



SOCIAL AND ECONOMIC POLICY
WORKING PAPER

THE RIGHTS OF CHILDREN, YOUTH AND WOMEN IN THE CONTEXT OF MIGRATION

Conceptual Basis and Principles for Effective Policies with a
Human Rights and Gender Based Approach

Victor Abramovich
Pablo Ceriani Cernadas
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April 2011
UNICEF POLICY AND PRACTICE

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The Rights of Children, Youth and Women in the Context of Migration

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Policy, Advocacy and Knowledge Management, Division of Policy and Practice UNICEF
3 UN Plaza, NY, NY 10017
April 2011

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This paper is an updated version of a previous draft working paper entitled,
"Migration, Children and Human Rights: Challenges and Opportunities"

Prepared for the Global Migration Group (GMG) Meeting 2011

“Migration should be positioned within the context of a human rights framework that provides protection for all children, adolescents and women affected by migratory processes. States that are parties to international human rights treaties are obligated to offer protection to the rights of non-nationals as well as direct protection to children as long as they remain in their territory.

“Whether on their own or with family, children are increasingly becoming migrants in search of survival, security, improved standards of living, education or protection from abuse. Also affected are children left behind by one or both parents and children living in areas with high migration rates. Policies should take cognizance of how migration affects these children and protect their rights by enhancing access to benefits of migration while simultaneously protecting against vulnerabilities.”

(GMG, 2008, pp. 52–3)

ACKNOWLEDGEMENTS

Many thanks are due to the members of the research team at the National University of Lanús: Edurne Cardenas, Paola Cymment, Mélissa Goupil-Landry and Carina Sobieray. The authors are also grateful for the support of the United Nations Children's Fund, particularly Isabel Ortiz, Elizabeth Gibbons, Rina Gill, Grace Maie Ayoub Van Khol, Rhea Saab, Seung Bok Lee, Nicholas Rees and Julie Bourbeau.

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Executive Summary

This paper aims to address the issue of children's and women's migration from a human rights perspective by highlighting: (i) the particular situation of children and adolescents within the migration-development nexus, (ii) the gender perspective at all stages of analysis and programming and (iii) the significant gaps within legislation and policies, that inhibit the formulation of effective and rights-based responses relating to children, adolescents and migration.

This paper outlines a comprehensive rights-based approach to migration from a child, gender and non-discrimination perspective. A comprehensive HRBA must address the two main policy gaps (a double deficit) that exist within current legislations and policies: The absence of a child rights-based perspective in migration policies and legislation in countries of origin, transit and destination; and the absence of a migrant perspective (namely, accounting for the specific needs and conditions of migrant children and adolescents) in childhood policies meant for the protection and promotion of children's rights. This approach, the authors determine, more effectively addresses the root causes of migration, employs a comprehensive notion of development, addresses the rights of children and adolescents left behind, ensures a gender and diversity-sensitive child-rights perspective in migration policies in countries of transit and destination, and highlights the main policy gaps regarding children and adolescents in the context of migration.

The paper concludes with a set of recommendations aimed at developing or strengthening public policies in order to ensure a HRBA to children, adolescents and women's needs and rights in the context of migration and development. These include a revision of current migration policies for child and gender perspectives, as well as other key recommendations for countries of origin, transit and destination.

Résumé Analytique

Ce document vise à répondre à la question de la migration des enfants et des femmes d'un point de vue des droits humains en mettant en évidence: (i) la situation particulière des enfants et des adolescents dans le lien entre migration et développement, (ii) une perspective de genre intégrée à tous les stades de l'analyse et la programmation et (iii) les lacunes importantes dans la législation et les politiques, qui empêchent la formulation de réponses efficaces et fondées sur les droits relatifs aux enfants, aux adolescents.

Le présent document décrit une approche globale fondée sur les droits à la migration dans les grandes lignes et incluant la perspective des enfants, du genre, et de la non-discrimination. Une approche compréhensive des droits humains doit répondre aux deux principales lacunes de la politique (un double déficit) qui existent dans les législations et les politiques actuelles: L'absence d'une perspective fondée sur les droits des enfants dans les politiques migratoires et dans la législation des pays d'origine, de transit et de destination ; et l'absence d'un point de vue des migrants (à savoir, tenir compte des besoins et conditions spécifiques des enfants et adolescents migrants) dans les politiques destinées à la protection et la promotion des droits des enfants. Cette approche, déterminée par les auteurs, vise à répondre de manière plus efficace aux causes profondes de la migration, emploie une notion globale de développement, qui traite des droits des enfants et des adolescents laissés dans les pays d'origines par les parents, assure une perspective de genre et la diversité dans les politiques migratoires en faveur des enfants dans les pays de transit et de destination, et souligne les principales lacunes des politiques concernant les enfants et les adolescents dans le contexte de la migration.

Le document se termine par une série de recommandations visant à développer ou renforcer les politiques publiques afin d'assurer une approche droits humains pour les enfants, les adolescents et les besoins des femmes dans le contexte de la migration et du développement. Il s'agit notamment d'une révision des politiques migratoires actuelles en tenant compte des enfants et de la question de genre, ainsi que d'autres recommandations clés pour les pays d'origine, de transit et de destination.

Resumen Ejecutivo

Este estudio pretende abordar los temas relacionados con niños y mujeres migrantes desde la perspectiva de Derechos Humanos, resaltando: (i) la situación particular de los niños y adolescentes dentro del marco migratorio y de desarrollo; (ii) la perspectiva de género en todas las etapas de análisis y programación y (iii) las brechas significativas existentes dentro de la legislación y políticas, las cuales obstaculizan la formulación de respuestas efectivas y con enfoque de Derecho con respecto a los niños, los adolescentes y la migración.

El estudio esboza los principales componentes de un enfoque comprensivo de Derecho, desde la perspectiva de la niñez, género y no-discriminación. Un enfoque comprensivo de DDHH debe responder a dos brechas de política clave; el doble déficit que existe entre la legislación y políticas actuales en los países de origen, de tránsito y destino; y la ausencia de una perspectiva migratoria (es decir, que pueda tomar en cuenta las necesidades y condiciones específicas de los niños y los adolescentes migrantes) en las políticas de protección y promoción de los derechos de la niñez. Para los autores, dicho enfoque permite abordar de manera más efectiva las causas de la migración; emplear una noción más completa de desarrollo; abordar los derechos no considerados de los niños y adolescentes; asegurar la integración de una perspectiva de género y sensible a la diversidad y la niñez, en las políticas de migración en países de tránsito y destino, y a su vez, resaltar las brechas de política más importantes con respecto a los niños y adolescentes en el contexto migratorio.

Este estudio concluye con un conjunto de recomendaciones enfocadas al desarrollo y el fortalecimiento de políticas públicas a fin de asegurar una perspectiva de Derecho para abordar las necesidades y derechos de los niños, adolescentes y mujeres, en el contexto de los procesos de migración y desarrollo. Esto incluye una revisión de las políticas migratorias actuales con respecto al enfoque de género y niñez, así como otras recomendaciones clave para países de origen, tránsito y destino.

1. Introduction

1.1 General Overview of Migration

International migration flows have increased substantially over the past decades. Today, the number of international migrants is estimated to be 214 million people.¹ This figure has remained relatively stable as a share of the global population, increasing only by 0.1 per cent, from 3.0 per cent to 3.1 per cent, between 2005 and 2010 (UNDESA, 2009). If the migrant population continues to increase at the same pace as the last 20 years, by 2050 the stock of international migrants worldwide could be as high as 405 million people (IOM, 2010).

The main causes of migration, both South-South and South-North, are intrinsically linked to human rights deprivations in origin countries, such as poverty, inequalities, gender-based discrimination and lack of opportunities. While the decisions to migrate (or not) and select the destination may vary according to several factors (e.g., geographical location, personal prerogative, family ties, costs and migration laws), the vast majority of migrants have all suffered some kind of constraints on their rights in their country of origin. Additionally, migrants may be escaping various kinds of abuse and violence, as well as armed conflict, aiming to reduce risk exposure by moving to a safer region or country.² Indeed, while States are primarily responsible for the human rights of individuals within their jurisdiction, effective realization of these rights increasingly depends on policies and decisions adopted at several interconnected levels, including the regional and international levels.

Migration is also a strategy to increase opportunities (e.g., increased income, access to employment, improved standard of living, and remittances that provide greater access to private/public social insurance schemes). However, the fulfillment of such opportunities is often constrained by a number of factors in countries of transit and destination: “[I]mproved financial status may prompt a family or some members of it (particularly adolescents) to use their resources to try and migrate in search of new opportunities” (ILO and UNICEF, 2009a, p. 9). Accordingly, it is important, “to make sure that programmes aimed at increasing family income are accompanied by initiatives designed to ensure that improved financial status does not become an incentive for unsafe migration” (ibid., pp. 9–10).

In this context, the Special Rapporteur on the Human Rights of Migrants has highlighted that “the potential benefits of migration may be eroded for both undocumented children and children with an irregular status, who are exposed to the denial of rights” (2009, p. 22). Indeed, even when a migration project becomes very positive (i.e., when it facilitates access to regular residence, decent employment and other basic rights, as well as the ability to send remittances to relatives who have remained in the country of origin), migrants should have had equal opportunities and access to all their rights in their country of origin. In other words, despite the positive outcomes, the root cause of migration is usually necessity and often a matter of last resort.

1 The term ‘migrant’ is understood to mean “any person who lives temporarily or permanently in a country where he or she was not born, and has acquired some significant social ties to this country” (UNESCO, n.d.). Thus, it includes those who enter a country irregularly, through trafficking or fleeing from human rights violations, as well as immigrants who are regularly and permanently present in a country.

2 For these reasons, it has been repeatedly emphasized that deprivation of human rights in countries of origin is a foremost migration push factor (see, among others, GMG, 2008; OSIWA, 2008; Save the Children, 2008; ECA, 2006; ECLAC, 2007; CESCR, 2008a and b; UNICEF TACRO, 2006).

1.2 Migration and Children

Children and adolescents are increasingly migrating in search of survival, security, improved standards of living, education or protection from abuse. Millions of young people are on the move, both within and between countries, whether accompanied by their families or as unaccompanied minors. Children are also increasingly affected by migration, as they are often left behind by migrating parents or born to migrant parents in destination countries.

Although comprehensive and comparable data are lacking, it is clear that youth and child migration are important phenomena.³ Available data indicates that “[d]eveloping countries host a higher proportion of young migrants. The percentage of young migrants is considerably higher in the less developed regions, where 26 percent of international migrants are under the age of 20. This is double the percentage found in the more developed regions. Young migrants constitute the largest group in Africa, making up more than half of all migrants in the region. Numbers are much lower in other regions – 20 percent in Asia; 18 percent in Latin America and the Caribbean; and even less in more developed regions” (Cortina and Hovy, UNICEF, UNDESA, 2009).

Globally, there are 33 million international migrants under the age of 20 and they account for 15 per cent of all international migrants⁴. However, there are regional age variations among these young migrants. In Europe, North America, Africa and Oceania, 15 to 19-year-olds represent respectively 39, 34 and 32 per cent of the total migrant population under the age of 20. On the other hand, in Asia 10- to 14-year-olds make up 26 per cent of all migrants under 20, while in Latin America and the Caribbean, 5- to 9-year-olds account for 27 per cent of migrants under 20.⁵

Among migrants, the number of child and adolescent migrants from southern and eastern countries has rapidly increased in the last ten years (De Wenden, 2007:16). According to a cross-country census-based study of child migration in Argentina, Chile and South Africa, around 4 per cent of all children were international or internal migrants, representing around a quarter of all migrants (Yaqub, 2009b).

The Special Rapporteur on the Human Rights of Migrants has asserted that there is a general absence of an “age” approach in migration policies and that there is a lack of accurate statistical information on the number of children involved in the international migration process. Age is not a common variable of disaggregated statistical data on international migration. The Governmental Meeting at the 3rd Global Forum on Migration and Development (GFMD), held in Athens in November 2009, also highlighted the need for studies determining the effects of migration on children left behind by migrant parents, as well as the cultural effects of migration on children who travel with their parents.

Children and adolescents may be at greater risk than adults to violations of their rights due to factors either directly or indirectly linked to migration. Indeed, the Special Rapporteur on the Human Rights of

3 See, for instance, PICUM 2008; Special Rapporteur on the Human Rights of Migrants, 2009; Yaqub, 2009a.

4 In comparison, persons under 20 account for 36 per cent of the world population (figure 3). This striking difference results, at least in part, from the fact that the children of international migrants born in the country of destination are not international migrants. UNDESA (2009).

5 This data is from the UN Global Migration Database, <http://esa.un.org/unmigration> which is a joint work of the United Nations Children’s Fund with the UN Department of Social and Economic Affairs and the Special Unit for South-South Cooperation. Much of the data comes from national censuses, and most countries report population data in five-year intervals. For this reason, for many countries, data is available for age groups 0–4, 5–9, 10–14 and 15–19.

Migrants (2009) has stressed the particular vulnerability of children and adolescents in the context of the entire migration process, especially those who are undocumented and unaccompanied. In cases where migration is a survival strategy, migrants from the poorest households may include younger family members in more vulnerable situations (de Haan and Yaqub, 2009). Additionally, children and adolescents crossing international borders, particularly females, may be vulnerable to trafficking, abuse, sexual violence and exploitation.

Overall, children and adolescents affected by migration have to cope with many constraints to their rights; yet most existing migration analyses tend to pay little attention to the issue of children and adolescents and most migration statistics make no distinction between children migrating with families, and children migrating independently (Save the Children, 2008). Until recently, migration has been discussed mainly in terms of adult, male movement. Women and children have been seen as dependent on male migration. The only exception being discussions focusing on child trafficking, and refugee children, in which the children are considered as passive, vulnerable and exploited. Even then, problems can arise when children travel alone, or become separated from their parents or customary guardians, and are denied careful consideration of their cases simply because they are children, the assumption being that children cannot be refugees in their own right (Bhabha, 2007). Similarly, the majority of literature on migration has focused on adults and rarely have migrant children's own perspectives been heard. Consequently, inadequate assumptions have been made about child migrants' lives. The fundamental problem they face is their invisibility or the general absence of a child perspective within migration laws and policies, which results in the deprivation of their rights (in countries of origin, transit and destination), discrimination and even exploitation.

Despite the fact that child migration could grow dramatically in the next decades as a consequence of global trends such as urbanization and climate changes, children on the move are virtually invisible to many policy-makers. The protection of children on the move can no longer be ignored. Much greater attention must be paid to assessing and responding to their vulnerabilities to exploitation, abuse and violence, as well as to support the positive outcomes of children's movement. Protection policies, laws and implementing services are still lacking in many countries, and where they do exist, they do not adequately protect children on the move. Moreover, policies intended to prevent or control child migration can have unintended negative consequences for children, putting them into even more vulnerable situations, and further constraining their already limited choices and opportunities (Save the Children, 2008:25).

Clearly, greater efforts are needed to ensure that laws and policies protect the rights of children affected by migration by enhancing access to benefits of migration and minimizing its negative effects (GMG, 2008:53). Despite the fact that international human rights standards are widely accepted, and more importantly, the Convention on the Rights of the Child has been almost universally ratified, child and adolescent migrants are victims of a wide range of constraints to their civil, political, economic, social, and cultural rights.

1.3 Migration and Gender

Migration necessarily involves a gender dimension, since women and girls account for almost 50 per cent of international migrants. Significantly more women are migrating today on their own or as heads of households. The absolute numbers of both male and female migrants have grown over recent years, with the proportion of male migrants remaining steady at around 51 per cent (UNDESA, 2009). However, national and regional variations in this figure are significant (see **Box 1**).

Among international migrants under the age of 20, male children and adolescents outnumber their female counterparts in both developed and developing countries. The percentage of female among young international migrants is 48 per cent in developed countries and 49 per cent in developing countries. Women outnumber men by wide margins among older international migrants in both developed and developing countries (UNDESA, 2009)⁶.

While historically women tended to migrate for marriage or family reunification, recent decades have seen an increase in women migrating independently and as main income-earners. Women may migrate in search of better opportunities (labor, education), to be able to send back remittances to support their families and children, to escape sexual violence and abuse, social stigma, pressure to marry, to join a migrant spouse or their parents (family reunification), or to flee from gender discrimination and constraining gender norms.

Undoubtedly, the increase of female migration has raised both prospects and challenges. It can advance gender equality and women's empowerment through opportunities offering them greater independence and self-confidence. It can be a vehicle for enhancing the status of women by breaking through oppressive gender roles. Migration may provide women with income, but also with the status, autonomy, freedom and self-esteem that come with employment (Zlotnik, 2003). However, gender inequalities, including violence against women, can increase with migration, therefore generating risks and vulnerabilities. Compared to men, migrant women face greater obstacles, as the types of jobs they can obtain are very limited, low skilled, and badly remunerated. The provision of care underlies much of female migration. They find employment as domestic workers and care professionals, facilitating the care of children, adults, disabled persons and elderly within households, residential homes and hospitals.

Women also migrate to labor as agricultural workers, sex workers and entertainers, among others occupations, which are generally associated with the worst conditions in terms of remuneration, working conditions and legal protection. Those who migrate with their children (the vast majority of mothers have their children with them) also face difficulties to work and care for their families, making them more prone to accept flexible and informal types of jobs (Cerruti, 2009).

Clearly, irregular migration exacerbates the risk of exploitation for female migrant workers, who may be more likely to accept adverse working conditions, fearing that they will be denounced and possibly deported. Migration may result in trafficking and/or smuggling, especially in cases where cultural constraints and gendered international emigration and immigration policies may limit women's ability to migrate. However, it is difficult to obtain quantitative and qualitative data in this area (ILO, 2010).

⁶ Statistics on women migration have their limitations. The predominance of women migrating as "dependent spouses", the invisibility of women's labor (e.g. domestic labor), restrictions on their right to work and involvement in activities that are deemed to be criminal offences or against public order (e.g. sex work) mean that a higher proportion of women are statistically invisible and undocumented. There is a clear lack of research on the impact of migration on broader social development and gender equality and there has been little concerted effort to incorporate gender into theories of international migration. This is partly because these theories have emphasized the analysis of the causes of migration over the study of who migrates, therefore failing to address gender-specific migration experiences (Boyd and Grieco 2003).

In any case, gender discrimination and the resultant weaker position of women in most societies constitute the root causes of some female migration, and typify the greater vulnerability of women at all stages of the migration process. At the same time, women's mobility also leaves care-gaps in the homes they leave behind. Therefore, gender issues must be at the core of the migration agenda, requiring greater attention from policy and lawmakers dealing with migration issues in origin and destination countries.

Box 1: Regional Variations of Female Migration

- There has been a slight increase in the number of female international migrants in all the sub regions of Asia, except for South-Central Asia. Almost half of all international migrants in Asia (48%) are women (UN DESA, 2009).
- In the last twenty years, South American women have increased their participation in intra regional migration and represent today the highest rate of women participating in migration in the world with a percentage of 52.5% in 2000. Nevertheless, the data available and studies are scarce and generally limited to interviews with female migrants in destination countries (Cerruti, 2009).
- While the number of female migrants increased by 2.7 million between 2005 and 2010, reaching a total of 36.5 million women migrants in Europe, the percentage of women in the total stock of migrants in Europe remained stable at 52.3 per cent, with no significant change between 2005 and 2010.
- In 2010, there were 10.2 million women migrants in the Middle East – a 20.4 per cent increase from 2005. Women are estimated to represent 38 per cent of the total number of migrants in 2010, but there is considerable variation across the region, with figures ranging between 55.9 per cent in Israel and 20.8 per cent in Oman (UN DESA, 2009).

Source: UNDESA. 2009. Trends in International Migrant Stock: The 2008 Revision. Cerruti (2009).

1.4 Root causes of migration and gender

Increasingly, it is recognized that discrimination, extreme gender inequality, and social and economic abuses are central factors in the decision of emigrating (Grant, 2005). Specific causes also affect the decisions of migrant girls and young women to migrate: gender discrimination, lack of social status together with domestic responsibilities, reduced access to resources, education and work in domestic labor markets. At the same time, reconfiguration of the global market generates a sustained demand for a female workforce in underpaid work ghettos of the unregulated service sector. This interplay of supply and demand in the labor market has resulted in an increase of the number of women and girls migrating in search of gainful employment (Sanghera, 2004).

In general, girls have less access than boys to basic social services such as public health and education. This is partly due to the failure to avoid gender stereotypes or to take into account the specific needs of women and girls. Other factors such as discrimination, household preferences and the assignment of domestic tasks frequently result in the denial of access to health facilities or primary schools for women and girls (UNICEF, 2002: 12).

Moreover, the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) expressed their concern about the multiple discrimination faced by women and explained how this situation sometimes forces them to emigrate.⁷ Regarding multiple discrimination, the Special Rapporteur on Violence against Women explained that gender-based discrimination intersects with discrimination based on forms of “otherness”, such as race, ethnicity, religion and economic status, thus forcing the majority of the world’s women into situations of double or triple marginalization. Not only are women discriminated as women, but as ethnic, racial or linguistic minorities and as ethnic, racial or linguistic minority women. Because discrimination based on ethnicity, race, religion, etc. is imbedded in State and social structures, such discrimination decreases the rights and remedies available to women and increases women’s vulnerability to violence and abuse.⁸

The Committee on CEDAW expressed its concern about “the prevalence of many forms of violence against women” and pointed how women “may be compelled to migrate because of violence against women.”⁹ Other studies have shown how, for women and children in particular, domestic violence and/or the consequences of family breakdown (often linked to economic decline and political and social destabilization) may represent the most significant menace to well-being, and the desire to escape domestic violence has been identified as one of the factors that can motivate migration (O’Connell, 2007).

In the case of women, UNFPA has argued that discriminatory immigration policies can limit legal migration channels for women. This relegates many women to the most vulnerable labor sectors or as dependents of male migrants. In the worst cases, they may end-up as trafficking victims. Most migrant women come from countries where discrimination against women is deeply embedded in the social and cultural fabric. This discrimination places many of them at disadvantage, which can then result in inadequate access to information regarding work opportunities in destination countries, costs, benefits and steps necessary to migrate legally and safely. Soliciting the aid of another person or smuggler may place a woman in considerable debt and danger (UNFPA, 2006).

2. A Human Rights-Based Approach to Migration

2.1 General Overview of a Human Rights-Based Approach (HRBA)

For the purposes of this document we first need to distinguish between the usual discussion of a HRBA to programming from a HRBA to development. Also, we need to address the use of this conceptual framework for the formulation of public policy and legislation in order to guarantee the effective realization of human rights. In this paper, we argue the importance of using human rights standards and principles as a minimum level of guidance in the design, implementation and monitoring of development plans, policies and processes, carried out by public and private actors.

The UN Programme of Reform (1997) sets out human rights as a crosscutting issue in all UN activities and urges its global consideration across the UN system. Recognizing the need for coherence of approaches in the context of UN inter-agency collaboration, the UN Common Understanding on a

7 Paraguay, E/C.12/PRY/CO/3, 4 January 2008, p. 14 and 24; El Salvador, CEDAW/C/SLV/CO/7, 7 November 2008, p. 37.

8 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women; E/CN.4/2000/68 29 February 2000, par. 55.

9 Honduras, CEDAW/C/HON/CO/6, 10 August 2007, p. 18.

Human Rights-based Approach to Development Cooperation was agreed in 2003. The Common Understanding was developed to ensure that UN agencies, funds and programmes apply a consistent Human Rights-Based Approach to common programming processes.¹⁰

A human rights-based approach (HRBA) to development aims to understand the causes of human rights non-fulfillment or violations. The essential idea underlying the adoption of a human rights approach is that policies should be based explicitly on international legal standards and that capacities of rights holders and duty-bearers must be developed in order to improve their faculty to claim their rights and fulfill their obligations.

There is a consensus regarding the interdependence of human development and human rights approaches, as illustrated by the UNDP in its Human Development Report 2000. Human development is considered sharing a common vision with human rights, as their final goal is enlarging peoples' choices. Indeed, human development and human rights are reinforcing one another as they help promote and maintain the well-being and dignity of all people, building self-respect and the respect of others.

A HRBA is in its essence a conceptual framework anchoring the human development process within a rights system and corresponding State obligations established by international law. Civil, cultural, economic, political and social rights provide the guiding framework for development plans, policies and processes. Its main focus areas include analyzing inequalities, discriminatory practices and imbalance in power relations, which often constitute the main obstacles to development.

It is of particular importance that a HRBA implies the existence of 'claims' and 'duties' as opposed to 'philanthropy' and 'charity' alone. A human rights based approach to development recognizes the individual as a central actor, who is not merely a recipient of aid, but has the right to participate in processes of relevance for her/his own development. Hence, a HRBA to development does not focus only on the expected result, but also on the road that will lead to processes that will generate the result. It is furthermore recognized that the individual is a rights bearer with justified claims against the state and that the state, subsequently, is a duty bearer with the responsibility to promote, respect, protect and fulfill its human rights obligations, without discrimination.

The HRBA transforms the traditional policy view aimed at securing access to needs into the perspective of accessing human rights, by the claim of each individual, alone or in a group, in line with the state's obligation to respect the human rights treaties it has ratified. Policies and programmes have to be formulated with as the main objective the fulfillment of human rights. The HRBA application into public policies include, among others, monitoring gaps between people's rights, national legislation, planning and their budgetary allocations, for ensuring the progressive realization of human rights and for strengthening the accountability of duty-bearers for the fulfillment of their obligations.

10 The Common Understanding provides conceptual clarity through the following three guiding principles: 1. All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments. 2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process. 3. Development cooperation contributes to the development of the capacities of 'dutybearers' to meet their obligations and/or of 'rights-holders' to claim their rights. 10 Furthermore, the human rights principles to guide development programming identified in the UN Common Understanding are: universality and inalienability, indivisibility, inter-dependence and inter-relatedness, equality and non-discrimination, participation and inclusion, accountability and rule of law. www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf

“The choices made by Governments as to how money is collected and distributed—and which rights are realized and for whom—are not value-free or politically neutral” (OHCHR, 2006). A rights-based approach to the budget demands that such choices be made on the basis of transparency, accountability, non-discrimination and participation. These principles should be applied at all levels of the planning and budgetary process. In sum, under a human rights-based approach, the policies and legislation should be based on a system of rights and corresponding obligations established by international human rights standards and principles¹¹.

2.2 A Human Rights-Based Approach to Migration

General

Migrants are entitled to human rights by virtue of their condition as human beings. However, human rights are also the key link between migration and development. Beyond the fact that States are obliged to ensure migrants’ rights according to international human rights standards, promoting the adoption of human rights-based approach is a win-win situation for several reasons:

- Ensuring the human rights of everyone within a state’s jurisdiction is the key for ensuring the legitimacy of public policies as human rights “lend moral legitimacy and the principle of social justice to the objectives of human development” (UNDP, 2000:2). In addition, human rights are a key dimension of democracy (UNDP, 2000:56, Ferrajoli, 2005:35, De Lucas, 1994) and inseparable from rule of law (Vázquez, 2002, 127);¹²
- Ensuring the rights of migrants is a *sine qua non* condition for social integration and cohesion in host societies thus facilitating the contribution of migrants to destination countries and countries of origin (through remittances), and prevents social exclusion, poverty, and disparities (Mahal and Marks, 2007:36).

Thus, in the migration context, adopting a HRBA requires aligning laws and policies related to migration and development with the principles and standards of international and national human rights instruments. Those rights should then be fulfilled through legislation, as well as administrative and judicial measures.

Apart from its normative value as a set of universally agreed standards and principles, a holistic approach that applies human rights standards to both the fundamental causes and impacts of migration, may in the long run reduce human rights violations against migrants by reducing their vulnerability (GMG, 2008:81).

Policy coherence, which has been discussed during GFMD debates and was further considered in Athens 2009 (Roundtable 3), is a critical component of a comprehensive rights-based approach to migration and development. Policy coherence requires ensuring consistency among policies designed in different areas

11 Human rights standards have become increasingly well defined in recent years. Codified in international, regional and national legal systems, they constitute a set of performance standards against which duty-bearers at all levels of society—but especially organs of the State—can be held accountable. The fulfilment of commitments under international human rights treaties (see annex I) is monitored by independent expert committees called “treaty bodies,” which also help to clarify the meaning of particular human rights. (OHCHR, 2006)

12 Democracy, development and respect for human rights are interdependent concepts, World Conference on Human Rights, Declaration and Program of Action, Vienna, 12 July 1993, para. 8.

of each government, including those promoted at the international level. For instance, while countries may design policies aimed at improving the human development and well-being of persons within their jurisdiction (i.e. access to healthcare), these policies will not be effective unless governments also design policies to tackle practices of migration control that impede the enjoyment of rights in breach of international human rights standards. (i.e., obligation of public health personnel to denounce undocumented migrants).

The policy objective should be much more than ensuring “safe” and “orderly” or “humane” migration. The objective should be to promote “migration in conditions of dignity, equity, security and justice” (ILO, 2010). A rights-based approach to migration and development should, as a minimum, include the following components: 1) attention to the root causes of migration, including irregular migration; 2) adoption of a comprehensive notion of development; 3) creation of a set of initiatives based on international human rights standards aimed at legislative and policy reform, which guarantee a child and gender dimension. International human rights principles (non-discrimination, best interests of the child, progressiveness and universality, and child development) should also guide the design or reform of policies relevant to migration and development. International human rights standards, as elaborated by international human rights bodies (e.g., the CRC, CESCR and CEDAW), should represent the minimum level of protection ensured by those policies (see **Box 2**).

Box 2: Database on human rights, children and migration

The database recently constructed by the United Nations Children’s Fund and the National University of Lanús (UNLa) compiles the elements of the Concluding Observations of UN human rights treaty bodies (CEDAW, CESCR, CMW, CRC and HRC) concerning children, human rights and migration. This collection confirms the relevance of the human rights of children throughout the entire migration process – i.e., from the root causes of migration to migrant children and adolescents’ rights in countries of transit and destination. The Observations of these Committees can be seen as key practical guidelines for: (1) envisaging whether or not policies, practices and laws are aligned with international standards; and (2) drawing a comprehensive rights-based map on migration, children and development, with a gender dimension.

Source: www.hrcam.org

In sum, a HRBA to migration requires a new perception of rights based on obligations and founded on the recognition that each and every human being is a rights holder. The principle of non-discrimination, which is at the center of all the human rights treaties, gives equal protection to citizens and migrants. The fundamental rights protection contained in the two International Covenants [ICCPR and ICESCR], and in the conventions protecting the rights of children [CRC], prohibiting racial discrimination [ICERD], discrimination against women [CEDAW], and torture [CAT] also universally apply to citizens and to all migrants, regardless of their immigration status.

Through their voluntary accession to human rights treaties, all UN member states have undertaken the protection of fundamental political, civil, economic, social, and cultural rights of all migrants in their countries, regardless of their immigration status. A HRBA framework would contribute to migration

policies through the acceptance of common basic principles. A HRBA to policy making should take into account the vulnerability of many migrants and the obligation to protect their human rights throughout the migration process. It should focus on the causes of migration and on the need to ensure respect for human rights in the countries from which most migrants originate and recognize both the link between legal status and human rights.

2.3 Children

A comprehensive HRBA should address the entire process of migration, starting with the root causes in the country of origin and taking into account age, gender and non-discrimination perspectives. In this regard, the Human Rights Council (2009) has stated that:

“[P]olicies and initiatives on the issue of migration, including those that refer to the orderly management of migration, should promote holistic approaches that take into account the causes and consequences and challenges and opportunities of the phenomenon and full respect for the human rights and fundamental freedoms of migrants, with due regard for the specific needs of children in vulnerable situations, such as unaccompanied children, girls, children with disabilities and those who may be in need of international refugee protection.” [emphasis added]

The Special Rapporteur on the Human Rights of Migrants has adopted a similar position (see **Box 3**).

Box 3: A rights-based approach to child-related migration policies

The Special Rapporteur on the Human Rights of Migrants has strongly encouraged States to “mainstream a child rights-approach to migration into national plans, programmes and policies”, adopt a human rights-based approach in all policies and programmes aimed at addressing the situation of children in the context of migration, and “consider the impact of migration on children in the elaboration and implementation of national development frameworks, poverty reduction strategies, human rights plans of action, and programmes and strategies for human rights education and the advancement of the rights of the child. States are also encouraged to adopt and develop programmes and policies to address significant gaps remaining in social policies and other areas where the protection of the migrant child is yet to be mainstreamed”.

Source: Special Rapporteur on the Human Rights of Migrants, 2009, pp. 81–83

At the 3rd meeting of the GFMD (Athens, November 2009), Session 1.1 focused on “Mainstreaming Migration in Development Planning: Key actors, key strategies, key actions”. As the Special Rapporteur on the Human Rights of Migrants has stressed, children are undoubtedly key actors in the entire process of migration. Within this context, it is critical to ensure a child and adolescent perspective within a comprehensive rights-based approach to the following types of migration and development policies and initiatives:

- Social and economic policies in countries of destination (e.g., policies on education, health care, social security, labor, juvenile justice, family life and sexual and reproductive health);

- Development policies in countries of origin aimed at preventing migration as a necessity (e.g., poverty reduction strategies, adolescent education, access to employment and childhood protection programmes);
- International policies (e.g., development cooperation, trade and investment) meant to ensure human and sustainable development for every human being, including migrants;
- Policies based on human migration patterns in each region, including child mobility and irregular migration, aimed at facilitating regular avenues for migration; and
- Border control measures in transit and destination countries (e.g., avoiding the migration-related detention of children, including child protection officers in migration control procedures and ensuring the best interests of the child in procedures of reunification, repatriation and acquisition of residence permits).

It is important that, in their design and implementation, policies take into account the HRBA principles of non-discrimination, accountability, transparency, and participation. Public Policies affecting child and adolescent migrants should in particular be guided by the principles of the Convention on the Rights of the Child (CRC)¹³.

The main principles of the right-based approach can guide migrant policies in many ways¹⁴:

- **Non-discrimination:** child and adolescent migrants are particularly at risk of discrimination. To address the risks, exclusion and discrimination faced by children and adolescents who are migrating or are left behind, specific policies on migration should be accompanied by additional investments in health, education and social protection.
- **Accountability:** Right-based approaches seek to hold governments and other duty-bearers accountable and encourage rights holders to claim their rights. Duty-bearers (both in countries of origin, transit and destination) should be accountable for the violations of human rights of child and adolescent migrants.
- **Transparency:** The impact of migration on the fulfillment of human rights among affected children should be monitored through qualitative surveys, data collection and other relevant statistical research.
- **Participation:** Migrants, origin and host communities should have a voice in defining development. In the design of migration policies, it is also particularly important to create a participative process that protects women and children.

2.4 Gender

As mentioned, women account for almost half of the migrant population globally and increasingly women migrate not only as dependents, or part of the family reunification process, but also as independent persons looking for better opportunities for themselves. In fact, for many women the migration experience seems to play a role in modifying gender roles and women's status and enhancing gender equality. (i.e. Women who find employment abroad experience more autonomy over household decisions.) But, many women migration's experience is marked with abuses and discrimination, in particular for those migrating clandestinely, leaving them open to exploitation, violence and abuse.

13 UNICEF. 2008b.

14 Some of these recommendations are based on A joint UNICEF / UNDP background paper for the 2007 Global Forum on Migration and Development : Migration, Human Rights and Sustainable Human Development.

Many become victims of human trafficking. Girls and women victims of trafficking, refugees, transit and irregular female migrants are most vulnerable to human rights abuses. Restrictive regulations give women fewer chances than men of migrating legally and force them to migrate clandestinely. When legal channels are not available, many women see trafficking or smuggling as the only option to cross the border.

Women's migration in many developing countries implies a redefinition of the economic role of women in the society and within their family as well as a redefinition of the traditional family. At the family level, fathers who are not traditionally geared for being house-bound, have to suddenly take over the role traditionally held by the wife and mother. The migration of a man or woman has different implications on the children left behind, because different were the roles that fathers and mothers played in their life and society expected from them. At the same time, children migrants who either migrated on their own (i.e. for education purposes or can be victims of trafficking); who came with their parents; or who are trying to seek job without proper documentation may suffer discrimination in the receiving countries. The situation in many societies is worse for girls. As a result, we should question whether migration-related policies and regulations in countries of origin and/or destination have been consequently adjusted to the growing evidence of gender-related nature of migration or on the contrary most migration-related policies and regulations are not influenced by gender.

Achieving gender equality is at the heart of right-based approach, including within migration policies. There is a need for action that will tackle the root causes of women and girls' vulnerabilities as well as the underlying causes that restrict their economic opportunities and equitable participation in society, and how these causes might be exacerbated or aggravated in the context of migration. A human rights-based approach integrates international human rights standards and principles in development activities, including women's human rights and the prohibition of sexual discrimination (OHCHR, 2006). In the case of migrant girls, the application of a HRBA is of great importance because of their particular risk of suffering rights violations. Because of their subordinate status both as migrants and as women – sometimes characterized as 'double marginalization' – female migrants are particularly vulnerable to exploitation, ill treatment, and unequal opportunities.

The impacts of migration for women and men depend on many factors, all of which have gender implications. These include: the type of migration (temporary, permanent, irregular, regular, labor, natural disaster- or conflict-induced, independent or as dependent spouse). In destination countries, gender inequalities also influence the experiences of migrant women, and may circumscribe their civic, legal and social rights and entitlements. Entry status is more likely to handicap female migrants than male migrants because residency and employment rights and related entitlements often differ by gender. Women migrant workers who are admitted legally, but temporarily, may be poorly protected by existing labor laws in destination countries and they may have little recourse to state protection if abuse occurs. Female specific demand for domestics and nurses can lead to temporary rather than permanent residency for many female migrants. (Boyd and Grieco 2003).

2.5 The Applicable International Human Rights Framework - Children in the Context of Migration

The international human rights framework

A range of human rights instruments exists at the international level promoting the human rights of all migrants, including specific instruments on the protection of women and children that apply equally to migrant women and children. States must respect and ensure the human rights of all individuals within

its territory and subject to its jurisdiction, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Therefore, the rights contained in these instruments are guaranteed to all persons present in a State: nationals and non-nationals, regardless of their legal status, gender or age.

Migration should be positioned within the context of a human rights framework that provides protection for all children, adolescents and women affected by the migratory process. States that are parties to international human rights treaties are obligated to offer protection to the rights of non-nationals as well as direct protection to children, as long as they remain in their territory. Migrant children become non-nationals or “aliens” once they leave home, cross national borders and face a new social environment, but these circumstances should not restrict their human rights, whatever their migration status. (GMG, 2008:52)

Box 4: International human rights instruments relevant to migration

- Universal Declaration of Human Rights
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- Convention on the Rights of the Child (CRC).
- International Convention on the Rights of All Migrant Workers and Members of Their Families (ICMW)
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Elimination of All Forms of Racial Discrimination
- United Nations Convention against Transnational Organized Crime (2000) and its two associated Protocols
- ILO Conventions and Recommendations
 - Migration for Employment Convention, 1949 (No.97)
 - Migration for Employment Recommendation, 1949 (No.86)
 - Migrant Workers Convention, 1975 (No.143)
 - Migrant Workers Recommendation, 1975 (No.151)
 - Minimum Age Convention, 1973 (No.138)
 - Worst Forms of Child Labor Convention, 1999 (No.182)

As the title of this paper suggests, the situation of children and adolescents within the context of migration and development will be examined using the international human rights framework. This approach is used for several reasons (see **Box 5** for further reasons, including the rationale for the use of this approach for migration policies in host countries):

- 1) It provides a legal structure with an established set of obligations and duty-bearers;
- 2) UN agencies, such as the United Nations Children’s Fund, have a mandate and commitment to promote a rights-based approach both in their initiatives and in the childhood policies for which they advocate;
- 3) It enhances development work by approaching issues not solely from a needs-based approach, but from a more holistic and sustainable rights-based approach (Jonsson, 2003); and
- 4) The main objective of policies and programmes should be to fulfill human rights (OHCHR, 2006).

Box 5: Human rights, migration and public policies in democratic societies

Ensuring migrants' rights is a multiple-win situation for several reasons:

1. Guaranteeing the human rights of all persons within States' jurisdictions is key for the legitimacy of public policies, lending moral legitimacy and a notion of social justice to the goals of human development;
2. As democracy is defined by human rights, and human rights are a substantive dimension of democracy, then fulfilling migrants' rights strengthens and legitimates democracy;
3. Human rights and the rule of law are inseparable and complementary;
4. Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing;
5. Rights of migrants are a *sine qua non* condition for social and equal integration in host societies;
6. Such rights-based integration is an important tool for guaranteeing social cohesion;
7. Ensuring migrants' rights prevents social exclusion, poverty and disparities among members of society;
8. Public policies aimed at fulfilling human rights for everyone within a society are a key component of either reaching or reinforcing human and sustainable development in the medium and long term;
9. While child rights-based public policies are absolutely critical for ensuring sustainable development, there must also be a child-perspective within migration policies;
10. Protection of migrants' rights increases their contribution to countries of origin through remittances to their families; and
11. Last, but not least, attention to human rights concerns plays an important, instrumental role in advancing economic goals of equity and efficiency, as well as poverty reduction.

Sources: De Lucas, 1994; UNDP, 2000; Vazquez, 2002 ; Ferrajoli, 2005; Mahal and Marks, 2007.

2.6 The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC or the Convention) contains a set of legally binding international standards, and elaborates on many of the general provisions contained in earlier instruments with specific reference to children. It incorporates the full range of human rights - civil, cultural, economic, political and social - and all of these rights must be protected, respected, and fulfilled for all human beings under the age of 18 within the jurisdiction of States party to the Convention. Thus, the Convention is a key instrument for the protection of children in the context of migration. The CRC and its two optional protocols to the Convention, regarding the involvement of children in armed conflict and the sale of children, child prostitution and child pornography are an effective point of reference for all children affected by migration, regardless of their migration status¹⁵.

15 The CRC Optional Protocol on the Sale of Children provides a legal framework to prevent and punish sale of children, child prostitution and child pornography. This Protocol also deals with the issue of protection of child victims of these crimes both when they enter in contact with the criminal justice system as victims or witnesses and more generally with respect to their recovery and reintegration. The CRC Optional Protocol on the Involvement of Children in Armed Conflict establishes the obligation to take all feasible measures to prevent the participation in hostilities by persons under the age of 18 years, notably by ensuring that there is no compulsory recruitment into the armed forces under this age and by criminalizing the recruitment by armed groups. The Protocol sets forth a duty to provide victims of such acts with recovery and reintegration measures.

The Committee on the Rights of the Child¹⁶, a body of independent experts monitoring the implementation of the Convention on the Rights of the Child, advises that a State which ratifies the Convention on the Rights of the Child takes on obligations under international law “to ensure the realization of all rights in the Convention for all children in their jurisdiction.”¹⁷ In its general comment No. 6, the Committee stated: “the enjoyment of rights stipulated in the Convention is not limited to children who are nationals of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.”

States parties to the Convention must ensure that its provisions and principles are fully reflected and given legal effect in relevant domestic legislation and policies (art. 4), which must be guided by the principles of non-discrimination (art. 2), the best interests of the child (art. 3), the right to life, survival and development (art. 6) and the right of the child to express his or her views in all matters affecting him or her and to have them taken into account (art. 12).

The principle of non-discrimination (art. 2)

This article defines that States shall respect and ensure the rights set forth in the Convention to “each child within their jurisdiction”. Therefore, any child is entitled to enjoy the rights recognized in the Convention. This means that the rights recognized in the CRC are applicable to any child residing or otherwise present in the territory of the State Party, whether or not he or she is a national of that State. Therefore the obligation to respect and ensure the rights in the Convention applies also to migrants, refugee or asylum seeking children.

Furthermore, both nationality and immigration status are prohibited grounds within the principle of non-discrimination. Non-discrimination has been identified by the Committee on the Rights of the Child as a general principle of fundamental importance for the full implementation of the provisions of the Convention. Additionally, article 2 requires the States Parties to take the following measures:

- Legislative measures prohibiting all forms of discrimination, together with effective remedies in case of violations of this prohibition
- Other appropriate measures to prevent and combat *de facto* discrimination

Paragraph 2 of article 2 dealing with the obligation to respect requires that State parties refrain from any actions that would violate any of the rights under the CRC. Furthermore, the obligation to ensure goes well beyond, since it implies an affirmative obligation of the State party to take whatever measures may be necessary to enable individuals to enjoy and exercise the relevant rights.

Best interests of the child (art. 3)

Article 3 of the CRC is a leading principle in the implementation of all substantive articles of the CRC. The principle arising from that article is that the best interests of the child shall be a primary consideration and be applied in a systematic manner for any action affecting children— e.g., the best interests of the child must be the key concerning any decisions made on repatriation measures to countries of origin.

16 For more information on the Committee on the Rights of the Child see: <http://www2.ohchr.org/english/bodies/crc/>

17 Paragraph 1. Committee on The Rights of the Child.- General Comment No. 5 (2003). General measures of implementation of the Convention on the Rights of the Child. CRC/GC/2003/5 27 November 2003.

Even if the CRC does not offer a precise definition of the principle, the best interests must always be primary considerations for all actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Therefore, all policies affecting the child, including migration policies, should take into consideration the best interests of the child and must reflect a balance between the child's short and long-term interests¹⁸.

Right to life and survival and development (art. 6)

Article 6 concerns the child's inherent right to life and States parties' obligation to ensure to the maximum possible extent the survival and development of the child. The Committee expects States to interpret "development" as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed to achieve the optimal development of all children (CRC Committee, 2003b).

Many of the Convention's obligations, particularly those related to health, adequate standard of living and education are relevant to ensure the maximum development of the child. This principle implies adopting positive measures to guarantee that policies and programs affecting development and migration reach all members of society, including child migrants, in order to guarantee their right to basic services and equality of opportunity.

In this regard, it is important to evaluate how current migration policies, particularly those constraining basic rights due to immigration status, and those increasing restrictions to regular channels for migrating, impact the development of children.

Right to child participation (art. 12)

The right of children to express their views regarding all matters affecting them should be considered as a general principle in all activities relating to the implementation of the CRC. States parties are thus obliged to ensure that the views of the child are considered, taking into account age and maturity. This includes the opportunity to be heard in any judicial and administrative proceeding related to migration, affecting themselves or their parents. Furthermore, in destination countries, children and adolescents should be able to participate in the elaboration, implementation, and evaluation of policies concerning migration, integration, labor, education, fight against xenophobia, among others. As well, processes or policies linked to migration root causes in countries of origin should assure the participation of children and adolescents.

2.7 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)¹⁹ defines what constitutes discrimination against women and girls and sets up an agenda for action to end such

18 See the UNHCR Guidelines on Determining the Best Interests of the Child (May 2008) UN High Commissioner for Refugees, Best Interests Determination Children - Protection and Care Information Sheet, June 2008, available at: <http://www.unhcr.org/refworld/docid/49103ece2.htm>, for a detailed and practical explanation on how to determine the best interest of a child.

19 For more information on the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) see: <http://untreaty.un.org/>.

discrimination²⁰. The CEDAW applies to all women, including migrant women and girls left behind. Migrant women as well as country nationals should have equal access to employment, fair and equitable remuneration and benefits. Other particularly relevant provisions of CEDAW for women migrants include: elimination of the idea of stereotyped roles for men and women (article 5); suppression of all forms of women traffic and of exploitation or prostitution of women (article 6); equality of women's rights to acquire, change or retain nationality (article 9); equality of women's rights in relation to education (article 10), employment (article 11) and health (article 12); and recognition of the rights of women in rural areas (article 14).

The CEDAW seeks to promote gender equality by removing gender-based disparities, and to foster the full development, participation, and advancement of women. To attain such equality, CEDAW requires compliance with certain strategic principles that are also important for a HRBA to policing. Gender-based disparities must be identified and eliminated. Consequently, another strategic principle is that affirmative measures must be systematically implemented to assist women in realizing their rights²¹. Interventions should focus on removing social injustice and barriers generated by unjust construction of gender roles.

In most cases, gender-related issues are addressed through the principle of non-discrimination stipulated in international conventions. Provisions against discrimination on grounds of sex, national or social origin, or other status can be found in a number of international (human rights) instruments (Universal Declaration of Human Rights (article 2), International Covenant on Economic, Social and Cultural Rights (article 2, 2), International Covenant on Civil and Political Rights (article 2, 1), International Convention on the Elimination of All Forms of Racial Discrimination (article 1), Convention on the Rights of the Child (article 2) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (article 1)).

Women and children's rights are inextricably linked and complementary. For girls, the CEDAW builds on their human rights by reinforcing certain rights already covered by the CRC. In that sense, the linkages between CEDAW and CRC give us the main resources and standards to protect and fulfill the rights of girls and women. These treaties oblige States to maintain a gender perspective in migration laws and policies, particularly in receiving countries. The challenge for policy and lawmakers is to establish rules and regulations that meet the requirements of international conventions, including the CRC and CEDAW.

Several articles of the Convention on the Rights of the Child are also particularly applicable to the protection of migrant girls, including: family reunification (article 10); combating the illicit transfer and non-return of children abroad (article 11); protection from economic exploitation and hazardous work (article 32); protection from sexual exploitation and sexual abuse (article 34); and prevention of the abduction of, sale of or traffic in children (article 35).

20 For more information on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) see: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

21 CEDAW. Article 4.1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

In addition, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), which supplements the Convention against Transnational Crime, is also relevant to the protection of migrant women. It aims to prevent and combat trafficking in persons, paying particular attention to women and children, and also to protect and assist the victims of such trafficking, with full respect for their human rights.

A number of protection mechanisms deriving from the United Nations Charter are as well relevant to promote the rights of migrant women and girls. One of such mechanism is the mandate of the Special Rapporteur, established by the Human Rights Council. Of particular relevance for female migrants are the Special Rapporteurs on a) Violence against Women; b) Trafficking in Persons, especially Women and Children; and c) the Human Rights of Migrants (Redpath, 2006). The Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, reiterated the need for a comprehensive approach to female migrants' human rights in order to ensure that women and girls who migrate has an appropriate framework for protection and enjoyed adequately their rights according to their particular vulnerable situations (Human Rights Council, 2008).

International labor standards are also important sources of protection for migrant women and adolescents. The International Labor Organization has developed two Conventions that provide specific protection for migrant workers: the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), along with their accompanying non-binding Recommendations. The scope of Convention No. 97 is limited to migrants who are legally entitled to enter the country of employment, and contains provisions to protect migrants' rights and to assist States in the provision of migrant services. Article 6 sets out certain rights to be applied to migrants – without discrimination, including in respect of sex. Convention No. 143 is divided into two parts: Part I applies to all migrant workers and is particularly designed to protect non-nationals with irregular status, while Part II applies only to regular migrant workers. Article 1 requires all States Parties to undertake the respect of all migrant workers' basic human rights (including those of migrants women). Part I provides for equal treatment for migrant workers in irregular status and their families regarding the rights arising out of past employment, as regards remuneration, social security and other related benefits. Part I also requests States to adopt measures aiming to suppress clandestine movements and illegal employment of migrant workers, including by taking measures against the employers and the organizers of such movements (article 3). This is of particular relevance to women who are vulnerable to, or victims of, trafficking (ILO, 2008).

2.8 Other Relevant Instruments

Undoubtedly, the CRC is the most effective point of reference for all children affected by migration, regardless of their migration status. However, several other international human rights instruments also provide comprehensive guidance on ensuring the rights of migrant children and adolescents in the context of migration.

The human rights and fundamental freedoms of all persons are set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The rights contained in these instruments apply to all without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These rights include the right to life, liberty and security; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest,

detention or exile; the right to freedom of movement and residence within the borders of each State; the right to marry and to found a family; and the right to work, to free choice of employment and to just and favorable conditions of work. Furthermore, The Universal Declaration of Human Rights also provides that every person has the right to leave and re-enter his or her own country of origin.

Clearly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) has a number of provisions that are specifically applicable to migrant children and families. In that regard, the Committee on Economic, Social and Cultural rights has stated that “[t]he 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. The 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.”²²

The International Covenant on Civil and Political Rights (ICCPR)²³ and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are crucial to address issues such as: deportation and detention procedures, torture or other cruel treatment, right to a fair trial, right to an effective remedy, family life and family reunification.

The Convention that directly addresses the human rights of migrants and their families is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). The CMW addresses the rights of migrant workers and their family in both regular and irregular situations during the entire migration process: departure, transit, destination and return, and provides comprehensive guidance on ensuring the rights of migrant children and how to ensure that migration is managed humanely. The concluding observations of the Committee on Migrants Workers provide a framework for improving the enforcement of the Convention and, subsequently, the protection of migrants’ rights, including children and adolescents. Unfortunately, this Convention has not yet been widely ratified (none of the top ten immigrant-receiving countries features on that list).

UN Committees²⁴, UN agencies²⁵, and civil society organizations²⁶ have widely documented irregular practices leading to the deprivation of undocumented children’s rights. (See **Box 6**) These practices are rooted in a variety of factors, often complementary, such as: xenophobic attitudes of the host population and/or public authorities; inaccurate information and prejudices about the impact of migration on the host society; lack of training of civil servants, particularly regarding human rights; and the absence of public policies meant to disseminate information on states’ human rights obligations and the rights of migrants.

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

23 The Human Rights Committee (HRC) has pointed out some guidelines for the protection of migrant children’s rights in the General Observations No. 15 concerning the position of aliens under the Covenant, 1986. General Comment No. 15: The position of aliens under the Covenant : 04/11/1986.

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

25 See Regional Thematic Working Group on International Migration including Trafficking, *Situation Report on International Migration in East and South-East Asia*, IOM, UNICEF, UNIFEM, ILO et al., Bangkok, on restrictions to migrant children regarding education and other social rights in different Asian countries.

26 Among many reports on this, see PICUM, Report of the Second Workshop on “Fighting Discrimination-Based Violence against Undocumented Children”, Brussels, 4th April 2008.

Other relevant regional human rights instruments for the protection of migrant children's rights include the American Convention on Human Rights, the European Convention of Human Rights and the African Charter on Human and Peoples' Rights, and their respective mechanisms: Inter-American Commission and Court on Human Rights²⁷, European Court on Human Rights, European Committee on Social Rights, African Court on Human Rights.

Box 6: The Convention on the Rights of the Child and other human rights treaties concerning children in the context of migration

Human rights treaties – as well as standards produced by universal and regional human rights mechanisms – are essential for evaluating the degree to which States have fulfilled their human rights duties within migration and migration-related policies. Notably, the Convention on the Rights of the Child is the central reference regarding children's rights. While the Convention must be applied universally (i.e., without any discrimination based, for instance, on the nationality or migration status of the child or his/her parents), the effective realization of children's rights in the context of migration is one of the most serious challenges it currently faces. Indeed, periodic observations made by the Committee on the Rights of the Child (CRC) – as well as by the Committees on Economic, Social and Cultural Rights (CESCR), the Elimination of Racial Discrimination (CERD), the Elimination of Discrimination against Women (CEDAW) and Migrant Workers (CMW) and the Human Rights Council (HRC) – confirm the gravity and magnitude of constraints on migrants' rights. These constraints have a considerable impact on children and adolescents, particularly when they or their parents are undocumented migrants in countries of transit and destination.

2.9 Adopting a comprehensive notion of development

Development – migration nexus

The last decade has witnessed an increasing range of debates, initiatives and literature emphasizing the importance of the nexus between migration and development and highlighting migrants' contributions to development in both countries of origin and destination. However, very few have highlighted the key role of human rights within the migration-development nexus.

27 The Inter-American Court of Human Rights adopted the Advisory Opinion 18 on the Judicial Condition and Rights of the Undocumented Migrants, 17 September 2003: "1. That States have the general obligation to respect and ensure the fundamental rights. To this end, they must take affirmative action, avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right. 2. That non-compliance by the State with the general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility. 3. That the principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international law and domestic law. 4. That the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*. 5. That the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals. 6. That the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person. 7. That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination..."

“International migration has tended to be seen primarily in development terms, as a response to disparities in income levels and as a means to create employment opportunities. Unemployment and poverty are often the “push factors” which impel individuals to leave their home countries, while cross border differences in wage levels and labour demand are the “pull factors” which direct them to more developed economies. Migrants contribute to development in their home countries through remittances, and to their host countries through their work and cultural diversity, and – in some countries- to population growth and change in age structure. However, not enough attention has been paid to the role of human rights during migration process or to the ways in which a lack of respect for the human rights of migrants in the countries of destination reduces their ability to contribute to development. When migration is not also approached from this perspective, two difficulties arise: first –and self evidently- the protection of migrants is not given priority and secondly, where migration is seen only in economic terms, migrants may come to be regarded more as commodities, rather than as individuals entitled to the full enjoyment of their human rights” (GMG, 2008:5)

Just as the migration and development nexus must be addressed in a comprehensive and coherent manner, the meaning of development also has to be understood in an all-inclusive way. That is, the adoption of a comprehensive rights-based approach to migration requires adopting a holistic notion of development, in which both the right to development and the notion of sustainable development are critical components. According to UNDP, “sustainable human development seeks to expand choices for all people – women, men and children, current and future generations – while protecting the natural systems on which all life depends” (UNDP, 1998). Moving away from a narrow, economy-centered approach to development, sustainable human development places people at the core, and views humans as both a means and an end of development. Thus sustainable human development can only be realized if all human rights (economic, social, cultural, civil and political) are promoted, preserved and defended (UNICEF, 1999).

In that regard, greater efforts are needed to implement the goals of the 1986 United Nations Declaration on the Right to Development: “*States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals*”.

Indeed, the duty to ensure the right to development for everyone (which entails the full realization of all human rights²⁸) and the commitment to guarantee sustainable development (with its three pillars of economic development, social development and environmental protection²⁹) are principles that should be fully incorporated into a comprehensive approach, to effectively address the needs and vulnerabilities of children within the migration-development nexus. Moreover, the 2009 Human Development Report, which focused on migration, identified that “ensuring the basic rights of migrants” is one of the six policy entry points in the core package of reforms proposed to enhance human development outcomes (UNDP, 2009).

28 Declaration on the Right to Development, adopted by the UN General Assembly, A/RES/41/128, 4 December 1986.

29 Declaration on Sustainable Development, Johannesburg, A/Conf.199/20, 4 September 2002.

The 2009 GFMD meeting also addressed ways to make the “migration-development nexus work for the achievement of the Millennium Development Goals” (Roundtable 1). In this regard, it should be borne in mind that the MDGs (i.e., ending poverty and hunger, universal basic education, gender equality, child health, maternal health, combating HIV and AIDS, environmental sustainability and global partnership) are intrinsically linked to the root causes of migration, and all the MDGs are either directly or indirectly linked to the well-being and rights of children and adolescents. While the MDGs present a key opportunity to enhance the enjoyment of human rights around the world, they will only be achieved in a sustainable way if human rights obligations are respected and strengthened in States’ strategies aimed at achieving them.³⁰

2.10 Shared responsibility

During the 2008 Manila GFMD session on the rights of migrants, the concept of “shared responsibility” of all GFMD members was introduced in discussions on migration, human rights and development. However, “shared responsibility” was limited to issues of migration control and management, or of migrant workers protection in countries of origin and destination: “The safety and protection of migrant workers is therefore not just a personal responsibility but a shared undertaking that all parties to this movement must dutifully exercise” (Sto. Tomas, 2008).

For some HR scholars³¹, the concept of “shared responsibility” is much broader and has direct impact on the understanding of the right to development. As Salomon³² states:

“The gross inequality that characterizes world poverty today, the power differential that accompanies it, and the reality of global economic interdependence, serve to erode the legitimacy of this model that attributes secondary as opposed to shared responsibility to a developed state to fulfill the basic rights, for example, to food, water, and health of people elsewhere” (Salomon, 2008).

In this sense, Skogly (Skogly, 2002) comments that if states are to take seriously their responsibility regarding the right to development, they will need to pay attention to the human rights effects of their development cooperation, the consequences of international trade rules and the results in the international community of their behavior in intergovernmental institutions.

This argument is also valid in the case of international migration. The Global Commission for International Migration has stated that the world’s most prosperous states need to acknowledge the impact of their policies on the dynamics of international migration – for instance through trade reform that would give developing countries better access (or fair access, not fairer) to global markets (GCIM 2005).

The Programme of Action of the 1994 International Conference on Population and Development (ICPD) and the 1999 Bangkok Declaration on Irregular Migration drew conceptual connections between migration and development and urged States receiving migration to aid developing countries and countries with economies in transition through programmes addressing poverty reduction, social development, and the achievement of sustained economic growth (GMG, 2008:79).

2.11 Implications for policymaking

As Save the Children (2008) has stressed, governments must ensure “that children on the move are visible in all relevant national and international policy discussions. The rights of children on the move must be a key component and appropriately integrated in the development and implementation of national and international policies and programmes on child protection, child labor, migration, poverty reduction, development and decent work”.

Discussions and policy initiatives at local, national and international levels must take into account the obstacles, opportunities and challenges to achieving sustainable development and to ensuring the right to development for all individuals, particularly those in developing countries living in more vulnerable conditions. This includes hundreds of millions of children and adolescents, some of who will migrate or attempt to migrate in the future. As verified by many reports (e.g., HRW, 2008; PICUM, 2009; UNDP, 2009) and the concluding observations of UN treaty bodies (such as the CRC and CESCR), migrant children and adolescents are usually among the most impoverished members of their society, particularly in developed countries (see www.hrcam.org).

Attention to children and adolescents’ rights with a gender and non-discrimination dimension is a cornerstone to achieve multi-level strategies for sustainable development and the right to development: “If states do create favorable conditions for broad-based national development, migrants are likely to reinforce or perhaps even accelerate ... already positive trends by investing and returning (temporarily or permanently) to their origin countries” (de Haas et al., 2009, p. 54). In particular, considering the aforementioned invisibility of children and adolescents within migration policies, comprehensive rights-based strategies should involve an examination of how existing policies (e.g., on migration, childhood, education and labor) are meant to guarantee migrant children and adolescents’ rights, including their right to development.

As outlined in the Convention on the Rights of the Child, States must ensure a range of human rights to every child within their jurisdiction, irrespective of any private income received from their migrant parents. Indeed, as key duty-bearers under international law, States must design and implement legislation and policies aimed at respecting, protecting and fulfilling the rights of children and adolescents. Legislation and policies should consider the particular situation of each individual, family, community and social group, including the particular situation of children and adolescents left behind. Furthermore, States must avoid both legal and *de facto* discrimination (whether direct or indirect) and prevent social exclusion in order to ensure children and adolescents’ well-being.

Additionally, children’s and adolescents’ right to participation should be incorporated into all policies and programmes that may affect them, including the design, implementation and evaluation of public policies and programmes meant, *inter alia*, to: (1) address their particular needs and fulfill their rights, including their economic, social and cultural rights and their right to development; (2) facilitate, if appropriate and according to their best interest and will, family reunification in host countries where their parents live; and (3) ensure a gender approach regarding the situation of girls left behind by their migrant parents.

For instance, Latin American governments have highlighted the importance of protecting and ensuring respect for the human rights of migrants and their families, particularly women and children. These

states have also stressed their absolute conviction that the human being must be at the center of migration policies and programs, and that priority should then be given to the full exercise of migrants' rights, regardless of their migration status³³.

Both the international community and key actors at governmental and civil society levels have been increasingly addressing the challenge of ensuring a child rights-based approach to public policies related to migration and development. Rights-based approaches to development recognize that in order to achieve human development outcomes, human rights must be realized for those whose development is at stake (Jonsson, 2003). Since migrant children and adolescents are considered key actors in the development process, their rights should be protected and fulfilled. Moreover, they should not be regarded simply as miniature adults; they should be considered on their own terms, as development subjects requiring a distinctive and particular approach (White, 2002). A comprehensive rights-based approach should involve not only an analysis of how migration affects development, but also an analysis of how current development policies affect migration. Instead of focusing on the instrumental function of migration for national economic development, the contribution of migration to sustainable development should include the protection of the human rights of migrants and their families.

Meeting the challenge of mainstreaming this approach to development is clearly on the international agenda. However, "it has to be acknowledged that there is a very long way to go before such approaches become the norm" (Alston and Robinson, 2005). This wait may be even longer when it comes to comprehensively addressing the root causes of migration. The scope of this challenge is clearly broader when it comes to international migration and the fulfillment of migrants' rights, particularly children, women, and undocumented migrants.

3. Addressing legislative and policy gaps through an HRBA

The rights of all children and adolescents affected by migration processes are a matter of growing concern for the global community. Despite the fact that governments, policy-makers, UN agencies, academia, and civil society organizations have gradually begun to include the issues of children and migration in their agendas, there are still many challenges and perspectives that have not been taken into account. In particular, there are two significant policy gaps, or a double deficit, that should be considered:

a) A child rights-based perspective is generally absent from migration laws and policies in countries of origin, transit and destination. The Special Rapporteur on the Human Rights of Migrants (2009) has asserted that there is a general absence of an "age" approach in migration policies (see also Bhabha, 2008; UNICEF TACRO and UNLa, 2010). Until recently, migration has been discussed mainly in terms of adult male movement, and migrant children have been considered dependents – passive, vulnerable and exploited (Touzenis, 2008). Indeed, the Special Rapporteur has affirmed that children affected by migration may suffer rights deprivations and abuses that are different from those suffered by adults, and a lack of distinction between adults and children in migration policies may imply the denial of migrant children's rights (Special Rapporteur on the Human Rights of Migrants, 2009).

33 VIII South American Conference on Migration, *Declaration of Montevideo on Migration, Development and Human Rights of Migrants*, 19 September 2008, Preamble and para. 1.

The absence of a child rights-based perspective is particularly prevalent in transit and host countries. Arbitrary detention and deportation of migrant children, the deprivation of their human rights (such as education and health care) and the lack of integration policies focused on adolescents (both nationals and immigrants) are evident in several countries. Additionally, bilateral agreements signed with countries of origin on issues such as circular migration, repatriation and joint border controls also reveal a lack of child- and adolescent-sensitive policies regarding migration management and control, both national and international levels. This children invisibility is accompanied by a general lack of data on international migration and on undocumented migrant children and adolescents, particularly data disaggregated by age.

b) Childhood laws and policies, meant for the protection and promotion of children’s rights, have not yet taken into account the specific conditions and needs of migrant children.³⁴ In general, the migrant children invisibility within childhood policies may affect the scope of opportunities and general well-being of migrant children and adolescents (and those of migrant background) in the short and long run. It may also indicate whether or not an integration policy exists in a host society.

This invisibility is particularly evident in transit and destination countries, particularly in regard to juvenile justice policies and social policies related to children and adolescents (e.g., education, school drop-out rates, adolescent employment and training programmes, language barriers, birth registration obstacles, anti-child-exploitation programmes and domestic workers’ protection). In countries of origin, many childhood policies do not promote job opportunities for adolescents, and development policies often do not account for child and adolescent migration (whether children or adolescents migrating with families or those migrating unaccompanied, regularly or irregularly).

3.1 The Migration Process - maximizing the benefits and minimizing the harms of migration

While both states and intergovernmental bodies, including UN agencies and Committees have frequently highlighted that states are entitled to adopt their own migration policies, as well as regulate the admission and stay of migrants in their territory, it has been also widely established by these bodies that these policies must be fully in line with international human rights law, including its principles and standards. Nonetheless, in many countries migration policies have specially focused on issues such as national security and migration control, ignoring a rights-based approach. Due to the structural causes of migration, and other factors of this global, complex phenomenon, these migration policies have not been effective in achieving the goal/purpose of migration control.

As it stands, migration policy seems to be framed only in technical, pragmatic terms, focusing on the adequate figures for the growth and stability of the destination/demand countries, ignoring the respect for human rights and the rule of law (De Lucas, 2002:31).

Transit and destination countries have adopted restraining migration policies, and other public policies (i.e. health care) establishing constraints and limitations to migrants, either due to their foreign condition or immigration status. Although some countries, especially southern destination countries, have recently sanctioned progressive policies and legislation, as reflected in UNICEF (2010) and OHCHR (2010) papers, the last years tendency has been the increasing approval of measures denying or

34 Based on this gap, UK civil society has advocated for the government expression “Every Child Matters” in order to push for the inclusion of migrant children in public policies concerning children.

restricting the basic rights and protections to migrants, particularly to those in an irregular migration situation.

In addition, transit countries in development have adopted stricter migration policies and practices, due to either the influence or the pressure of developed states' migration control policy goals. Bakewell and other scholars have highlighted this situation regarding EU legislative and policy changes in some African countries, such as Morocco and Libya, describing not only the negative impact on human rights of migrants, but also on previous practices of people free circulation in the region (Bakewell, 2009:24).

The invisibility of children and adolescents in migration policies and discussions, which has been described throughout this report, is especially acute in transit and destination countries, particularly the latter. While the ethnic and national origin of children and adolescents should not lead to any unequal treatment (e.g., in their access to jobs, training and educational opportunities), many migrant children (both with their families and unaccompanied) and children born to migrant parents in countries of transit and destination face several constraints on their rights.

In many countries, exhaustive revision is needed on existing migration laws and policies affecting migrants, in order to incorporate age, gender and non-discrimination dimensions, as well as all the provisions of various human rights treaties.³⁵ Indeed, any initiative aimed at addressing these constraints should include a range of proposals for the full incorporation of these dimensions in migration laws and policies. It is also critical that the migrant perspective be present within all policies affecting children and adolescents. In particular, during this revision process, the following core principles should be fully recognized for all migrants, especially children and adolescents, as well as children born to migrant parents in countries of destination:

- Universality, which implies the development of a legal framework that effectively protects and fulfills the rights of all children and adolescents, including migrants regardless of their migration status (UNICEF, 2008b; CRC Committee Concluding Observations);
- Non-discrimination, based on prohibited grounds (such as nationality and migration status);
- Best interests of the child, child participation and child development; and
- Gender equality.

Strategies aimed at promoting these legislative and policy reforms should highlight the intrinsic connections between the human rights of all migrants (particularly children and adolescents) and sustainable human development, democracy and rule of law. As indicated by the title of Session 2.1 of the 2009 GFMD,³⁶ the protection of migrants' rights is essential for an equal inclusion strategy as well as a key tool for social development. As members of society who are entitled and able to effectively exercise their human rights, migrants can play an active role in the social and economic development of the host country and even of their country of origin, particularly when rights such as education, health care, social security and employment are fulfilled, ensuring equal opportunities and gender equity.

The following pages highlight the types of rights constraints faced by migrant children and adolescents, as well as children of migrant background, in countries of transit and destination. The human rights principles mentioned above, among others, should guide policies aimed at dealing with these.

3.2 Human rights constraints while in transit

Migrant adults and children may spend significant periods of time in transit countries, due to restrictions that have been increasingly adopted by both Southern and Northern countries of destination and transit (de Haas, 2005; Mghari, 2008). Children and adolescents on the move may also be subject to deportation and detention measures during transit, as well as criminalization based on their migration status (UNICEF, 2008a; Special Rapporteur on the Human Rights of Migrants, 2009, par. 22, 25, 40). Moreover, there is a great deal of abuse and violence evidence suffered by women and adolescent girls both in transit countries border controls and during their journey (Foro Migraciones, 2005; APDHA, 2008).

Protection of migrant children and adolescents in transit and destination countries, especially those who are travelling unaccompanied and undocumented, should be based on an integrated rights-based approach, namely, the guarantee of their civil and political rights, as well as economic, social and cultural rights. However, this implies a much wider focus than the protection measures linked to the fight against child and adolescent trafficking. In fact, only a very small percentage of human international mobility, including child and adolescent mobility, is connected to human trafficking. Therefore, an approach that focuses exclusively on trafficking might present perverse effects, such as increasing the clandestine nature of such movement, exacerbating the vulnerability and oppression of these children and adolescents, and affecting well-established social and cultural practices associated with such movements (Massart, 2009). Rather, it should be emphasized that most people involved in those movements require protection policies meant to ensure all their rights, especially when it comes to social groups such as children (particularly unaccompanied) and undocumented migrants.

3.3 Child and adolescent migration-related detention in transit and destination

Migrants are most often deprived of their liberty through two mechanisms: the criminalization of migration and the detention as an interim measure within a migration procedure (admission, deportation). Children, both unaccompanied and with their families, are affected in many ways by these policies, particularly due to their detention and/or their parent's.

States, civil society institutions, and international bodies, including UN and regional human rights mechanisms, have all affirmed that migrants should not face criminal punishment due to their immigration status or the infraction of migration law (South American Conference on Migration, 2008 and 2009; Global Migration Group, 2010; Special Rapporteur on Human Rights of Migrants, 2008, 2009, and 2010; European Commissioner for Human Rights, 2010; UNICEF TACRO-UNLA, 2010). Nonetheless, while some host countries in Latin America had reformed legislation in order to derogate criminalization of irregular migration³⁷, some developed receiving states have recently carried out legislative reform in order to criminalize irregular migration status³⁸.

Many countries have policies leading to migrants' detention during a procedure that may lead to either their admission or deportation. While administrative detention is generally an exceptional measure, when it comes to migration-related detention it seems to be the norm, despite the fact that

³⁷ Mexico, *Ley General de Población*, reformed in 21st July 2008; Panama, Law 3/2008.

³⁸ For instance, Italy, 2009; USA –Arizona Law SB 1070-, 2010.

international standards indicate otherwise. Children, both unaccompanied and with their family, are also detained in many countries.

The detention of unaccompanied migrant children and of migrant families with children is a situation of extreme concern.³⁹ In most countries, there are no special provisions and policies aimed specifically at granting protection to migrant children in this context, nor alternative measures to detention⁴⁰. The absence of a child and adolescent perspective within migration-related detention policies implies that children and adolescents are treated as adults, in violation of international human rights standards. The Convention on the Rights of the Child, in addition to other well-established human rights principles, explicitly states that children should only be detained as a measure of last resort and, in particular, migrant children should not be detained based on their migration status or that of their parents. It should be clear that the detention of children will never be in their best interest, whether they are unaccompanied or with their family (Steps, 2008; UNICEF-UNLA, 2010). Therefore, alternative measures should be provided to all children within migration control procedures (Special Rapporteur on Human Rights of Migrants, 2009).

Pursuant to Article 37 of the CRC and the principle of the child's best interests, migrant children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of children being unaccompanied or separated, or their migratory or residence status. In exceptional cases where detention is justified, it shall be conducted in accordance with Article 37(b) of the Convention, which requires that detention be conform to the relevant country's law and that it only be used as a last resort and for the shortest appropriate period of time. As a result, all efforts, including acceleration of relevant processes, should be made to allow the immediate release from detention of unaccompanied or separated children and for their placement in other forms of appropriate accommodation (Touzenis, 2008)⁴¹. In this regard, the U.N Guidelines should be followed for the Alternative Care of Children (2009).⁴²

Despite the fact that fundamental standards establish that the detention of migrant children and adolescents should be an exceptional measure, legislation and practices in many Southern and Northern countries demonstrate that there is still a long way to go in order to ensure children's and adolescents' rights within migration control policies (see, among others, HRW, 2009a; IACHR, 2009; Special Rapporteur on the Human Rights of Migrants, 2009; UNICEF TACRO and UNLa, 2010). Examples of arbitrary migration-related detention laws and practices include:

39 See for instance the several Concluding Observations by the Committee on the Rights of the Child addressing this issue, e.g., C.O. on The Kingdom of the Netherlands (CRC/C/NLD/CO/3, 30 January 2009, par. 67), United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/CO/4, 20 October 2008, par. 70.a), Malaysia (CRC/C/MYS/CO/1, 25 June 2007, par. 82), Latvia (CRC/C/LVA/CO/2, 28 June 2006, par. 52), Thailand (CRC/C/THA/CO/2, 17 March 2006, par. 68), Australia (CRC/C/15/Add.268, 20 October 2005, par. 62), France (CRC/C/15/Add.240, 30 June 2004, par. 50); CMW, Concluding Observations on Mexico (cit., par. 42.c), Ecuador (CMW/C/ECU/CO/1, 5 December 2007, par. 23), and Bosnia and Herzegovina (CMW/C/BIH/CO/1, 30 April 2009, par. 25).

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41 The impropriety of detaining migrant children becomes clear when one considers that Article 37 applies to juvenile offenders who, given the reintegration aim of the CRC, should, in the case of conviction, only be deprived of liberty as a last resort.¹²¹ Moreover, many migrant children (perhaps especially, but not only, those that are unaccompanied) most likely fall into the category of victims in the sense of Article 39, rather than of juvenile offenders in the sense of Article 40. Experience unfortunately shows, however, that children are routinely detained upon arrival and thus "stored away". In such cases, children may have difficulty in understanding why they are being "punished". (IOM-Touzenis, 2008).

42 Guidelines for the Alternative Care of Children. Resolution adopted by the General Assembly 64/142. 24 February 2010.

- Legislation regarding migration-related detention that does not distinguish children from adults;
- A lack of alternative measures for adults and children;
- The general absence of basic guarantees of due process, either in law or practice, such as the rights to a guardian, a legal representative, an impartial judicial process and an interpreter;
- The absence of an established maximum length of detention;
- The absence of child-protection officials in detention centers, as well as a general lack of social service provisions, such as education and health care;
- The detention of unaccompanied adolescents below 18 years old and detention facilities that are unsuited for children and/or their families;
- The use of prison-like facilities for administrative detention; and
- The criminalization of irregular migrants, including children and adolescents, i.e., irregular migration is considered a criminal offence.

Additionally, there is a considerable lack of information regarding the experiences of migrant children (both unaccompanied and with their families) within migration control measures (e.g., information about their treatment at borders and in detention centers). Indicators on these issues are absent in most transit and destination countries, and both intra-government and civil society monitoring of these issues is quite poor.

Finally, it has to be borne in mind that the detention of parents due to their migration status may affect their children (i.e., children born in destination countries), particularly their right to development, family life and mental health, among others. Therefore, adopting a child-rights approach, which considers the child's best interests, will require alternative policies addressing the migration status of their parents, including measures facilitating their regularization, access to social rights and family unity, rather than detention and deportation.

3.4 Child deportation or repatriation in transit and destination countries

In case of children migrating with their parents, it is clear that any migration law breach (i.e., irregular entry, irregular stay after expiration of permit) is generally an adult decision. As well, unaccompanied children in transit and host countries should be approached with a protective-based perspective, considering their best interest as a dominant guideline. Nonetheless, children, as adults, are widely and globally facing deportation measures. In this regard, the Special Rapporteur on Human Rights of Migrants has stated that the principle of non-deportation of unaccompanied children should be considered, whereby children should be repatriated only if it is in their best interests, namely, for the purpose of family reunification and after due process of law (2009, § 85; see also UNICEF TACRO-UNLA, 2010).

Similarly, the absence of a child perspective has been widely evidenced in deportation policies. In many countries, children (both unaccompanied and with their families) may be deported for breaching migration law (e.g., irregular entry or expired residence permit) with no consideration for their particular rights and needs. Children's parents may be deported with no consideration for the consequences of family separation. Furthermore, within most of these procedures, the best interest of the child principle is not respected, and due process of law is far from being ensured in many transit and destination countries. Children are generally not granted the right to be heard within their parents' deportation processes (Special Rapporteur on the Human Rights of Migrants, 2009; UNICEF TACRO, 2010).

Children should not be deported or repatriated to their origin country unless it is in the child's best interest (e.g., in order to facilitate family reunification). Decisions regarding deportation and repatriation are often made without due process, and family reunification has often not been effectively organized between States of origin and destination (APDHA, 2008; HRW, 2008). Under the principle of *non-refoulement*, States must also take measures to ensure that non-citizens are not returned or removed to a country or territory where they may be subject to serious human rights violations, including torture and cruel, inhuman or degrading treatment or punishment⁴³.

Beyond the fact that children should not be deported as a punitive measure, in accordance with international human rights standards on deportation, States must ensure that migrants are only expelled from the State party's territory pursuant to a decision taken by the competent authority, following a procedure established by law and in conformity with international standards. That decision should possibly be reviewed on appeal; pending such appeal, the person concerned shall have the right to seek a stay of the expulsion.⁴⁴ In addition, States must: guarantee the persons concerned the right to object to their expulsion and the right to submit their case to the competent authority;⁴⁵ notify migrants and their families of decision in a language they understand; indicate the reasons for the decision (except in some particular cases, it is almost always justified by national security motives).⁴⁶ In case of expulsion, the person concerned shall also be informed without delay of his/her right to have access to the protection and assistance of the consular or diplomatic authorities of his/her State of origin or of a State representing the interests of that State of origin.⁴⁷

Moreover, in most countries, migration processes do not include specific steps aimed at ensuring the right of every child to be heard, whether in procedures concerning their migration status or those concerning the status of their parents. Children should be fully entitled to participate in both administrative and judicial proceedings that may lead to their parents' deportation, if appropriate according to their age and maturity, in order to ensure their rights are respected throughout the process. Children and adolescents must also be fully entitled – by law and in practice – to participate in any proceeding on their own entry and stay in the host country, regardless of whether they are unaccompanied, while seeking to reunite with their parents. The CRC Committee states that:

“Children who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation. For this reason it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings. In the case of migration, the child has to be heard on his or her educational expectations and health conditions in order to integrate him or her into school and health services. (...) The Committee emphasizes that these children have to be provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings. A guardian or adviser should be appointed, free of charge....” (2009, § 123–124)

43 CERD, Concluding Observations: Italy, CERD/C/ITA/CO/15, 16 May 2008, para. 18.

44 CMW, Concluding Observations: El Salvador; CMW/C/SLV/CO/1, 27 November 2008, para. 28.

45 CMW, Concluding Observations on Mexico (cit., para. 13) and Ecuador (cit., para. 26).

46 CMW, Concluding Observations: Mexico (cit., para. 13).

47 CMW, Concluding Observations: Ecuador, cit., para. 26.

In addition to the aforementioned examples of the absence of an age perspective in many migration control policies, recent reports have highlighted migration control policies that may be in breach of international law. Consequently, children and adults may be suffering violations of their rights to asylum and due process, as well as of the principle of *non-refoulement* (Ceriani Cernadas, 2009; HRW, 2009a; UNHCR, 2009).

Finally, it should be noted that, within the context of the current international economic crisis, some States have adopted stricter enforcement of migration laws, including harsher deportation and detention policies, such as raids against irregular migrants, abuses at borders, criminalization of irregular migrants and deportation of parents of children born in destination countries.⁴⁸

3.5 Addressing the rights of children and adolescents left behind

Along with the increasing number of international migrants in the last decades, millions of children have been left behind in their country of origin. As an example, Bryant explains that:

“the growth of international migration in Southeast Asia has affected significant numbers of children. Some necessarily crude calculations suggest that 3-6 million children have been left behind by Filipino parents working overseas; the equivalent figure for Indonesia is something like one million, and for Thailand half a million. These numbers imply that roughly 10-20 per cent of Filipino, and 2-3 per cent of Indonesian and Thai children, have a parent overseas (...) Meanwhile, in Thailand, there are over 100,000 children of undocumented migrants from Myanmar, Cambodia, and Laos. There are tens or perhaps hundreds of thousands of children of Indonesian migrants in Malaysia. Scattered evidence suggests that these children face much greater difficulties than the children left at home by Filipino, Indonesia, and Thai workers” (Bryant, 2005).

It has sometimes been assumed that, because of remittances, children and adolescents left behind may live in better conditions than other members of their community who do not have relatives abroad. On the contrary, children and adolescents left behind by migrant parent(s) may be left in particularly vulnerable situations, at risk of being abused or trafficked, having their basic rights jeopardized, as well as becoming vulnerable to the psychological and social impacts of family separation (Azzedine Salah, 2008; Cortes, 2008). In many cases, States do not account for the special situation of children and adolescents left behind and do not ensure that public policies address their particular needs and vulnerabilities. Attention has mainly focused on how remittances affect children’s well-being.

While it is very important to evaluate the extent to which remittances may improve children’s and adolescents’ well-being (e.g., regarding education, health care and housing), it is also important to remember that neither remittances nor international cooperation for development can replace national development policies. First of all, due to the global financial crisis, a decline in remittance flows has already been recorded in a number of developing countries, which is pushing remittance-receiving households to cut back on some expenses in order to cover basic needs. Secondly, it is clear that remittances should build on, but not replace, government obligations to invest in public services, promote decent work as a central objective and implement social protection programs and poverty reduction, in order to mitigate and reduce vulnerabilities as well as make sure that those left behind still can enjoy their rights to protection, survival and development.

⁴⁸ See, for instance: Itano, 2009; Amnesty International, 2009a; HRW, 2009b.

Likewise, migration alone cannot guarantee the realization of children and adolescents' rights to protection, quality education, parental guidance and full participation in society. Nor can migration modify ingrained gender roles that allocate domestic work to girls and mothers and might limit their right to access paid work and higher education. In assessing the impact of migration on human rights, States must pay special attention to the gender-related effects (Special Rapporteur on the Human Rights of Migrants, 2009). For instance, it has been widely evidenced that the impacts of parental migration include gender disparities, such as inequalities in girls' access to education due to a gendered distribution of household duties (see Cortes, 2008; UNICEF and UNDP, 2007). These impacts should be fully considered when formulating policies meant to respect, protect and fulfill the rights of children and adolescents left behind.

Awareness should be raised about the fact that children from migrant homes must be considered a vulnerable and growing population, and policies must be implemented to provide them with the services they need. This should include the adoption of policies and legislation that strengthen child labor regulations, as in some cases parental migration forces children to drop out of schools and work, in order to help support the family that remains. Specific programs for children left behind can also be valuable and beneficial for single parent households and non-traditional caregivers such as grandmothers or other relatives who, as a result of migration, often care for the migrants' children.

3.6 Economic and social rights in transit and destination countries

There are several key issues that should be taken into consideration regarding the economic and social rights of migrant children and adolescents in countries of destination. First, there is an intrinsic relationship between social rights and achieving social integration into the host society. Social cohesion, equitable human development, as well as democracy and rule of law, may be reinforced if social rights are recognized for all individuals, without discrimination based on nationality or migration status, and if child and gender perspectives are ensured (De Lucas, 2004; Pisarello, 2005; Touzenis, 2008; Special Rapporteur on the Human Rights of Migrants, 2009).

The CRC Committee has observed that discrimination against migrant children and adolescents (particularly the undocumented) and asylum seekers, in the context of their economic and social rights, is hampering social integration, social progress and justice.⁴⁹ Furthermore, every constraint on the social rights of migrant children and adolescents also presents in both the short and long run an obstacle to sustainable and human development principles and goals.⁵⁰ Therefore, linking international migration to the issue of development has opened up new avenues for dialogue and collaboration among governments, revolving around the identification of mutual interest and the creation of 'win-win' situations. While it is important to capitalize on the current political momentum, those supporting and driving this process should be mindful of avoiding inconsistencies in the migration and development discourse with regard to human rights" (GMG, 2008:80).

It should be emphasized that the CRC Committee and other United Nations human rights committees have stressed repeatedly that governments should ensure economic and social rights to all children within their jurisdiction, irrespectively of their nationality, origin, migration status and any other

49 CRC, Concluding Observations: France, CRC/C/FRA/CO/4, 11 June 2009, para. 30; and CRC/C/15/Add.240, 30 June 2004, para. 18.

27 CRC/C/15/Add.240, 30 June 2004, para. 18.

grounds prohibited by the principle of non-discrimination.⁵¹ This core principle of international human rights law has been recognized as *jus cogens*, that is, an imperative international regulation that cannot be ignored under any circumstance (ICHR, 2003). However, evidence from several key actors, particularly UN Committees (such as the CRC and CESCR⁵²), suggests that contrary to international human rights principles, the degree to which the basic social rights of migrant children and adolescents (such as the rights to education, housing, health care and an adequate standard of living) are fulfilled is affected by their nationality and migration status (see also Regional Thematic Working Group on International Migration, 2008; HUMA Network, 2009; PICUM, 2009). This is particularly true for undocumented children's access to education (see **Box 7**).

In its General Comment number 6 on unaccompanied and separated children, the Committee on the Rights of the Child (CRC) Committee stipulates that:

"[T]he enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness." "...States should ensure that separated and unaccompanied children have a standard of living adequate for their physical, mental, spiritual and moral development. As provided in article 27 (2) of the Convention, States shall provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing" (2005)

Nevertheless, some States have developed legislation and policy reform strategies in order to ensure that all children, irrespective of their nationality and migration status, are effectively entitled and able to access education equal in condition to that enjoyed by nationals. Argentina, a Southern destination country, passed a new law in 2004 that includes clear recognition of the rights to education and health care of undocumented migrant children. In 2008, Uruguay adopted a similar provision (Law No. 18.250, January 2008, article 11).

Other constraints on the social rights of migrant children and adolescents can be attributed to the absence of a gender dimension in laws and policies, as well as factors related to the current economic crisis. In particular, migrant female children and adolescents may suffer particular rights deprivations (e.g., as domestic workers) based on the general absence of a gender dimension within migration laws and policies. They are therefore left in vulnerable conditions due to increased gender-related gaps, social exclusion and poverty. Additionally, the current economic crisis may also lead to increased constraints on the social rights of migrant children and adolescents. For instance, restrictions on migrant workers' rights may in turn negatively affect the well-being and human rights of children (ILO, 2009a).

In this regard, it has to be borne in mind that children's social rights are impacted by particular constraints to migrants in irregular migration status, along with lack of regularization programmes. In this sense, the Special Rapporteur has pointed out that:

51 Examples are available in the UNICEF-UNLa database on child migration and human rights at www.hrcam.org.

52 For instance, on the right to education, see Committee on the Rights of the Child (CRC/C/NLD/CO/3, 2009; CRC/C/CHL/CO/3, 2007; CRC/C/SAU/CO/2, 2006), Committee on Economic, Social and Cultural Rights (E/C.12/SWE/CO/5, 2008), Committee on Migrant Workers (CMW/C/ECU/CO/1, 2007; CMW/C/EGY/CO/1, 2007), Committee on the Elimination of Discrimination against Women (CEDAW/C/DEU/CO/6, 2009; CEDAW/C/FRA/CO/6, 2008) and Committee on the Elimination of Racial Discrimination (CERD/C/NZL/CO/17, 2007). For more examples of this, as well other social rights of migrant children, see www.hrcam.org.

“Policies that exclude legal avenues for the regularization of irregular migrants and prohibit the access of irregular (adult) migrants to employment may also have an impact on the standard of living of children. Migration policies should therefore take into consideration the impact that they may have on the enjoyment by migrants of their human rights. In this connection, the Special Rapporteur wishes to highlight the fact that regularization policies constitute a good example of practices aimed at strengthening social integration and cohesion, ensuring the human rights of migrants and attaining State goals such as social security, public health-care coverage and social inclusion.” (2009: § 59).

Box 7: Right to education of undocumented children

A third of the developed countries sampled in the United Nations Development Program Human Development Report (2009), including Singapore and Sweden, did not allow access to education for children with irregular status, while the same was true for over half of the developing countries in the sample, including Egypt and India. In Belgium, education is free and a right for every person, but not compulsory for irregular children. In Poland, education for children between 6 and 18 years of age is a right and is compulsory, but children with irregular status are excluded for funding purposes, which may lead the school to decline to enroll them.

On the one hand, poverty and discrimination (formal and informal) can inhibit access to basic services. Even if children with irregular status have the right to attend a state school, there may be barriers to their enrolment. In several countries (e.g., France, Italy and the United States), fears that their irregular situation will be reported have dissuaded migrant children from enrolling. In South Africa, close to a third of school-aged non-national children are not enrolled for a combination of reasons, including inability to pay for fees, transport, uniforms and books and exclusion by school administrators. Those who are regularly enrolled in school report being subjected to xenophobic comments by teachers or other students.

On the other hand, undocumented migrant children and adolescents are highly affected by inadequate or discriminatory educational provision. In particular, the undocumented population (predominantly low-income Latinos) in the United States has historically had an extremely low school completion rate. According to the 2000 Census, only 40 per cent of undocumented Latino males between 18 and 24, who arrived in the United States before the age of 16, had completed high school or obtained a GED (an equivalent qualification).

A third of the migrant flow from developing countries is aged 12 to 24. Young undocumented migrants suffer problems when they reach the end of the period in which schooling is legally mandated and free of charge. For example, in the United States, in 2006, there was an estimated 1,075,000 undocumented youth between the ages of 5 and 24 for whom legal status presented a serious challenge to their ability to access education. Federal law does mandate that these migrants receive free schooling up to the age of 18. However, the undocumented cannot receive funding to attend colleges (particularly public institutions) in the United States. Indeed, 360,000 of the 1,075,000 undocumented youth from the 2006 study were already in this position, as they were over the age of 18.

Source: UNDP, 2009.

3.7 Social rights constraints linked to migration control policies

Some constraints to the enjoyment of human rights by migrant children and adolescents, including their economic and social rights, are linked to migration control mechanisms. Many migration laws and policies, including some recently adopted, oblige various civil servants and individuals to report undocumented migrants to migration authorities. Some of these provisions are imposed on health-care and education workers, as well as landlords who would like to rent housing to migrants (HUMA Network, 2009; UNICEF TACRO and UNLa, 2010). Consequently, these provisions inhibit migrants from seeking medical assistance, sending their children to school or obtaining a place of residence.

In some cases, this obligation to denounce undocumented migrants also applies to members of the judiciary, preventing migrants from standing before a judge in order to defend their human rights. Therefore, migrant workers' access to justice is limited, particularly in matters concerning their labor rights. According to the Inter-American Court of Human Rights:

“[At] times, undocumented migrant workers cannot even resort to the courts of justice to claim their rights owing to their irregular situation. This should not occur; because, even though an undocumented migrant worker could face deportation, he should always have the right to be represented before a competent body so that he is recognized all the labour rights he has acquired as a worker” (ICHR, 2003, § 159).

Additionally, recent laws criminalizing irregular entry into a country or irregular stay (defined as the lack of, or expired, legal residency) constitute a clear threat to the social rights of migrants, who are unable to enjoy these rights for fear of being detained or convicted while seeking access to social services.⁵³ Moreover, existing legislation criminalizes organizations offering aid to migrants, even those living in particularly vulnerable conditions.⁵⁴ Instead of protecting the rights of people in vulnerable situations, as international human rights standards demand, these measures increase the vulnerability of certain individuals, particularly undocumented migrants, who are further marginalized and denied access to basic rights. Moreover, these constraints obstruct social cohesion and integration, as well as impede equal human development in both the short and long term.

3.8 Cultural rights of migrant children and adolescents in destination countries

Other constraints on the rights of migrant children and adolescents, as well as children of migrant background, include the deprivation of their cultural rights in destination countries. In particular, many destination countries of South-South and South-North migration lack intercultural policies meant to facilitate the social integration. In addition, most countries that do have such policies or programmes do not include an age perspective. In this regard, it is critical that intercultural policies start recognizing – by law and in policies and practice – the cultural rights of all migrants, as well as the multicultural character of host societies. In order to ensure the cultural rights of migrant children and adolescents, as well as children of migrant background, governments should include measures to ensure that children and adolescents are able to enjoy, practice and develop their culture and cultural identity. These measures should include, *inter alia*:

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

54 See Huma Network (2009) on these kind of regulations in countries of the European Union.

- Negative obligations, namely that governments should not interfere arbitrarily in children’s and adolescents’ cultural rights and practices. In this regard, the CESCR (2009b, § 34) has asserted that governments should pay particular attention to the protection of migrants’ cultural identities, as well as their language, religion and traditions and should not prevent migrants from maintaining cultural links with their countries of origin.
- Positive duties to facilitate and create conditions to effectively exercise such rights. This would include the use of an intercultural approach in all public policies, not only those directly related to migrants (i.e., such policies should not be unidirectional towards migrants but should be directed to all groups and members of society, including nationals).

Issues such as language barriers in accessing education and health care, intercultural programmes at school and cultural practices related to adolescent women and their sexual and reproductive rights⁵⁵ should be fully taken into account by public policies. Finally, transit and destination countries should fully respect the cultural rights of migrant children and adolescents belonging to indigenous peoples/communities.⁵⁶

3.9 Family life and family reunification

The right to family life, recognized for every human being in many international human rights treaties,⁵⁷ may be severely affected by migration, particularly in the family reunification context. Indeed, family reunification has been identified as a key element of integration policies, as well as a right that should be promoted and fulfilled within migration policies (see **Box 8**).

As Bhabha asserts “...in most countries citizen children born to immigrant or non-citizen parents have no rights to bring or keep their parents with them, though similarly situated adults do have those rights to family unity or reunification. And yet, no-one disputes that the family is vital to the well-being and upbringing of a child (...) Why then don’t citizen children have the right to maintain this group so fundamental to their well-being in the country of their birth?” (2007).

Box 8: Family reunification

South American countries have stressed that family reunification must be considered the right of all migrants, as well as a core element for better integration into host societies. Similarly, Santiago’s Declaration on Migratory Principles, adopted by Mercosur States and Associates, asserts that the importance of family reunification is a necessary element for the stability of immigrants as a family and a fundamental base of society.

Sources: Santiago Declaration on Migration Principles, 17 May 2004; Fifth South American Conference on Migration, La Paz, November 2004.

55 See CRC Committee, 2003, § 13, 16, 38.

56 Among others, see Yescas and Trujano, 2008.

57 Such as the Convention on the Rights of the Child (arts. 8, 9, 10, 16); International Covenant on Economic, Social and Cultural Rights (art. 10); International Covenant on Civil and Political Rights (arts. 17, 23); Convention for the Elimination of All Forms of Discrimination against Women (art. 16); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (art. 14).

While individual or family decisions may lead to family parting, migration policies can impede or obstruct family reunification and even generate family separation. The following examples highlight existing constraints on family reunification and the effective realization of migrants' right to family life:

- Family reunification procedures, meant to bring children and adolescents left behind to the host country where parents are living, may be too restrictive. Consequently, many children and adolescents remain alone in the countries of origin or decide to migrate irregularly to reunite with their families.
- Adult irregular migration status in destination countries could lead to family separation if a deportation order is enforced without taking into consideration the right to family unity, as well as children's and adolescents' rights.
- In many countries, children born to migrant parents have no rights to bring or keep their parents with them, though similarly situated adults do have those rights to family unity or reunification (Bhabha, 2007).
- Children and adolescents may also be prevented from leaving their country of origin in order to reunite with their parents abroad as a result of tax debts that parents might have accrued (UNDP, 2009).

The Committee on the Rights of the Child considered in General Comment No. 6 (2005) that:

“Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country’s decisions on family reunification therein.

In this context, it should be reminded that States parties should deal in a positive, humane and expeditious manner the child or the parents' applications to enter or leave a State Party for the purpose of family reunification, and should avoid adverse consequences for the applicants and for the members of their family. Children and adolescents left behind may face several constraints to reunification with their parents in destination countries. On many occasions, they must wait years to reunite with their migrant parent(s). In this regard, States both of origin and destination should develop strategies and policies intended to avoid such waiting periods and ensure within a reasonable time frame family reunification (Special Rapporteur on the Human Rights of Migrants, 2009).

A broader approach of family life should be adopted in migration policies. In line with international human rights law, this perspective requires both positive and negative obligations, which at a minimum include policies directed at facilitating family reunification, and severely restricting deportation measures (based on irregular migration status) that might lead to family separation, particularly between spouses as well as children and their parents. Moreover, places of origin should facilitate proper documentation and advocate bilaterally and internationally for flexible and rights-based policies on family reunification.

3.10 Birth registration

In many transit and destination countries, children born to migrant parents face difficulties in obtaining birth certificates. This restriction not only affects the right to a birth certificate (Convention on the Rights of the Child, art. 7; Convention on Migrant Workers, art. 29), but also several other human rights intrinsically connected, such as the right to a name and to be recognized as a person before the law. In

addition, this restriction also presents obstacles to the right to a nationality (either of the country where the child was born or of the country of his/her parents), which in turn can lead to statelessness. Finally, these constraints may also affect rights such as education and health care.

In this regard, for example, approximately one half of the Thai adults in Japan are in an irregular situation, and many are reluctant to register their children with the Thai embassy, or with the Japanese authorities, for fear of being deported (Bryant, 2005).

Usually, the migration status and national origin of migrant parents are the causes of such restrictions even though international human rights standards have repeatedly highlighted that children should never be subjected to such constraints under any circumstance. A parent's condition cannot be used to deny or arbitrarily curb children's rights (ICHR, 2005; Save the Children and Forced Migration Studies Programme, 2009; Special Rapporteur on the Human Rights of Migrants, 2009; UNICEF TACRO and UNLa, 2010; see also www.hrcam.org).

3.11 Xenophobia

United Nations human rights committees have also widely demonstrated that migrant children and adolescents may face xenophobia in countries of transit and destination. Xenophobia may be present in schools and/or expressed in the rhetoric of politicians and public servants, and may even lead to violence.

The Special Rapporteur on the Human Rights of Migrants has highlighted that the criminalization of irregular migration may contribute to increasing xenophobic and racist attitudes towards migrants, which can also impact children in specific ways:

“...criminalizing irregular migrants for the offence of being in a country without adequate documentation makes all migrants, regardless of immigration status, vulnerable to potential racist or xenophobic acts. Societies quickly distort the particular situations of migrants, and associate them with criminality, including organized crime, drug trafficking, robbery or even terrorism...This detrimental pattern of individual and group behavior in some transit and destination societies has a negative impact on children's upbringing since xenophobic models are handed down to them by adults and discriminatory sectors of society (2010, § 16, 17).

Within the context of the economic downturn, evidence suggests that there is an increase in violence and xenophobia against migrants, including children and adolescents. Moreover, migrants who have been victims of xenophobia and racism, including children and adolescents, have faced constraints on their effective access to justice, legal advice and protection services (see www.hrcam.org).

In this regard, several international treaties (CRC, CERD, CEDAW) and the Declaration and Plan of Action adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, along with the UN Bodies observations and recommendations provide an important framework (principles, strategies, standards and goals) to address this issue by guiding public policies on the prevention, prosecution, and punishment of such attitudes. In addition, case-law adopted by

regional human rights bodies, such as the European Court of Human Rights, provides useful standards on States' duties for investigating and denouncing acts suspected of being xenophobic or racist.⁵⁸

3.12 Regularization programmes

Regularization programmes are a key element of migration policies. According to the Office of the High Commissioner for Human Rights (OHCHR, 2008, par. 47), migrant regularization programmes:

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

Additionally, regularization programmes have been considered an act of social justice, as they provide identity to undocumented migrants, protect them from abuses and facilitate their effective integration into the host society (including labor markets), while also providing human capital to host countries and transparency to public policies.⁵⁹

“[I]t has been strongly argued that control measures alone are insufficient to tackle irregular migration and that a comprehensive approach is required, including the need to adopt a package of more ‘constructive’ measures. The protection of the rights of this vulnerable group forms an integral aspect of such a comprehensive approach which also comprises the need to address informal labour markets where both national and migrant workers are found; provide more regular avenues for migrant workers to be able to meet the demand for labour in *all* sectors of a destination country’s economy; and give serious consideration to the regularization of those with irregular immigration status.” (GMG, 2008, p. 43)

Recently, several destination countries (both in the South and North) have implemented regularization programmes for migrants who have been living in their territory without a residence authorization. Despite the particularities of each case, these initiatives highlight that regularization is a measure resulting in a range of positive outcomes for migrants and the host society. Indeed, regularization plans are considered an effective and appropriate tool for development. It must be stressed that regularization programmes should pay particular attention to those children and adolescents who have been victims of any kind of abuse or exploitation, including trafficking. Granting them legal residence, along with other protection measures, should not be conditional to their collaboration in the investigations or trials of their persecutors, as is the case in some countries.

Finally, it is important to bear in mind that the regularization of migrants living in host countries might be addressed in at least two main ways: 1) Extraordinary programs directed at providing regular residence to those migrants that are in a territory without proper authorization at a certain time; and 2) permanent channels established by law that entitle migrants to access legal residence on the basis of

58 See, among others, ECtHR, case *Nachova et al. v. Bulgaria*, Applications 43577/98 and 43579/98, Judgment of 6th July 2005.

59 See, among others, OHCHR, 2008, para. 47; Fifth South American Conference on Migration, Declaration of La Paz, 26 November 2004, para. 17; Ibero-American Forum on Migration and Development, Cuenca, Ecuador, 10–11 April 2008, Final Report, Session IV, Integration of Migrants, para. E.

several grounds, e.g. a labor contract, family ties with nationals or regular residents, length of time in the country, among others. Both types of measures are necessary and effective for achieving the abovementioned outcomes, as well as to address irregular migration more comprehensively.

4. Policy recommendations

In order to ensure this integrated and comprehensive human rights-based and gender-aware approach to children, women and migration, it is crucial that countries of origin, transit and destination develop a wide and sustainable strategy of legislative and policy reforms. Reforms should ensure that migrant children and adolescents, as well as those born in transit and destination countries, are fully incorporated into child-related policies, including social protection programmes. Additionally, legislation, policies and practices should be reviewed in order to eliminate any kind of discrimination against migrant children and children born in host countries. National and regional initiatives aimed at promoting legislative reform should incorporate existing good practices on the integration of human rights standards into migration policies, as well as international agreements related both to migration and issues that have an impact on migration, while ensuring an age, gender and non-discrimination dimension.

The human rights approach to legislative reform “related to the CRC is an approach based on the full recognition of the equal rights of children, boys and girls, as subjects of rights in society...[,] an approach that is directed towards the effective implementation of such legislation in all segments of society and all aspects of children’s lives” (UNICEF, 2008b, p. 2). It follows that this process should include all migrant children and adolescents within society, irrespectively of their nationality or migration status or the one of their parents. Additionally, practices obstructing the access of migrant children and adolescents, and children born in destination countries, to their rights should be identified in order to develop strategies to overcome them.

Gender issues and the protection of human rights must be at the center of the migration agenda. Women who stay behind as heads of households have special needs, as do the increasing numbers of women migrating across borders. Female migrants, especially girls and irregular migrants, are often vulnerable to trafficking, exploitation, HIV/AIDS and other human rights violations and need special protection. In countries of origin, women and girls considering migration need to be informed about the risks of irregular migration. Gender sensitive migration policies are needed to promote children’s best interests and ensure women benefit from migration.

It is important to note that legislative reform encompasses more than merely writing new laws. Implementing the Conventions on the Rights of the Child and on the Elimination of All Forms of Discrimination against Women requires developing children, adolescents and women’s rights through law, policy, budgetary and institutional reform at the national and international level:

“[L]egislative reform involves reviewing and reforming not only laws but those things necessary to effectively implement them—legal and other governmental institutions, social and economic policies, budget allocations, and the process of reform in the country. From a rights perspective, legislative reform is a complex process that should be a catalyst for broad measures that transform the legal and administrative frameworks that define and direct relations amongst the government, individuals, and private

actors...A human rights-based approach (HRBA) to legislative reform takes into account the reality behind law reform. Effective reform must be participatory and must take into account the budgetary, policy, and institutional requirements for effective implementation of the law.” (UNICEF, 2007, p. 11)

Additionally, States Parties to the Convention on the Rights of the Child are duty-bound to ensure that its provisions and principles are fully reflected and given legal effect in relevant domestic legislation (art. 4). As stated by the CRC Committee in General Comment No. 5, it is important to ensure that domestic law reflects the identified general principles in the Convention (art. 2, 3, 6 and 12).⁶⁰ It is also crucial that all relevant ‘sectorial’ laws consistently reflect the principles and standards of the Convention. In the case of any conflict between an international treaty, such as the Convention, and domestic legislation, predominance should always be given to the Convention, in light of article 27 of the Vienna Convention on the Law of Treaties⁶¹ (CRC Committee in General Comment No. 6).

At the 12th Session of the Human Rights Council on the ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development’, the Council called upon States to:

- 1) “[P]romote and protect effectively the human rights and fundamental freedoms of all migrants, especially those of children, regardless of their status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party”; and
- 2) “[T]ake appropriate measures to promote and protect effectively the rights of children who are left behind in their country of origin by migrating family members”.⁶²

The following set of recommendations are proposed, which espouse the aforementioned recommendations of the Human Rights Council and intend to contribute to a comprehensive rights-based approach to the migration-development nexus, with age, gender and non-discrimination dimensions:

Countries of origin, transit and destination

- Ensure a comprehensive and coherent rights-based approach to migration and development policies, including a child, gender and non-discrimination perspective;

60 Principles are formulated, in particular, in articles 2, 3, 6 and 12.

Non-discrimination: The Convention on the Rights of the Child protects every child regardless of nationality or migration status and guarantees all of their rights.

Best Interests of the Child: article 3 states that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Life, Survival and Development and adequate Standard of Living (articles 6 and 27): The right to survival is related to the right to an Adequate standard of living, the highest attainable standard of health, nutritious food and clean drinking water.

The Right of the Child to be Heard (article 12): Children have the fundamental right to formulate opinions about all matters that affect them and to express their opinions. The Convention establishes the principle that children’s views should be heard and given due attention, taking into account “the age and maturity of the child”.

61 Vienna Convention on the Law of Treaties, article 27: Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

62 See Human Rights Council (2009), para. 3–4.

- Include adequate provisions in general laws to ensure that all children have an equal right to protection and support, regardless of their nationality or immigration status and in accordance with the Convention on the Rights of the Child; and
- Build up or strengthen data on international migrants, including gender and age dimensions.

Countries of origin

- Tackle root causes of migration, including irregular migration, ensuring that child and gender dimensions are considered;
- Develop policies addressing the specific vulnerabilities of children and adolescents left behind and ensuring their rights, particularly their economic, social and cultural rights and their right to development; and
- Ensure participation of children and adolescents left behind in policies affecting them, especially in programmes meant to ensure their rights, including their right to reunite with their parents in the host country.

Countries of transit

- Develop or strengthen strategies that advocate for a child rights-based approach in the design of policies that aim to ensure migrants' rights while they are in transit to another country;
- Develop policies and practices to address mixed migration flows;
- Develop and strengthen measures aimed at preventing the increasing number of migrant adults and children's deaths during transit; and
- Facilitate cooperative work between the institutions located in transit countries and the ones in origin and destination countries.

Countries of destination

- Guarantee the economic, social and cultural rights of migrant children and adolescents, as well as their right to a family;
- Ensure the inclusion of migrant children in childhood policies;
- Strengthen a HRBA, including child and gender dimensions, in international development cooperation policies;
- Prevent detention and criminalization of migrant children and adolescents;
- Avoid deportation of children and adolescents, either unaccompanied or travelling with their parents, as a punitive measure;
- Ensure family reunification of unaccompanied children and adolescents, either in the country of origin or destination, according to their best interest;
- Create regularization policies to facilitate family reunification;
- Involve child protection officers, trained in a HRBA, in migration policies that may affect children and adolescents, both unaccompanied and with their parents;
- Develop indicators on migrants' rights within the enforcement of migration control policies;
- Address discrimination, including racism and xenophobia; and
- Review bilateral and international policies that may have a negative impact on development and human rights in developing countries, i.e., policies that affect the root causes of migration.

States, regional and international organizations, civil society and non-governmental organizations

- Work together to narrow the protection gap for **unaccompanied migrant children** by:

- Reforming law and policy;
- Improving data collection, research and evaluation;
- Developing practical tools to support Member States; and
- Funding relevant organizations, actors and projects.⁶³

The following are recommendations for countries of origin, transit and destination that should be considered by governments, in order to effectively address the circumstances of women and girls affected by migration.

Gender

- Redress conditions in places of origin – such as poverty, lack of job opportunities, gender discrimination – which may force people to migrate or make women and girls more vulnerable to irregular migration including trafficking.
- Bilateral agreements between sending and receiving areas should be developed in order to protect women and girls migrants' rights.
- Eliminate any existing restrictions on internal migration in places of origin and emigration so that women and girls in particular are not forced into irregular and hence more dangerous channels for migration.
- Measures should be developed to ensure sufficient regular channels for women's entry, to avoid them being pushed into more risky irregular channels and trafficking.
- Support for sending-countries' own citizens migrating to other countries, including specific policies on recruitment agencies, agents and other related business to reduce abuse of potential migrant workers, including unreasonable fees and harassment during transit.
- Resource centers should be established, through sending-countries' embassies or an officer responsible for migrant women and girls in receiving countries, that permit migrant women and girls (in particular) accessing information on, for example, how to obtain their rights, access services and how to deal with abuse.
- Gender policies on asylum, recognizing gendered forms of persecution, should be adopted.
- The rights and the protection needs of trafficked persons should be at the center of approaches to combat trafficking. Trafficked women and girls need to have full information about and access to the asylum system.
- There is an urgent need for sex-disaggregated migration data and gender-sensitive research. Good data on international migrants flows and cyclical migration, as well as research on the root causes of migration and the extent of human rights abuses are essential to sensitize policymakers to the needs of female migrants and for evidence-based gender-sensitive policy formulation and programme implementation addressing the needs of female migrants.

⁶³ See Save the Children et al., 2009.

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