that are free, fair and fully consented to, the terms of employment for migrant workers, including those in an irregular situation, in a language they understand, outlining their specific duties, hours of work, remuneration, days of rest and other conditions of work. In its general comment No. 2 (2013), it further directed that State parties should take effective measures against non-payment of wages, delay in payment until departure, transfer of wages into accounts that are inaccessible to migrant workers, or payment of lower wages to migrant workers, especially those in an irregular situation, than to nationals (para. 63). The Committee on the Elimination of Discrimination against Women has requested States to ensure that contracts for all women migrant workers are legally valid. In particular, they should ensure that occupations dominated by women migrant workers, such as domestic work and some forms of entertainment, are protected by labour laws. ILO Convention No. 158 concerning Termination of Employment at the Initiative of the Employer of 1982 requires employers to provide adequate grounds for dismissal and enunciates the right to legal protection and redress for unjustified dismissal.

Forced labour

The International Covenant on Civil and Political Rights states unequivocally that no one shall be held in slavery or servitude (art. 8). This is echoed in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provides that “no migrant worker or member of his or her family shall be held in slavery or servitude” and that “no migrant worker or member of his or her family shall be required to perform forced or compulsory labour” (art. 11).

The Committee on Economic, Social and Cultural Rights has highlighted the vulnerability of migrant workers to forced labour, affirming in its general comment No. 18 (2005) that: “States parties are under the obligation to respect the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers” (para. 23).

The prohibition of servitude and forced labour is recognized at the regional level in the European Convention on Human Rights, which states that “no one shall be held in slavery or servitude” and “no one shall be required to perform forced or compulsory labour” (art. 4). In determining that an irregular migrant domestic worker had been subjected to servitude and forced labour, the European Court of Human Rights took into account, among other factors, that the victim had been in a situation of particular vulnerability, being an adolescent girl in a foreign land, unlawfully present on the State’s territory and in fear of arrest by the police. In addition, she did not work willingly, enjoyed no free time and had no freedom of movement.¹⁹⁰ The Court held the respondent State responsible for breaching the prohibition of servitude and forced labour. It stated that Governments have a positive obligation to adopt and apply criminal law provisions that penalize the practices referred to in article 4.

¹⁹⁰ *Siliadin v. France*, Application No. 73316/01, Judgement of 26 July 2005, paras. 121–129.

Right to freedom of association

The International Covenant on Economic, Social and Cultural Rights affirms that everyone has the right to form trade unions and join a trade union of his or her choice, and the right of trade unions to function freely (art. 8). It also recognizes the right to strike, “provided that it is exercised in conformity with the laws of the particular country” (art. 8.1 (d)).

Under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the right of irregular or undocumented migrants to join any trade union freely, to take part in union meetings and activities, and to seek their aid and assistance is recognized (art. 26). In its guidance, the Committee on Migrant Workers has encouraged States to expand the scope of this right and, in its general comment No. 1 (2011), stated that “the laws of States parties, particularly countries of employment of migrant domestic workers, should recognize the right of the latter to form and join organizations, regardless of migration status (article 26) and self-organization should be encouraged” (para. 46).¹⁹¹

One of Germany’s largest trades unions for service occupations, Ver.di, has established weekly consultations for irregular migrants who need legal advice or assistance. Through its legal aid programme, it has helped irregular migrants to take labour violations before the Labour Court, for example to claim withheld wages.

Source: FRA, *Fundamental Rights of Migrants in an Irregular Situation*, p. 56.

¹⁹¹ Note also that the ILO Committee on Freedom of Association has declared that ILO Convention No. 87 grants migrant workers the right to form and join a trade union, irrespective of their status (Case No. 2121 (Spain), complaint by the General Union of Workers of Spain, Report No. 327, vol. LXXXV, 2002, Series B, No. 1, para. 561). Article 2 of Convention No. 87 reads: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.”

The International Covenant on Civil and Political Rights (art. 22.1) as well as ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize of 1948 (art. 2) protect the right of everyone to form trade unions and, consequently, apply to migrant workers in an irregular situation. In this regard, and recognizing the particular difficulties often faced by domestic workers in enjoying effective access to freedom of association, ILO Convention No. 189 protects the right of all domestic workers and employers of domestic workers to establish and join “organizations, federations and confederations of their own choosing” (art. 3.3). The Committee on the Elimination of Discrimination against Women, in its general recommendation No. 26 (2008), guided State parties to ensure that constitutional and civil law and labour codes provide to women migrant workers the same rights and protection that are extended to all workers in the country, including the right to organize and freely associate (para. 26 (b)).

Key messages

- States should ensure that irregular migrants have non-discriminatory access to employment so that they may live in dignity.
- Irregular migrant workers shall be treated on an equal footing with nationals in their conditions of work, remuneration and terms of employment.
- With regard to employment, States must ensure equality of treatment in conditions of work between nationals and migrants, including those who are in an irregular situation, without any derogation even in private contracts.
- Migrant workers in an irregular situation should have access to remedies, including in cases of violence and physical, mental or sexual abuse by employers, failure to pay wages and unlawful dismissal.
- States should establish a system of labour inspection and monitoring in the workplace, and separate their powers and remit from those of bodies responsible for immigration enforcement.
- Migrant workers, including those in an irregular situation, have the right to freedom of association, including the right to form and join organizations, and they should be encouraged to organize themselves.

Conclusion

With very few narrowly defined exceptions, all migrants, including those in an irregular situation, have the same human rights, including economic, social and cultural rights, as anyone else; all restrictions based on their legal status must pursue a legitimate aim and be proportionate to the achievement of this aim. The tests of equality and non-discrimination apply to the treatment of migrants, including irregular migrants, as they do to others. This is the clear message of the international human rights framework.

Nevertheless, migrants, and especially irregular migrants, are in practice often prevented from effectively enjoying their rights by many legal and practical barriers. One prominent barrier is the duty of public service providers to report the presence of irregular migrants. Others are administrative obstacles (such as requirements for identity documents, social security numbers and proof of address that irregular migrants cannot obtain), complex administrative, judicial and other systems, lack of information and training (both for service providers and irregular migrants), financial barriers, linguistic hurdles, and fears that accessing services will result in detention or deportation or more generalized fear of making contact with the authorities.

This publication has highlighted that international human rights standards require State parties to strive to ensure that all those within their jurisdiction, including irregular migrants, have access to their fundamental economic, social and cultural rights.

In this light, the Committee on the Rights of the Child has made a number of recommendations calling for States to ensure that all children in the context of migration have access on an equal basis as national children to economic, social and cultural rights and to basic services regardless of their or their parents' migration status, making these rights explicit in legislation. They are called upon to: expeditiously reform legislation, policies and practices that discriminate against children affected by migration and their families, in particular those in an irregular situation,

or prevent them from effectively accessing services and benefits such as health care, education, long-term social security and social assistance. The Committee also recommended that attention should be paid to addressing the gender-specific impact of reduced access to services, such as sexual and reproductive health rights and security from violence.¹⁹²

Human rights-based governance of migration

The Global Migration Group calls upon States to review the situation of migrants in an irregular situation within their territories and to work towards ensuring that their laws and regulations conform with and promote the realization of the applicable international human rights standards and guarantees at all stages of the migration process.

Source: Statement of the Global Migration Group on the human rights of migrants in an irregular situation.

The independent Global Commission on International Migration concluded in 2005 that irregular migration will not be stemmed by restrictive policies alone. It called on States to address the conditions that prompt people to migrate in an irregular manner, to prosecute those who organize irregular migration through migrant smuggling and human trafficking, to penalize the employers of irregular migrants and to provide migrants with regular migration opportunities.¹⁹³

In this respect, the adoption of human rights-based migration policies is a key prerequisite. The Inter-American Court of Human Rights has observed that States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, including those of a migratory character.¹⁹⁴ Human rights *standards* as reflected in the core international human rights instruments, as

¹⁹² "Report of the 2012 Day of general discussion", paras. 86–88.

¹⁹³ Global Commission on International Migration, "Migration in an interconnected world", pp. 32–40.

¹⁹⁴ Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants.

well as *principles* such as participation, empowerment and accountability, should thus guide all stages of policymaking on migration.¹⁹⁵

The international human rights framework provides guidance to States on a range of measures related to migration governance. Indeed, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in its Part VI, explicitly provides a framework for human rights-based policymaking on migration. For instance, State parties are enjoined to maintain appropriate services to deal with questions about international migration of workers and members of their families and formulate and implement policies on migration, exchange information with other State parties, provide information to employers and workers on policies, laws and regulations, and provide information and appropriate assistance to migrant workers and members of their families (art. 65).¹⁹⁶

To pre-empt the risk of exploitation and forced labour, in its general comment No. 1 (2011), the Committee on Migrant Workers directed that States should take measures to ensure that the immigration status of migrants does not depend on the sponsorship or guardianship of a specific employer (para. 53). The Special Rapporteur on the human rights of migrants has similarly affirmed that the residence permits of migrant workers should not be tied to a single employer and urged States to eliminate systems of forced sponsorship that have the effect of imposing control over the migrant throughout the period of residence.¹⁹⁷ Recognizing one important pathway into irregular status, international human rights law prevents the arbitrary confiscation of documentation from migrants

¹⁹⁵ See “Promotion and protection of human rights, including ways and means to promote the human rights of migrants: Report of the Secretary-General” (A/68/292), paras. 9–13.

¹⁹⁶ The ILO Multilateral Framework on Labour Migration provides similar guidance. Its guideline 8.2 states that migrants should be provided with information on their rights and obligations and assisted to defend their rights, guideline 8.3 states that Governments should provide effective enforcement mechanisms for the protection of migrant workers’ human rights and provide training on human rights to all government officials involved in migration.

¹⁹⁷ A/HRC/14/30/Add.2, para. 106 (f).

and emphasizes that States should prohibit employers and recruitment agents from retaining the identity documents of migrants by law.

Irregular migrants will remain vulnerable to abuse of their rights unless they enjoy protection under the law and are able to demand accountability. The principle of accountability requires States to put in place robust regulatory and independent mechanisms to enforce rights and continuously monitor the situation of migrants. Monitoring will encourage transparency and deter exploitation, collusion and mistreatment, including by employers and State authorities. States should also provide for appropriate relief, by way of compensation, restitution or non-repetition. Such relief should also include temporary measures as appropriate, such as the provision of shelters for migrant domestic workers who have suffered abuse.

Any person who is a victim of a human rights violation should have access to effective judicial or other appropriate remedies at the national level. Ombudspersons, national human rights institutions and other professional associations, including trade unions, all have an important role in defending the human rights of migrants, regardless of their status. All victims of such violations are entitled to adequate reparation. Recognizing the importance of judicial remedies in this respect, the Committee on the Elimination of Racial Discrimination has recommended, for instance, that Italy should “amend its legislation to allow undocumented migrants to claim rights arising out of previous employment and to file complaints irrespective of immigration status”.¹⁹⁸ States should provide legal redress through quasi-judicial or judicial mechanisms to enable migrants to enforce their rights against State and non-State actors, without fear of detention and deportation.¹⁹⁹

¹⁹⁸ CERD/C/ITA/CO/16–18, para. 23.

¹⁹⁹ The Inter-American Court of Human Rights has made clear that, to provide genuine access to judicial guarantees, States have a duty to ensure that no person is at risk of being reported and expelled or detained when exercising this right. In order to give practical effect to this right, the Court has recommended that all persons should have access to a free public legal aid service. Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants, para. 126. See also A/HRC/14/30/Add.2, para. 106 (g).

A number of measures have been adopted in Mexico to guarantee access to justice for irregular migrants, including the creation of a public prosecution service for all migrants in the State of Chiapas, as well as protocols adopted by the National Institute of Migration in 2010 for the identification of and assistance to any migrant who is a victim of crime.

Source: A/68/292, para. 88.

ILO Convention No. 81 concerning Labour Inspection in Industry and Commerce of 1947 requires States to establish a system of labour inspection in industrial workplaces. This can be an effective means of tackling abuses against migrants in an irregular situation. The Committee of Experts on the Application of Conventions and Recommendations recognized the role of labour inspectors in 2009, when it studied the degree to which labour inspections in Italy protected workers against conditions of work that breached national laws, and fines deterred employers from breaking labour laws when they employed irregular migrants. To be effective, the Committee of Experts found labour inspectors needed to win the trust of employees, including those in an irregular situation. The Committee of Experts therefore recommended that Governments should clearly separate the powers and the remit of labour inspectors from those of other bodies responsible for combating illegal employment and migration.

EU Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals facilitates complaints by irregular migrants against their employers, including for the purpose of recovering unpaid wages. Its article 13 requires member States to “ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State” To facilitate proof of an employment relationship, which is difficult for irregular migrants, member States are invited to “provide for a presumption of an employment relationship of at least three months’ duration so that the burden of proof is on the employer in respect of at least a certain period” (seventeenth preambular paragraph).

In addition, States are expected to address the root causes of irregular migration and to develop adequate paths of regular migration at all skills levels, including sufficient channels for family reunification, by adopting and implementing appropriate national, bilateral and multilateral measures. In this context, the ILO Multilateral Framework on Labour Migration requests States to consider expanding avenues for regular labour migration, taking into account labour market needs and demographic trends. The accompanying guidelines refer to the value in this regard of establishing systems and structures for periodic, objective labour market analyses and also establishing transparent policies for the admission, employment and residence of migrant workers based on clear criteria, including labour market needs.²⁰⁰

In Italy, loss of employment or resignation from employment by non-EU migrant workers who have a regular status does not automatically result in the withdrawal of their residence permits. They are entitled to registration on placement lists until their residence permits expire, or for a minimum of six months.

Source: Immigration Act (No. 286) of 25 July 1998, as modified by Act No. 189 of 30 July 2002.

Regularization

States are, furthermore, advised to take steps that will enable irregular migrants to enjoy a more secure and decent life. This implies taking measures to regularize the situation of irregular migrants and provide them with access to the formal economy. While recalling there is no right to regularization under international law, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in its article 69.2, requests States to consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, and in doing so to take appropriate account of the circumstances of their entry, the duration of their stay in the States of employment and other relevant

²⁰⁰ Principle 5 and guidelines 5.1 and 5.2.

considerations, in particular those relating to their family situation. The Committee on Migrant Workers recalled, in its general comment No. 2 (2013), that “regularization is the most effective measure to address the extreme vulnerability of migrant workers and members of their families in an irregular situation. States parties should therefore consider policies, including regularization programmes, for avoiding or resolving situations whereby migrant workers and members of their families are in, or are at risk of falling into, an irregular situation” (para. 16).

A 2009 study on regularizing third-country nationals staying irregularly in EU member States highlighted that the outcomes of regularization programmes included: social integration and cohesion, increased family protection, reduced marginalization, prevention of trafficking and exploitation, accurate data on immigrant populations, and regulation of informal sectors of the economy with improved protection of both foreign and local workers.

Source: International Centre for Migration Policy Development, “REGINE: Regularisations in Europe – Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU” (Vienna, 2009).

The Committee on Economic, Social and Cultural Rights has observed that migrants working in the informal economy are deprived of legal and social protection and underlined that States should take effective measures to regularize the situation of irregular migrants and reduce the number of workers outside the formal economy. In particular, States should: make registration and quota systems more flexible; give migrant workers access to effective appeals against orders of deportation; strictly control private entities to ensure they provide just and equally favourable social and employment conditions for migrant workers; and make social benefit systems more accessible to migrant workers.²⁰¹

²⁰¹ E/C.12/RUS/CO/5, para. 17.

Between 2007 and 2010, Argentina implemented the “Patria Grande” regularization programme, which granted either temporary or permanent residence to 560,131 people. This has resulted in a decrease in unemployment and poverty. Reports indicate that between 2006 and 2013, unemployment and underemployment in Argentina fell from 20 to 7.8 per cent, while poverty rates fell from 54 to 13.2 per cent and extreme poverty from 27.7 to 3.5 per cent.

Source: Foreign Ministry of Argentina, “Informe elaborado en cumplimiento de la A/RES/67/172: La perspectiva de derechos humanos en el tratamiento de la cuestión migratoria en la República Argentina”, July 2013 (copy on file).

* * *

On 2 July 2009, the Brazilian National Congress approved legislation (Law No. 11.961) to provide residence permits to migrants in irregular status.

Denying fundamental economic, social and cultural rights to migrants is sometimes justified on the grounds that such a denial deters or sanctions irregular migrants. For example, many host countries restrict migrants’ access to health care on the grounds that they need to protect their welfare systems from abusive claims and deter migration. Human rights treaty bodies and experts have questioned this claim, on both ethical and factual grounds.²⁰² Recent research in the European Union suggests that the causal effect between social welfare spending and migration is statistically insignificant; in other words, there is no evidence of a “welfare magnet”.²⁰³ Similarly, there is a growing body of evidence that administrative detention does not deter irregular migration.²⁰⁴

²⁰² See, for example, A/HRC/14/30, para. 22.

²⁰³ Corrado Giulietti and others, “Unemployment benefits and immigration: evidence from the EU”, *International Journal of Manpower*, special issue on “Migration, the Welfare State, and European Labor Markets”, vol. 34, No. 1–2 (2013).

²⁰⁴ The Special Rapporteur on the human rights of migrants has noted that, despite the worldwide introduction of increasingly tough detention policies over the past 20 years, the number of irregular arrivals has not decreased (A/HRC/20/24, para. 8). There has been considerable momentum in recent years calling on States to explore effective alternatives to immigration detention, based inter alia on the principle of proportionality in international law, which requires detention to be approached as a measure of last resort. See, for instance, the 2010 report of the Working Group on Arbitrary Detention to the Human Rights Council (A/HRC/13/13).

Irregular migrants are not criminals ... and should not be treated as such.

Source: A/HRC/20/24, para. 13.

While policies of criminalization and exclusion are unlikely to be an effective deterrent to irregular migration, they *are* able to produce widespread and harmful consequences, not only for the human rights and well-being of individual migrants, but also for relations between host communities and migrants in society.²⁰⁵ From this longer-term perspective, it is in the interest of States, within their own countries and in their relations with other States, to ensure that migration benefits, and at the very least does no harm to, those who are involved and affected by it.

All the evidence available thus suggests that control measures alone will not be sufficient to eliminate irregular migration and regulating it will require a more comprehensive and human rights-based approach. Respecting, protecting and fulfilling the rights of irregular migrants, and particularly their rights to health, to an adequate standard of living, to education, to social security and to decent work, are an integral part of such an approach.²⁰⁶

To improve the human rights situation of irregular migrants and to ensure that the dignity of all migrants is respected, States should adopt measures, in law and in practice, that respect, protect and fulfil human rights and remove barriers and obstacles that prevent migrants from enjoying all the rights to which they are entitled under the international human rights framework.

²⁰⁵ For example, Argentina's Patria Grande programme (see above) took place in the context of its efforts to address the country's severe economic crisis and in recognition of the economic benefits that could be achieved through the regularization of irregular migrants.

²⁰⁶ Global Migration Group, *International Migration and Human Rights*, pp. 43–44.

Key messages

- Adopt legal and practical measures to prevent discrimination against irregular migrants. Remove rules that make access to basic services conditional on the production of documents that irregular migrants cannot obtain.
- Remove any obligations on service providers to report individuals to the authorities on the grounds that they are irregular migrants and explicitly inform service providers that they are not required to report the presence of persons in an irregular situation.
- Improve the collection of data in order to effectively monitor the human rights situation of irregular migrants, ensuring that such data are disaggregated by sex, age, nationality and sector of work. Ensure that international rules on data protection and the right to privacy are scrupulously respected in the collection, storage and use of such data, and that effective firewalls are put in place to protect migrants from immigration enforcement on the basis on such data.
- Do not return or expel any migrant to a situation where he or she risks denial of access to economic, social and cultural rights or destitution which reaches the level of inhuman or degrading treatment, which would be in contravention of the principle of non-refoulement.
- Ensure that irregular migrants have full, non-discriminatory access to appropriate administrative and judicial remedies. Provide irregular migrants with information on their rights.
- Develop specific national strategies or plans of action to realize the rights to health, housing, education, social security and decent work of all migrants, ensuring that they pay due attention to the situation of irregular migrants.
- Ensure that all migration policies and policies relevant to the situation of migrants are human rights-based; inter alia, refrain from criminalizing irregular migration, delink the immigration status of migrants from a specific employer and consider measures to regularize the situation of irregular migrants.

Further reading

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ISBN 978-92-1-154205-9



9 789211 542059

Designed and printed at United Nations, Geneva
1453721(E) – August 2014 – 2,819 – HR/PUB/14/1

United Nations publication
Sales No. E.14.XIV.4