THE RIGHTS OF MIGRANT CHILDREN: CHALLENGES FOR CHILEAN MIGRATION LAW
THE RIGHTS OF MIGRANT CHILDREN: CHALLENGES FOR CHILEAN MIGRATION LAW*

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I. INTRODUCTION.

In its concluding observations of September 2011, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) noted that a new migration law is under preparation in Chile, and invited the Chilean State to ensure that the draft law is passed in the near future and that it fully complies with international standards protecting the rights of migrant workers and members of their families and, in particular, with the provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.1 These recommendations followed others made to Chile by United Nations human rights treaty bodies, such as the Committee on the Rights of the Child in February 2007, to enhance protection of the rights of refugee, asylum-seeking and migrant children.2

* This article is a translation (of the original in Spanish) of chapter 1 of the book “Los derechos de los niños, niñas y adolescentes migrantes, refugiados y víctimas de trata internacional en Chile. Avances y desafíos” [The rights of child and adolescent migrants, refugees and victims of international trafficking in Chile. Progress and challenges], Santiago, Chile: UNHCR, IOM, UNICEF, 2012.

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1 The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families considered the initial report of Chile (CMW/C/CHL/1) at its 169th and 170th meetings (CMW/C/SR.169 and 170) held on 13 and 14 September 2011. At its 180th meeting, on 21 September 2011, the Committee adopted its Concluding Observations. See Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Available online at: http://www2.ohchr.org/english/bodies/cmw/docs/CMW.C.CHLCO.1-E.pdf

2 “The Committee welcomes the amendments to the Constitution which seek to eliminate statelessness for children born to Chileans abroad, however remains concerned that children of foreign nationals without legal residence in Chile may remain exposed to statelessness. Furthermore, the Committee regrets that the State Party has still not adopted adequate legislation in accordance with international obligations for refugee protection. The Committee is also concerned that refugee, asylum-seeking and migrant children lack adequate access to health services while their applications to the national registry system are being processed, and that they face de facto discrimination in exercising their right to education. Furthermore, the Committee regrets the paucity of information on the situation of refugee, asylum-seeking and migrant children in the State party report and the State party reply to the list of issues.” Committee on the Rights of the Child, 44th session, Concluding Observations. Consideration of the Periodic Report Submitted by the State of Chile, 2007, paragraph. 63. Available online at: http://www2.ohchr.org/english/bodies/crc/crcs44.htm. Some of these recommendations have been adopted by the State of Chile, such as the adoption of a refugee law and other
In view of those recommendations and the Chilean government’s ongoing legislative review of migration law, this article identifies a number of the key regulatory challenges that a future Chilean migration law will face in providing a comprehensive framework of protection for the rights of migrant children. Accordingly, it does not represent a finished study of all current legal and administrative provisions on migration that are relevant for guaranteeing the rights of migrant children. Instead, the article uses standard human rights principles to systemize some of the main rights and guarantees that governments and legislatures should seek to uphold in when revising migration law and institutions, as applicable to migrant children and adolescents.

Naturally, to fully protect and guarantee the rights of migrant children requires legal and institutional reforms that extend beyond the domains of migration as such. For example, legislation is needed that comprehensively protects the rights of all children and adolescents (hereinafter referred to as C&As), which makes it possible to create the formal and material pre-requisites and guarantees for effective exercise of their rights (including those who are asylum seekers, refugees or victims of international trafficking). The same may be said about the need to create a Children’s Ombudsperson (Defensor del niño), with autonomy and independence from the political authority of the day, to defend and protect the rights of all C&As, including those who are migrants, asylum seekers, refugees and victims of international trafficking, against abuse by authority and the private sector.

In this context, and recognizing that different issues involved in the comprehensive protection of migrant children cannot be completely regulated by migration law, we believe that this reform process in Chile should be harnessed to achieve two administrative measures on health and education. The full effectiveness of these measures is to some extent reviewed in this article.


There are several laws that are germane to this subject, the most important being Decree Law 1094 (1975) of the Ministry of the Interior establishing regulations on foreign nationals in Chile. See also Supreme Decree 597 of 1984, of the Ministry of the Interior (regulations to the Law on Foreign Aliens); Supreme Decree 5142 of 1960 of the Ministry of the Interior (establishing regulations on the nationalization of foreign nationals) and Presidential Instruction 9 of September 2008, establishing the national migration policy, among others.

For a general discussion of what should be included in an overall reform of childhood institutions in Chile, see “Nueva Institucionalidad de Infancia y Adolescencia en Chile: Aportes de la sociedad civil y del mundo académico” [New institutional framework for childhood and adolescence in Chile], UNICEF, Reflexiones, Infancia y Adolescencia series, No. 13, Santiago, Chile, January 2012, available online at: http://www.unicef.cl/unicef/public/centrodoc/ficha.php?id=363.
objectives: (a) promoting a rights perspective in migration policies, institutions and legislation; and (b) defining an explicit nexus between legal standards on migration and the rights and guarantees recognized by the Convention on the Rights of the Child (hereinafter referred to as the CRC).

II. HUMAN RIGHTS, MIGRATION AND COMPREHENSIVE CHILDHOOD PROTECTION

One of the basic characteristics of human rights is that they are “universal”, which means three things at least: (a) human rights are the rights one has simply because one is a human being; (b) human rights hold against all other persons and institutions, as the highest moral rights they regulate the fundamental structures and practices of political life; and (c) human rights are almost universally recognized and accepted, at least in word or as ideal standards.6

Without prejudice to the universal nature of human rights, their formal and material recognition still remains closely linked to certain hypothetical —non-categorical — imperatives that significantly restrict the full exercise of human rights for certain groups of people. Criteria such as nationality, sex, age, race, colour, gender, political opinion and religious beliefs, social and economic status, among others, tend to operate as differentiating factors that distort the universal nature of human rights.7

For that reason, the international community, aware of the special vulnerability8 of certain individuals, groups of individuals and peoples, has made systematic progress in building stronger legal standards to protect their rights.9 Examples are

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7 Characteristics explicitly considered as discriminatory in international human rights instruments and in domestic constitutions are usually identified as “suspect classifications”. These categories (e.g. national or social origin, birth, gender, colour, race, among others) are subject to a strict scrutiny test, requiring the existence of “very strong reasons” or “an imperious social need” (based, in turn, on criteria of objectivity and reasonableness) to justify the distinctions based on them. See United States Supreme Court, *Korematsu v. United States*, 323 US 214; *Loving v. Virginia*, 4666 US 429; and Constitutional Court of Colombia, Judgment C-101/05. For an explanation of the doctrine of suspect classifications, see Ariel Dulitzky, *El Principio de Igualdad y No Discriminación. Claroscuros de la Jurisprudencia Interamericana* [The principle of equality and nondiscrimination. Light and shade in Inter-American jurisprudence] online at http://www.cdh.uchile.cl/anuario03/4-Articulos/anuario03_articulo_01_%20Dulitzky.pdf, viewed on 23 September 2011.

8 On the notion of vulnerability of certain individuals, groups of individuals and peoples, see Nos. 3 and 4 of the Brasilia Regulations: “(3) Vulnerable people are defined here as those who, due to reasons of age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances, find it especially difficult to fully exercise their rights before the justice system as accorded to them by law. (4) The following may constitute causes of vulnerability: age, disability, belonging to indigenous communities or minorities, victimization, migration and internal displacement, poverty, gender and deprivation of liberty.” See *Brasilia Regulations Regarding Access to Justice for Vulnerable People*, online at http://www.cumbrejudicial.org/c/document_library/get_file?uuid=10cef78a-d983-4202-816e-3ee95d9c1c3f&groupId=10124, viewed on 9 September 2011.

9 See International Convention on the Elimination of all Forms of Racial Discrimination;
migrants and their families, who are often ignorant of the laws and the language of their host country, and sometimes face open hostility from the population, and even from the authorities. This is particularly serious in the case of undocumented or irregular migrants, whose status exposes them even more to abuse, such as arbitrary arrest and lack of due process; mass deportation; discrimination in granting nationality or gaining access to the social services to which foreigners are legally entitled; subhuman conditions of detention; harassment by authorities such as police and immigration officials; and complete lack of defence against exploitation by unscrupulous employers. Such circumstances affect women and migrant children in particular, who are also exposed to excesses such as sexual harassment, physical abuse and deficient working conditions.¹⁰

The vulnerability described above is accentuated when two vital circumstances combine: being a child and being a migrant at the same time. In this situation, many of the potentialities and benefits of migratory processes can be eclipsed by the treatment that children receive during the migration process, particularly in the case of undocumented C&As and children of irregular migratory status, whose rights may be violated through measures such as arbitrary deprivation of liberty; and their access to education and health care services may be restricted or obstructed.¹¹ Vulnerability can reach extreme proportions for C&As who are unaccompanied¹² or separated from their parents,¹³ who often risk deportation without receiving the protection measures to which they are entitled, and are also particularly prone to become victims of the sale of children or human trafficking.¹⁴
In view of this, the international community has created a special regulatory framework, based on general international treaties that give rise to resolutions, recommendations and other provisions, along with international and regionally specific standards. This legal framework makes it imperative that States pay special attention to protecting the rights of all migrants, and migrant children in particular, when designing, implementing and supervising migratory policies and legislation.

Concern for effective protection of the rights of migrants must also be accompanied by principles, rules and standards designed specifically to meet the needs arising from child and adolescent migration. This entails a duty on governments to design migration policy and legislation that focuses on providing comprehensive protection for the rights of migrant C&As and being sensitive to their specific needs and vulnerabilities. The scope of action on this issue thus encompasses a children’s rights perspective in migration policies and laws that recognizes all human rights for all migrant children, irrespective of their age, gender, nationality or migratory status.

III. SPECIAL STANDARDS APPLICABLE TO MIGRANT CHILDREN: UPHOLDING THEIR RIGHTS.

Under the provisions of the CRC, States are required respect and ensure the rights proclaimed in this international instrument to all children under their jurisdiction without any distinction, irrespective of race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, economic status, physical impairment, birth or any other condition of the child, its parents or its legal representatives. This obligation extends to the adoption of all measures needed to ensure that the child is protected against all forms of discrimination or punishment owing to his or her status, activities, or the opinions expressed or beliefs held by his or her parents, guardians or family members.

Accordingly, the general principle applicable to the standards of rights for migrant children is the full exercise of all rights recognized by the CRC, other international human rights instruments, and domestic legislation, without the child’s migratory status (or that of his or her parents, guardians or family members) affecting the enjoyment of these rights. As noted by the Committee on the Rights of the Child,
the State’s obligations under the CRC are applicable to all children within its territory and those who are, for other reasons, subject to its jurisdiction (article 2). These State obligations may not be arbitrarily and unilaterally restricted, whether by excluding zones or areas of the territory, or by establishing specific zones or areas that are wholly or partly outside its jurisdiction. Moreover, under the CRC, the State’s obligations are applicable within its borders, even with respect to children who come under its jurisdiction having entered national territory illegally. Accordingly, the enjoyment of the rights stipulated in the CRC is not restricted to children who are nationals of the State party. Unless explicitly stipulated to the contrary in the CRC, all children rights are also applicable to asylum-seeking, refugee, and migrant children, irrespective of their nationality or statelessness, or their immigration status.\(^{19}\) In other words, the purpose of International Human Rights Law is to generate a framework of protection in which “being a child” takes precedence over “being a migrant”, with migratory regulations that observe this fundamental principle.\(^{20}\)

Given the special vulnerability of migrant children, there are a number of rights and guarantees that are particularly important for their due protection. Without being exhaustive, this list, in conjunction with an analysis of certain comparative legislative practices that recognize these rights and guarantees, will make it possible to identify some of the constituent elements of migration laws, with a rights perspective. These should serve as a framework for reviewing Chilean legislation on this subject.\(^{21}\)

1. CIVIL AND POLITICAL RIGHTS OF MIGRANT CHILDREN.

As holders of the human rights recognized by International Law and the Political Constitution of the Republic of Chile,\(^{22}\) migrant C&As are entitled to all

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19 Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, (op cit, note 12), paragraph 12.


22 “Sovereignty rests essentially with the Nation. It is exercised by the people through the plebiscites and periodic elections, as well as by the authorities established by this Constitution. No group or individual may assume its exercise. The exercise of sovereignty recognizes as a limitation the respect for the essential rights originating from human nature. It is the duty of State agencies to respect and promote the rights guaranteed by this Constitution and by
fundamental rights granted to human beings. In other words, irrespective of their migratory status (regular or irregular) or nationality, migrant children enjoy the general range of human rights that the State of Chile is obliged to respect and guarantee. Nonetheless, given the practical difficulties that migrants and their family members experience in upholding their rights, there are a number of rights and guarantees that are particularly important in the case of migrant children, in relation to their entry into the country, residency, permanency, departure, re-entry, expulsion and control.²³


International Human Rights Law has gradually consolidated a major guiding principle: States should consider irregular migration as an administrative offence, and thus reverse the trend towards more severe punishment.²⁴ This stems from the tendency to apply the human rights framework to bilateral and regional agreements for managing migratory flows and protecting the national interest.²⁵ As migration laws in most countries lack a C&A rights approach, the treatment of irregular migration as a serious offence has serious impacts on children’s rights, who consequently suffer the effects of the criminalization of irregular migration by their family members and themselves.²⁶

In Chile, this issue is particularly important in view of provisions on migration law offences and sanctions contained in paragraph 1 of Title II of Decree Law 1094 of the Ministry of the Interior (which defines regulations governing foreign nationals in Chile).²⁷ On this point, the Committee on the Protection of the Rights of All international treaties ratified by Chile and in force.³² Political Constitution of the Republic of Chile, Article 5, online at http://www.leychile.cl/Navegar?idNorma=242302

²³ This point is fundamental, because current Chilean legislation regulates these issues through Decree Law 1094 (1975, of the Ministry of the Interior, which defines regulations on foreign nationals in Chile that do not contain explicit rights or guarantees for migrant children. See Decree 1.094, Ministry of the Interior, 1975, Article 1, online at: http://www.leychile.cl/Navegar?idNorma=6483.

²⁴ The criminal offences created by States include irregular entry, lack of a residency permit, use of an expired residency permit, or unauthorized entry after being subject to a deportation order with re-entry prohibited.


²⁷ For example, articles 68 and 69 of that decree law provide as follows:

“Article 68. Foreign nationals entering the country or attempting to leave it, using falsified or adulterated documents, or documents issued in the name of another person, or making use of them during their residency will be subject to the maximum minor prison term, followed by expulsion as soon as the sentence imposed is completed.

In offences of this type, suspended sentences shall not apply.

The provision of this article shall not apply if the foreign national makes the statement referred to in article 35 (2).
Migrant Workers and Members of their Families has made the following observation:

24. The Committee is concerned that migrant workers need an authorization to leave the country if they have been subject to sanctions imposed by the administrative authority for infringement of Decree-Law No. 1.094 of 1975 on foreigners.

25. The Committee urges the State party to review its legal provisions to ensure that all migrant workers, including those who have been subject to sanctions imposed by the administrative authority for infringement of Decree-Law No. 1.094, are free to leave the State party, except if the restriction is necessary to protect national security, public order, public health or morals or the rights and freedoms of others, in accordance with article 8 of the Convention.

It is also essential that Chile's future migration law consider the effects of the deportation and/or expulsion of irregular migrants on children’s rights. On this point, International Human Rights Law has formulated a number of basic criteria that States should bear in mind to consider the best interests of the child in this type of decision. These criteria include the following:

a. States should observe the principle of non-deportation of unaccompanied children, whereby children should be repatriated only if it is in their best interest, namely, for the purpose of family reunification and after due process of law;

b. The enforcement of the principle of non-deportation and strict repatriation requires public policies and a legal framework in both the country of origin and the country of destination;

c. Migration policies must avoid any “punitive approach” and instead prefer a “protection approach” based on the best interests of the child;

d. States should also consider the possibility of reunification in the country of destination;

e. Within deportation procedures, States should fulfil “age appropriate” due process of law, including, inter alia, rights to a guardian, a legal representative, free legal aid, access to jurisdiction, effective remedy, an

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Article 69.- Foreign nationals entering the country or attempting to leave it in a clandestine manner shall be subject to a minor prison sentence of maximum degree.

If this occurs through unofficial places, the penalty will be a minor prison sentence of minimum to maximum length.

Persons entering the country when there is a restriction or prohibition on their entry will be subject to a penalty ranging from the maximum minor prison sentence to a major prison sentence of minimum length.

Once the penalty imposed in the aforementioned situations has been completed, the foreign nationals in question will be expelled from national territory.” Decree Law 1094, (op cit, note 23).

28 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, (op cit, note 1), paragraphs 24-25.
interpreter if necessary and to be heard; and lastly
f. Mechanisms are also needed to ensure children’s rights and perspectives within the deportation procedures of their parents (based on their migration status), especially their right to be heard.\textsuperscript{29}

1.2. Non-deprivation of liberty for migrant C&As: Avoid administrative detention and ensure adequate conditions when imposing interim measures.

As noted by the MERCOSUR Institute for Public Policy on Human Rights, the special needs involved in protecting the rights of migrant children, given their vulnerable status, are particularly visible in certain circumstances, such as the deprivation of liberty related to their migratory status, which can be imposed in two ways. One involves using deprivation of liberty as a punishment for having entered the other country without authorization or being there without a residence permit, or with an expired one (this type of punitive response to migratory irregularity is usually referred to as the criminalization of irregular migration). The second reason for the deprivation of liberty of migrants (in general and children in particular) is detention as an interim measure as part of a migratory procedure, generally expulsion from the country.\textsuperscript{30}

In the case of Chile, although migrants are not imprisoned as a punishment for violating migration law, detention is used as an interim administrative measure. This issue has been addressed by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, which has stated:

\textit{26. While noting that migrant workers detained for infringement of migration laws are placed in administrative custody, the Committee is concerned about the lack of information received on the length and conditions

\textsuperscript{29} Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, A/HRC/11/7, 14 May 2009, paragraphs 56-59; and Committee on the Rights of the Child, General Comment No. 6, (\textit{op cit, note 12}), paragraphs 81-90. See also, the Migration and Foreign Aliens Law of Costa Rica, Law No. 8764, of September (in force since March 2010), Article 185: “The deported foreign person may not return to the country within five years. The director general, through a justified resolution, may on an exceptional basis authorize re-entry before the said period has expired, as established in article 44 of this law. Minors shall not be subject to deportation or expulsion from national territory unless this is in their own interest;” Decree Law 3/08 of Panama, of 22 February 2008, article 66: “Before issuing a deportation order, the National Migration Service shall: (...) 6. Seek to preserve the best interests of minors and the family unit;” and the Migrations Law of Paraguay, No. 978, of 27 June 1996, chapter V (Cancellation of permanency), article 35: “Ordinary justice: (a) prior to issuing sentence may provide a reasonable period of time to regularize their migratory status; and (b) it may decide not to cancel permanent residency on the grounds of old age, serious health condition, the fact that their spouse or direct descendants are Paraguayans and live in the country, or when the spouse and indirect descendants, minors or persons with disabilities, are foreign nationals with permanent residency in the country”.

\textsuperscript{30} MERCOSUR Institute for Public Policy on Human Rights, \textit{Request for an Advisory Opinion on Childhood Migration before the Inter-American Court of Human Rights}, 6 April 2011, p. 5. The Advisory Opinion’s request was signed by the Governments of Argentina, Brazil, Paraguay and Uruguay.
It is a well-established principle in International Human Rights Law that the deprivation of liberty of any person constitutes an *ultima ratio* measure, which occurs independently of the nomenclature, nature or modality adopted in practice. In other words, detention may be referred to by terms such as “shelter”, “apprehend”, “accommodate”, “secure”, “intern”, “caution” etc. What matters for determining the existence of potential deprivation of liberty is whether the person subject to such a measure can freely enter and leave the place where he or she has been housed. In this regard, administrative or precautionary detention of migrant C&As in Chile involves the potential deprivation of liberty of minors, which should be analysed according to the right to personal freedom to which all children are entitled.

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31 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *(op cit, note 1)*, paragraph 26.

32 The Inter-American Commission on Human Rights defines deprivation of liberty as “any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.” See *Report on Citizens Security and Human Rights*, 2009, OEA/Ser.L/V/II. Doc. 57, 31 December 2009, paragraph 143. Similarly, Rule 11 of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, adopted by General Assembly Resolution 45/113 of 14 December 1990 states: “The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.”

33 “States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”. *Convention on the Rights of the Child, (op. cit., note 15 above)*, Article. 37.
The Committee on the Rights of the Child has been particularly clear on this point, setting out two fundamental principles relating to the deprivation of liberty of C&As: (1) the detention or imprisonment of a child shall be in conformity with the law and shall only be used as a last resort and for the shortest possible period of time; and (2) no child shall be deprived of his or her liberty unlawfully or arbitrarily. These principles give rise to a number of specific regulations which Chilean migration law needs to strictly observe to fulfil international standards on the subject. These include the following:

a. As a general rule, and as a logical corollary of the principles of best interests of the child, innocence and non-penalization of migration, no C&A migrant should be deprived of his or her liberty, even under an administrative or precautionary detention measure.

b. By virtue of the foregoing rule, the legislation should include a set of effective alternatives for complying with migration regulations, so as to ensure that migrant C&As are not deprived of their liberty.

c. In cases where administrative or precautionary detention of migrant C&As does occur, the State must guarantee each and every one of the rights to which the children deprived of liberty are entitled, particularly: that the period of detention be expressly limited by law; their detention be the subject of periodic review by a competent, independent and impartial authority or judicial body; to receive adequate legal or other assistance; to be held separately from adults; to remain with their direct family members, and to be guaranteed their rights to personal integrity, health, education, and adequate food and housing.


As the OAS Special Rapporteurship on Migrant Workers and Their Families has indicated, in any non-criminal (vgr. Administrative, civil, labour, etc.) proceedings against a migrant worker, a degree of due process must also be respected. Accordingly, whenever effective enjoyment of a right or a legitimate interest is at stake, the authorities should rule on the case only after the interested party has been duly heard. Furthermore, in cases where the persons involved in the process are children, the duty to uphold their fundamental guarantees of due process is maintained and reinforced.

When governments make an administrative decision that affects the rights of migrants (whether adults or children), the latter, irrespective of their migratory status, are entitled to a fair and public hearing by a competent, independent and


36 Inter-American Court of Human Rights, Advisory Opinion, OC-17/02, Juridical Condition and Human Rights of the Child, of 28 August 2002, paragraphs 92-103.
impartial tribunal established by law. As noted by the Inter-American Court of Human Rights, the range of minimum guarantees of the right to due process applies to the determination of rights and obligations of a criminal, civil, labour, fiscal or any other nature. In other words, migrant C&As are fully entitled to guarantees of due process at both the administrative and the judicial levels. These general guarantees must be supplemented by specific guarantees such as the right to consular assistance, no collective expulsion orders (the situation of each person must be reviewed individually) and the right to be assisted by an interpreter.

Another basic element of due legal process is the right to receive legal assistance in migratory processes in which a person’s entry, acquisition of a residency permit or expulsion from the country can be decided on. This guarantee is of vital importance, as a large number of migrants and their families cannot afford the costs of a legal advisers and legal representatives. Accordingly, States need to


39 Article 23 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that “Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin [...] whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.” International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ratified by the State of Chile on 21 March 2005.

40 To ensure that the guarantees of due process, and in particular the right to be heard, are respected in practice, the child needs to be assisted by an interpreter or translator, if he or she speaks a language other than that of the country in which he or she is present. On this point, see article 86 of the Migrations Law of Argentina, Law 25.871, which provides that: “foreign nationals in national territory who lack economic means will have the right to free legal assistance in administrative and judicial procedures that could result in denial of entry, return to their country of origin, or expulsion from Argentine territory.” Moreover, the Law on the Comprehensive Protection of the Rights of Children and Adolescents of Argentina, Law 26.061, in article 27(c) recognizes the right “to be assisted by a lawyer preferably specializing in childhood and adolescent issues, as from the start of the legal or administrative procedure in their regard.” In addition, if they do not have sufficient resources to pay for such representation, “the State shall appoint a lawyer to represent them.”

41 See Estudio sobre los estándares jurídicos básicos aplicables a niños y niñas migrantes en situación migratoria irregular en América Latina y el Caribe: Estándares jurídicos básicos y líneas de acción para su protección [Study on the basic legal standards applicable to migrant children of the regular migrant status in Latin America and the Caribbean: basic legal standards and lines of action for their protection] Buenos Aires, UNICEF, 2009, p. 55. States should guarantee the person liable to deportation the possibility being represented by lawyers of his or her choice, or by persons with expert knowledge of the subject. Although the State may not be required to provide free professional defence as occurs on criminal matters, it should be provided to people that cannot pay for it, such as is the case with many migrants, and certainly children. Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, OEA/Ser./L/V/II.111, 16 April 2001, paragraph 99.
design and implement public policies that make it possible to guarantee access to legal aid and legal representation in the context of migratory procedures.\textsuperscript{42} Lastly, verification of the guarantees of due process and all other rights to which migrant C&As are entitled, involves the formal and practical possibility of access to effective appeal procedures and adequate legal protection.

Comparative law recognizes several remedies for appealing migratory decisions, and various alternatives in relation to the deadlines for submitting such appeals, in some cases a matter of hours and in others weeks. Very short deadlines can render appeal processes ineffective and make it impossible to exercise that right. Appeals in this type of process can become even less effective if there are no policies or mechanisms to provide migrants with the information needed to contest decisions. In fact, the decision (no-entry, for example) may be notified orally and not in writing and also lack the necessary justification. The decision may even not be communicated unequivocally to the person in question. In such cases, appeal procedures may be rendered ineffective if the regulations provide peremptory appeal deadlines, and if the decision fails to indicate in writing what remedies are available, and the deadlines for lodging them.\textsuperscript{43}

\section*{1.4. Family life and migratory processes: Guaranteeing the right for migrant C&As to grow up under parental co-responsibility and not to be separated from their families.}

The preamble to the CRC recognizes that the family, as the fundamental group of society and the natural environment for the growth and well being of all its members and particularly children, should be afforded the necessary protection

\textsuperscript{42} In this regard, the Office of the National Ombudsperson (Defensoría General de la Nación de Argentina) set up a number of commissions to assist migrant and refugee children and adolescents. Resolution DGN 1858/08 created the “Migrant Commission”, to promote the defence and protection of the rights of migrants living in national territory, particularly in administrative procedures involving expulsion and in judicial processes in which foreign persons are accused. Resolution DGN 1071/07 created the programme of assistance and protection of refugees and asylum seekers, with the aim of protecting the rights of refugees and asylum seekers. Although this has a component for dealing with adult asylum seekers, its actions focus more on the other two lines of action: firstly, legal representation of unaccompanied children and adolescents although separated from their asylum-seeking and refugee families; and secondly the accompaniment of refugee and asylum-seeking children and adolescents. Such accompaniment basically consists of social assistance work using an interdisciplinary approach. See Estudio sobre los derechos de niños y niñas migrantes a 5 años de la nueva ley de migraciones [Study on the Rights of Migrant Children Five Years on from the New Migrations Law], Universidad Nacional de Láns and UNICEF, Buenos Aires, 2010, p. 52.

\textsuperscript{43} Some legislations specify the suspensive nature of appeals, which means that until the competent authority rules on the appeal, the State may not carry out the decision (e.g. expulsion from the country); Argentina, Law 25.871, art. 61; Legal Regime Governing Migration, Bolivia, art. 20.h; Migration and Foreign Aliens Law, Costa Rica, art. 229; Migrations Law, Paraguay, art. 117; Migration Law, Uruguay, art. 53. When reviewing regulations in the countries of the Region, the United Nations Committee on the Protection of Migrant Workers has stated that the requirements to guarantee an effective appeal procedure, must include the right for the person concerned to seek a stay of the expulsion, pending such an appeal (Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding Observations, El Salvador, CMW/C/SLV/CO/1, 4 February 2009, paragraphs 27 and 28).
and assistance so that it can fully assume its responsibilities within the community.\textsuperscript{44} The CRC also contains at least four articles that are essential for effective protection of the right to family life: article 3 (best interest of the child),\textsuperscript{45} article 9 (principle of non-separation),\textsuperscript{46} article 10 (family reunification)\textsuperscript{47} and

\textsuperscript{44} Convention on the Rights of the Child (op cit, note 15 above) preamble, paragraph 6. The Inter-American Court of Human Rights has expressed a similar opinion by stating that as part of their responsibility for ensuring the protection of children, States are under “the obligation to favor, in the broadest manner, development and strengthening of the family nucleus. In this regard, ‘recognition of the family as a natural and fundamental component of society,’ with the right to ‘protection by society and the State,’ is a fundamental principle of International Human Rights Law.” See Inter-American Court of Human Rights, OC-17/02, (op cit, note 36 above), paragraph 66.

\textsuperscript{45} “Article 3.1. 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.”

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision”. Convention on the Rights of the Child, (op cit, note 15 above), Article 3.

\textsuperscript{46} “Article 9.1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.”. Convention on the Rights of the Child, (op cit, note 15 above), Article 9.

\textsuperscript{47} “Article 10. 1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article
article 18 (parental co-responsibility). These provisions are complemented on migration issues by the provisions of article 44 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which is particularly relevant for the rights of children in migratory situations.

As noted by the United Nations Children’s Fund (UNICEF), States regularly adopt numerous migration policy measures governing the entry, permanency, or departure of migrants, which could have a decisive impact on the unity or separation of the family. Decisions on applications to enter the country or to obtain or renew a residency permit, or a decision on possible expulsion from the territory of a child or its parents, could have a positive or negative effect on the right of migrant C&As to family life. In this regard it is essential that States observe certain special criteria to guarantee children the right to live in a family setting, including the following:

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9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention." Convention on the Rights of the Child, (op cit, note 15 above), Article 10

48 “Article 18. 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible”. Convention on the Rights of the Child, (op cit, note 15 above), Article 18.

49 “Article 44. 1. 1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.

2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.” International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (op cit, note 15 above), article 44.

50 UNICEF (op cit, note 21 above), p. 73.
a. The State must give preferential protection to the child’s right to family life, when ordering expulsion of its parents.

States Parties must ensure that children are not separated from their parents against their will, unless, following a judicial review, the competent authorities decide, pursuant to the applicable law and procedures, that such separation is in the child’s best interests.51 This requires the concurrent fulfilment of at least three specific obligations: (1) respect the principle of family unity as a guiding criterion for any migratory decision; (2) respect and guarantee access to justice—pursuant to the rules of due process identified above—for all migrants for whom an expulsion measure has been ordered; and (3) demonstrate that any administrative or judicial expulsion decision is essential to guarantee the best interests of the migrant child, expressly including his/her right to be heard.

Although migration law currently in force in Chile52 includes the right to lodge a legal appeal against an expulsion order, this remedy suffers from major shortcomings in terms of human rights standards. In particular, it allows an extremely short period for lodging a judicial appeal before the Supreme Court; it does not guarantee expeditious and quality access to legal assistance to be able to exercise the right; and it does not establish the obligation to verify the child’s best interests as a guiding criterion for the final expulsion decision. Consequently, the standards do not fulfil the provisions of the CRC.

51 CRC, Art 9. Convention on the Rights of the Child, (op cit, note 15 above). On this point, the Inter-American Court of Human Rights has stated that “Any decision pertaining to separation of a child from his or her family must be justified by the best interests of the child”, so “the child must remain in his or her household, unless there are determining reasons, based on the child’s best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary”. Inter-American Court of Human Rights, OC-17/02, (op cit, note 36 above), paragraph 77.

52 “Article 84 (1). The foreign national expulsion measure will be imposed by Supreme Decree, signed by the Ministry of the Interior, under the formula “by order of the President of the Republic”, affording the legally appropriate administrative and judicial appeal procedures to the affected party.”

“Article 89. A foreign national against whom an expulsion order has been issued by Supreme Decree, may lodge a legal appeal, either individually or through a member of his or her family, before the Supreme Court within 24 hours from being notified of the order. This appeal must be justified and the Supreme Court shall issue a brief and summary ruling on the appeal within five days.

Following the lodging of an appeal, the execution of the expulsion order shall be suspended; and while the appeal is being processed the foreign national in question shall be detained in a prison establishment or in a place decided upon by the Ministry of the Interior or Regional Governor (Intendente).”

“Article 90. The expulsion order shall be notified to the affected party in writing, who may, at that time, indicate his or her intention to appeal against the measure, or to accept it, as the case may be. In the latter case, the expulsion shall be executed without further delay.

If no appeal has been lodged 24 hours after the notification, or if any such appeal is ruled inadmissible, or 24 hours after an appeal has been rejected, the authority mentioned in article 10 shall execute the expulsion order.” See Decree Law 1094, (op cit, note 23 above).
The Committee on the Protection of the rights of all Migrant Workers and Members of their Families has recently expressed this opinion with regard to Chile:

28. The Committee is concerned about information according to which the procedure of appeal against decisions of expulsion is insufficiently accessible, as illustrated by the short time-limit for migrant workers to lodge appeals against decisions on their expulsion.

29. The Committee recommends that the State party take the necessary measures to ensure that the procedure of appeal against decisions of expulsion is accessible to migrant workers, including by extending the time-limit for lodging appeals against decisions on expulsion, and that the legal framework which regulates expulsion/deportation procedures is adequately implemented.53

The need to legislate guarantees for the protection of the family as an institution and prevent migrant children being separated from their parents is a principle that is progressively being recognized by the most advanced migration legislation, on which the Chilean State should draw when drafting its new migration law.54

b. The right of migrant children to family reunification.

State obligations in relation to the right to family life, and its involvement in migration policy, entail the need not only to refrain from decisions that result in family members becoming separated, but also to adopt positive measures to promote the reunification of migrant children with their family members and guarantee this in practice.55 This is the central meaning of articles 10 of the CRC56

53 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (op cit, note 1 above), paragraphs 28 and 29.

54 On this point, for example, Mexican legislation (of May 2011) recognizes family reunification and the best interests of the child and adolescent as basic principles of the State's migration policy, and as a priority criterion for permitting foreign nationals to enter and stay in Mexico as temporary or permanent residents, along with employment needs and humanitarian reasons, since the family unit is a substantive element for maintaining a healthy and productive social fabric among the foreign communities living in the country. (Article 2). This principle is upheld in the guarantee mentioned in article 10 of the Migration Law, as follows: "Article 10. The Mexican State shall guarantee the right to preserve the family unit, for migrants intending to enter regularly into the country or who live in national territory with regular migratory status, as well as those intending to regularize their migratory status in the country." Migration Law published in the Official Gazette of the Federation (Diario Oficial de la Federación) on 25 May 2011, articles 2 and 10.

55 UNICEF (op cit, note 21 above), p. 79.

56 "Article 10.1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both
and 44.2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which define basic criteria for promoting and respecting family reunification in cases where children are separated from their other family members.

In particular, article 10 of the CRC requires States Parties to deal with applications by a child or his or her parents to enter or leave a State Party for the purposes of family reunification in a positive, humane and expeditious manner, and to ensure that the submission of such a request shall entail no adverse consequences. This has been supported by the Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families in its Concluding Observations to the State of Chile, as follows:

38. The Committee is concerned about information received that, in practice, some migrant workers face obstacles to family reunification and about the absence of a legal framework regulating family reunification.

39. The Committee recommends that the State party ensure that legal provisions regulating family reunification are incorporated in the migration law, in line with article 44 of the Convention.

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (op cit, note 1 above), paragraphs 38 and 39. This problem has also been addressed by the National Institute of Human Rights (INDH), which has noted that: “current migration law defines the migrant worker’s family group as the spouse, parents and children of one or both of them. Although these persons receive a residence permit, as dependents, the fact that they are not allowed to undertake paid activities has a negative impact on the conditions of life of the family group as a whole, and could also have gender-relation consequences by impeding women’s economic autonomy and making them more vulnerable to situations of violence.” The INDH also highlights that: “The current law only covers relationships established by marriage, but excludes cohabitation. Although the State told the Committee that in practice migration management has extended the concept of family members to situations analogous to marriage, the absence of an explicit provision to this effect makes its application subject to the discretion of the officials who analyse each case”. INDH, *Situación de los Derechos Humanos en Chile (2011)*
Chilean legislature should take account of legal instruments that have moved towards recognizing specific guarantees of the right to family reunification for migrant children. Among other examples, it is possible to identify specific clauses that establish the right to family reunification for immigrants with their parents, spouses, unmarried minor children or adult children with disabilities, and those that recognize the right for foreign residents to be reunited with their family members according to the criteria, requirements and procedures expressly established in the law.


60 Cf. Migrations Law of the Argentine Federal Republic, (Law 25871) of 17 December 2003: “Article 3: The objectives of the present law are as follows: d) Guarantee exercise of the right to family reunification;” and “Article 10: The State will guarantee the right to family reunification of immigrants with their parents, spouses, unmarried minor children or adult children with differential capacities;” and the Migration Law of the Eastern Republic of Uruguay (Law 18.250) of 17 January 2008: “Article 10: the Uruguayan State will guarantee the right of migrants to family reunification with parents, spouses, cohabiting partners, unmarried minor children or adult children with disabilities, pursuant to Article 40 of the Constitution of the Republic.”

61 Foreign Aliens Law of Spain (Organic Law 4/2000) of 11 January, on the Rights and Freedoms of Foreign Nationals in Spain and Their Social Integration, in the wording given by Organic Laws 8/2000, of 22 December, 11/2003, of 29 September, 14/2003 of 20 November and 14/2003 of 11 December: "Article 16. Right to Family Privacy. 2. Foreign nationals resident in Spain have the right to regroup with the family members specified in article 17. (Drafted in accordance with the Organic Law 8/2000);” and "Article 17. Regroupable family members. 1. Resident foreign nationals are entitled to regroup with the following family members in Spain: (drafted in accordance with Organic Law 2/2009). (b) the children of the resident and spouse, including adoptive children younger than 18 years of age or persons with disabilities who are objectively unable to provide for their own needs owing to their health status. In the case of children of one of the spouses only, it is also necessary that the said spouse exercises patria potestad alone, or that he or she has been granted custody and the children in question are effectively in his or her charge. In the case of adopted children it must be shown that the decision granting the adoption includes elements needed to be valid in Spain; (c) minors younger than 18 years of age and those older than 18 years who are objectively unable to provide for their own needs owing to their health status, when the foreign resident is their legal representative and the legal instrument defining representative powers does not contravene the principles of Spanish law; (d) first-degree ancestors of the regrouper and of his or her spouse when in his or her charge, who are older than 65 years of age and there are reasons justifying the need to authorize their residence in Spain. Regulations will determine the conditions for regrouping of the ancestors of long-term residents in another Member State of the European Union, of workers holding the EU blue card and beneficiaries of the special regime for researchers. On an exceptional basis, when are humanitarian reasons are involved, an ancestor younger than 65 years of age may be regrouped if the other conditions provided in this law are fulfilled. 3. (...) on an exceptional basis, the regrouped ancestor with one or more minors in his or her charge, or children with disabilities that are objectively unable to provide for their own needs owing to their health status, will be able to exercise the right of regrouping under the terms provided in the second section of this article, without the need to have acquired long-term residency.” The requirements, procedure and legal effects of the regrouping are, respectively, defined in articles 18, 18 bis and 19 of this law.
1.5. The right of migrant children to be registered, to be given a name and acquire a nationality: avoiding exclusion and statelessness.

Article 7 of the CRC provides that all children “shall be registered immediately after birth and shall have the right from birth to a name and to acquire a nationality.” Moreover, under article 8 of the CRC states parties are required to respect the right of the child to preserve his or her identity, including nationality and name.

Although the rights to registration, name and nationality are recognized, parents in irregular migratory situations often fail to register their children, despite the fact that when they are born they are entitled by law to be registered and obtain nationality in the countries of destination. This is not because the parents in question are ignorant of the importance of registering their children, but because they may fear being identified and punished by the migration authorities. Consequently, migrant children are exposed to the lack of appropriate documentation, which results in rights violations such as statelessness or lack of nationality.

Enrollment and registration at birth is of crucial importance for the children of migrants, and should be done irrespective of their parents’ migratory status — in other words, whether they are in the country on a regular or irregular basis. This is because enrollment and birth registration, as well as name-giving, are not only essential for the recognition of legal identity, but also are a basic and essential prerequisite for access to other fundamental rights, and can be a decisive factor in the family’s social integration and migratory regularization in the country of destination.

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62 “Article 7. 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless”. Convention on the Rights of the Child, (op cit, note 15 above), Article 7.

63 “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.” Convention on the Rights of the Child, (op cit, note 15 above), Article 8.


65 UNICEF, (op cit, note 21), p. 114. As indicated by the OAS, UNICEF and the Comprehensive Plan for the Americas (Plan Integral para las Américas – PIA), the right to identity consists of:
As in the case of enrollment, birth registration and name, the right to acquire and nationality is fundamental for effective exercise of the rights recognized both by international human rights law and by domestic legislation.\(^{66}\) For that reason, the Inter-American Court of Human Rights has noted that deprivation of the right to nationality not only can render the child stateless, but also can affect the development of his or her personality and right to legal status.\(^{67}\) In other words, irrespective of their parents’ regular or irregular migratory status, children born in the country of destination are entitled to be registered at birth, and to receive a birth certificate, and a name and nationality.\(^{68}\)

Although these standards are fully in force internationally, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, responding to the concern raised by the Committee on the Rights of the Child in 2007,\(^{69}\) has drawn attention to the difficulties faced by migrant children in irregular situations in Chile, in fully exercising these rights:

> 32. The Committee notes that children of parents in an irregular situation are recorded in the official register under the mention “children of foreign nationals in transit” and can opt for Chilean nationality within a period of one year immediately following their twenty-first birthday. However, the Committee is concerned about cases of children of parents in an irregular situation who can find themselves on the Chilean territory without a

“Recognition of the right to a name, the right to nationality and the right to legal personality, which enables an individual to exercise citizenship. In addition, it is the key to access and upholding political, civil, economic, social and cultural rights, such as health and education. The absence of this right generates inequality and discrimination, a serious problem in the Americas, hindering the person’s activity and inclusion in the political, economic and legal aspects of a democratic society. In the specific case of children, the absence of this right involves denial of their human rights and may cause a chain of rights violations, from denial of school enrolment, to sexual exploitation. Recognition of the right to identity, through birth registration, involves the incorporation of a child as a legal subject within a State.” See OAS, UNICEF and Comprehensive Plan for the Americas (Plan Integral para las Américas – PIA), Concept paper, presented at the Latin American Regional Conference on the Right to Identity and Universal Birth Registration, Asunción, 28-30 August 2007, p. 1.

\(^{66}\) In addition to the provisions of article 7 of the CRC 7, the right to nationality is recognised in articles 14 and 15, respectively, of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights.

\(^{67}\) To quote the Inter-American Court of Human Rights, “The migratory status of a person cannot be a condition for the state to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights; the migratory status of a person is not transmitted to his children.” See Inter-American Court of Human Rights, case of Year and Bosico vs. Dominican Republic, Judgment of 8 September 2005, paragraphs 156, 167, 175-178.

\(^{68}\) Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding Observations, Egypt, CMW/C/EGY/CO/1, 25 May 2007, paragraphs 35-36.

\(^{69}\) “63. (...) The Committee welcomes the amendments to the Constitution which seek to eliminate statelessness for children born to Chileans abroad, however remains concerned that children of foreign nationals without legal residence in Chile may remain exposed to statelessness” (see note 2 above).
nationality.

33. The Committee encourages the State party to grant nationality to children who are born in Chile and whose parents are in an irregular situation, whenever parents are unable to transfer their nationality to the children. The Committee also encourages the State party to accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.  

With regard to regulations governing the right to nationality, the Political Constitution of the Republic of Chile recognizes both the principles of Ius Solis (whereby a person born in Chile is considered Chilean) and the principle of Ius Sanguini (which establishes that the child of Chilean parents is also Chilean). In the case of Ius Solis, the Chilean Constitution also provides that all persons born in national territory are nationals except for the children of foreign nationals who are in Chile at the service of their government, and the children of foreign nationals in transit (extranjeros transeúntes).  

Regardless of the meaning and scope of the expression “in transit” (transeúnte), the migration authorities have applied this provision to descendants born in Chile of parents in irregular migratory situations. As a result, these migrant children become stateless unless the country grants them a nationality. Positively, this administrative interpretation has been rejected both by the Office of the Comptroller General of the Republic (Contraloría General de la República), and

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70 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, (op cit, note 1 above), paragraphs 32-33.

71 “Article 10. The following persons are Chilean:

1.- Persons born in the territory of Chile, except for the children of foreign nationals in Chile at the service of their government, and the children of foreign nationals in transit, all of whom, nonetheless, may choose Chilean nationality;

2.- The children of a Chilean father or mother, born abroad.

Nonetheless, it shall be required that one of the child’s direct ascendants of first or second degree, has acquired Chilean nationality pursuant to the provisions of paragraphs 1, 3 or 4;” Political Constitution of the Republic of Chile, article 10, available online at http://www.leychile.cl/Navegar?idNorma=242302.


73 “(...) in the particular case of registration of the birth of the children of foreign nationals who are not legally resident in the country, there are other elements that need to be considered: the Constitution (article 1, paragraphs 2 and final), proclaim that the family is the fundamental nucleus of society and that it is the State’s duty to protect and strengthen it, and to ensure the right of persons to participate in national life with equal opportunities. Moreover, it should be recognized that the children of foreign nationals in such situations, who could become Chilean under article 10 paragraph 1 of the aforementioned law, are not responsible for the legal situation of their parents.” Office of the Comptroller General of the Republic, Ruling 6197 of 17 February 1998, quoted in the Annual Report on Human Rights in Chile, UDP (2009), Santiago, Chile, p. 261.
by the Supreme Court of Chile,\textsuperscript{74} which means that the issue needs to be resolved unequivocally in the forthcoming migration legislation. The key principle to be considered on this matter has been identified by the Inter-American Court of Human Rights in the following way: “to consider that a person is in transit, irrespective of the classification used, the State must respect a reasonable time limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit”.\textsuperscript{75}

2. ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF MIGRANT CHILDREN.

As noted throughout this article, migrant C&As possess all the basic human rights recognized by international law and the Political Constitution of the Republic of Chile. In other words, irrespective of their regular or irregular migratory status or their nationality, migrant children are entitled to the full range of human rights that the State of Chile is obliged to respect and guarantee. These obligations also include respecting, protecting and guaranteeing the economic, social and cultural rights (hereinafter ESCR) of all children, as provided for in the Political Constitution of the Republic (including those recognized by the international treaties ratified by Chile and currently in force)\textsuperscript{76} and other rights that have been specified through ordinary legislation.\textsuperscript{77}

This means that the Chilean State has at least three specific duties in protecting the ESCR of migrant children.\textsuperscript{78} Firstly, the duty to respect ESCR entails a negative

\textsuperscript{74} The Supreme Court has ruled that, as the term “transeúnte” (in transit) is not defined in the law, it should be understood in its natural and obvious sense, as indicated in article 20 of the Civil Code. Using this natural interpretation of the term, the court has upheld appeals against administrative classification as “in transit” for persons who are clearly not passing through the country. As a result, the nationality rights of the children of those foreign nationals has been respected pursuant to article 10, paragraph 1, of the Political Constitution of the Republic. See Supreme Court, Helvi Nestares Alcántara vs. Department of Foreign Aliens and Migration of the Ministry of the Interior and other, No. 6073-2009, 28 December 2009. A presentation of this case is made in the Annual Report on Human Rights in Chile, UDP (2010), Santiago, Chile, p. 247.

\textsuperscript{75} Inter-American Court of Human Rights, case of Yean and Bosico vs. the Dominican Republic, see supra note 67, paragraph 157. Similarly, regarding the arbitrary use of the term “in transit”, see Committee for the Elimination of All Forms of Racial Discrimination, Concluding Observations, Dominican Republic, CERD/C/DOM/CO/12, of 16 May 2008, paragraph 14

\textsuperscript{76} See International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200 A (XXI), approved on 16 December 1966 and ratified by the State of Chile on 2 February 1972; and the Convention on the Rights of the Child, (op cit, note 15 above).

\textsuperscript{77} See, for instance, Law 19.585, amending the Civil Code and other legal instruments on filiation, abolishing discrimination between legitimate and illegitimate children; Law 20.066, on domestic violence; Law 20.086, a constitutional reform to expand the scope of entitlement to free education to the secondary school level, the creation of a full school day; and Law 20.370 (General Education Law), strengthening the principles of quality education that is free to the user; Law 20.379, creating the integrated childhood protection system Chile Creece Contigo, which aims to accompany, protect, and comprehensively support all children (from gestation to four years of age) and their families; and Law 20.545, amending regulations governing maternity protection, and incorporating parental post-natal leave, allowing a full extension of maternity leave to 24 weeks.

\textsuperscript{78} For a succinct presentation on the main characteristics, regulatory content and obligations associated with social rights, see Nicolás Espejo Yaksic, “Los derechos económicos, sociales y
obligation, whereby the State undertakes not to impair the ESCR of migrant children, for example through acts of discrimination involving the deprivation of one or more of the rights defined in the Political Constitution, international human rights instruments, and domestic legislation.\(^\text{79}\) Secondly, the State has the duty to protect the ESCR of migrant children, adopting legislative and other measures to prevent third parties — private individuals, groups, firms and other entities, as well as persons acting on their behalf — from in any way undermining the exercise of a child’s ESCR.\(^\text{80}\) Thirdly, the State is obliged to take suitable legislative, administrative, budgetary, judicial or other steps to fulfil the migrant children’s right to ESCR. This latter duty, is divided into three specific sub-obligations, as follows: facilitate (which means adopting positive measures that permit and help migrant children, their families and communities to exercise their ESCR); promote (which requires the State to disseminate appropriate information on the ESCR of migrant children); and guarantee (which entails a duty to make ESCR effective in cases where migrant children or their families are not in a position, for reasons beyond their control, to exercise those rights for themselves with the resources available to them).\(^\text{81}\)

1.1. Migrant children’s right to health: Guaranteeing effective, non-discriminatory access

The right to health goes beyond the legal aspiration to obtain access to a range of facilities, goods and services (including health services) for a given person or group of persons. As a human right, the right to health also includes creation of the conditions needed to achieve and maintain health, such as: adequate food and housing, quality water, sanitation, the existence of healthy employment conditions and access to a healthy environment.\(^\text{82}\) In particular, guaranteeing the right of

\(^{79}\) Committee on Economic, Social and Cultural Rights (hereinafter CESCRI, General Comment No. 3, The Nature of States Parties obligations (article 2 (1) of the Covenant), E/1991/23, 14 December 1990, paragraph 1; General Comment No 14, paragraph 33; and General Comment No 15, paragraph 21.

\(^{80}\) Inter-American Court of Human Rights, Case of Vélásquez Rodríguez vs. Honduras, judgment of 29 de July 1988, Series C No. 4, paragraph 172.


\(^{82}\) See Nicolás Espejo Y. et. al., (op cit, note 78), p. 51. Thus interpreted, the right to health is recognised directly in various instruments and international documents of a universal nature. Among others, article 25 of the Universal Declaration of Human Rights; article 12 of the International Convention on Economic, Social and Cultural Rights (ICESCR); article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD); article 12 of

\(...\)
migrant children to health requires the State to satisfy at least four specific regulatory dimensions: (a) **Availability:** ensuring a sufficient number of health-care establishments, goods and public services, as well as and health care facilities and programmes on a progressive basis;\(^{83}\) (b) **Accessibility:** making sure health facilities, goods and services are accessible to everyone, without discrimination, within the State’s jurisdiction;\(^{84}\) (c) **Acceptability:** avoiding undifferentiated or unduly insensitive application to the specific position and needs of certain groups in society;\(^{85}\) and (d) **Quality:** as well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.\(^{86}\)

The Chilean State has adopted a number of positive measures (mainly administrative and not of legal rank) to progressively attain equal levels of health

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83 CESCR, General Comment No. 14, (*op cit, note 81 above*), paragraph 12 (a).

84 Accessibility to the right to health has four overlapping dimensions: (a) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds. (b) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities. (c) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households. (d) Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality. CESCR, General Comment No.14, (*op cit, note 81 above*), paragraph 12(b).

85 This means making it an obligation for States to guarantee that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned. CESCR, *General Comment No. 14, (op cit, note 81 above)*, paragraph 12(c).

86 This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation. CESCR, *General Comment No. 14, (op cit, note 81 above)*, paragraph 12(d).
access and care for migrant children (and asylum seekers and refugees). Measures include the following:

a) Circular No. 6.232 of 2003, of the Foreign Aliens and Migration Department (Departamento de Extranjería y Migración), which aims to encourage pregnant foreign women of irregular migratory status to register at medical clinics, thereby providing protection for their children from the gestation period onward;

b) Ordinary Decree (Ordinario) No. 2.284 of 2007, issued by the Under-Secretariat for Assistance Networks, which seeks to guarantee the right to health under equal conditions for foreign nationals and refugees of regularized status; the right to register in the National Health System (FONASA) for those with a Chilean residency permit; the right of foreign nationals of irregular migratory status, to the emergency health services in facilities operated by the health services assistance network, or else to be treated privately; the right of refugees and asylum seekers to access health services under equal conditions, although how this access will be obtained is not described, whether privately and/or by affiliating to the public health network;

c) Collaboration agreement between the Ministry of the Interior and the Ministry of Health in 2007, which specifies that health care is provided, in National Health Services System establishments, to foreign children and adolescents under 18 years of age, whatever their migratory status in terms of permanency in Chile, as well as their parents, guardians or legal representatives;

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88 Notice addressed to the Regional Governor (Intendente) of the Metropolitan Region and to provincial governors, specifying the right of access to the primary health care network, “... for foreign nationals who are in an irregular situation and are pregnant, to enable them to register in the clinics serving their place of residence, thus facilitating the control and monitoring of their pregnancies.”

89 Ordinary Decree (Ordinario) addressed to the health service directors, stipulating that the initiative was arranged following an earthquake that occurred in Peru, to provide health care to Peruvian citizens resident in Chile, and possible undocumented migrants.

d) Exempt Resolution (*Resolución Exenta*) of September 2008, issued by the Ministry of Health, calling for the creation of a Ministry of Health Work Group on the Health of Immigrants and Refugees (SIR-MINSAL), to provide technical assistance for Ministry of Health decision-making on the health of immigrants and refugees, including the corresponding children;

e) Presidential Instruction on migratory policy of 2008, with the aim of instructing the various government bodies on migratory policy, its incorporation in current programmes and those to be developed, and stipulating lines of government action in terms of integration and non-discrimination;  

f) *Ordinario* No. 2.551 of 2009, issued by the Ministry of Health, stipulating that immigrants with FONASA credentials and a residency permit in process maintain health benefits even with an expired identity card; and (g) Law 20.430 of 2010 (on the protection of refugees), article 13 of which recognizes the right to access to health services, and in article 32 operational aspects of its application.

Despite this progress, migrant children in Chile continue to face difficulties in effectively accessing State health services. As indicated by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, in its report of Concluding Observations to the State of Chile:

30. While the Committee welcomes the issuance by the Ministry of Health of Communication No. 3229 of 11 June 2008 on access to emergency medical care for migrants in an irregular situation, and access to health care for pregnant women and children in an irregular situation, it remains concerned about information received on the lack of implementation of this Communication as well as the lack of awareness among a health personnel of the rights of migrant workers with regard to access to health.

31. The Committee recommends that the State party ensure the effective implementation of Communication No. 3229 of 11 June 2008 on access to health for migrant workers, including by disseminating the provisions of the communication of among health personnel and by establishing a monitoring

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91 The National Migration Policy contains guiding principles inspired in the Declaration of Human Rights, including a section on health. “... (2) Health, where in no circumstances may health care be denied to foreign nationals requiring it, on the grounds of their insurance status…” (Presidential Instruction, 2 September 2008, p. 4). It also explicitly calls for actions to avoid and sanction the unlawful trafficking of migrants and human trafficking generally. Although unlawful trafficking and trade in children is not mentioned explicitly, this section does include them as migrants. In relation to refugee status, it calls for a new refugee law, which the Chilean State enacted after this Presidential Instruction was issued.

mechanism for the implementation of the Communication.\textsuperscript{93}

As Becerra and Altimir point out, government initiatives in the last decade represent fundamental progress from the rights perspective.\textsuperscript{94} Nonetheless, while formal standards have been set for protecting migrant children’s right to health, practices and institutional assumptions have obstructed the effective fulfilment of these rights. Obstacles to the effective exercise of the right to health for migrant C&As include a lack of dissemination and training on standards of the right to health of migrant children; fragmentation of the entities responsible for implementing the standards set (which the authors claim results in complex and discoordinated procedures); and problems stemming from a health system that is structured so that services not associated with a national identity number (RUN) cannot be registered, and are therefore not financed by the State.\textsuperscript{95}

In view of this, it is essential that Chilean migration law move forward in terms of respecting, guaranteeing and upholding the right of migrant children to health in the following areas at least: (1) recognize the rights and guarantees for effective access to the right to health of migrant C&As, in a single integrated legislative framework (and not scattered among a series of norms, instructions, and other administrative provisions);\textsuperscript{96} (2) establish bodies and protocols to verify effective

\textsuperscript{93} Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, (op cit, note 1 above), paragraphs 30-31.

\textsuperscript{94} Becerra and Altimir, (op cit, note 87). In 2007 the Committee on the Rights of the Child recommended the Chilean government to: “(c) Ensure that refugee, asylum-seeking and migrant children are guaranteed speedy processing of their registration and identity documents and that they not be denied access to health services and education during this period”; Committee on the Rights of the Child, (op cit, note 2 above), paragraph 64.

\textsuperscript{95} This problem is usually resolved on a discretionary basis by the health centre staff or professionals who attend migrant C&As, for example by creating a fictitious “RUN” or “RUT”, which enables these users to be attended with the associated financing.

\textsuperscript{96} A number of good legislative practices in this area can be found in Argentine, Spanish, Mexican and Uruguayan law. For example, Argentina: “Article 8. Under no circumstances can access to the right to health, social assistance or sanitary attention be denied or restricted to foreign nationals requiring it, whatever their migratory status. The authorities of health establishments shall provide guidance and advice on the corresponding procedures for the purposes of correcting migratory irregularity;” Migrations Law of the Argentine Federal Republic (Law 25 871) of 17 December 2003, Article 8. Spain: “Article 12. Right to Health Care (drafted according to Organic Law 2/ 2009). 1. Foreign nationals in Spain, registered in the municipal register of their habitual domicile, are entitled to health care under the same conditions as Spanish nationals. 2. Foreign nationals in Spain are entitled to urgent public health care for serious illness or accident, whatever the cause thereof, and the continuation of such care until they receive medical discharge. 3. Foreign nationals under 18 years of age in Spain are entitled to health care under the same conditions as Spanish nationals. 4. Pregnant foreign nationals in Spain are entitled to health care during pregnancy, childbirth, and post-partum;” Foreign Aliens Law of Spain, Organic Law 4/2000 of 11 January, on the rights and freedoms of foreign nationals in Spain and their social integration, drafted pursuant to Organic Laws 8/2000 of 22 December, 11/2003 of 29 September, 14/2003 of 20 November and 2/2009 of 11 December, Article 12. Mexico: “Article 8. Migrants shall be entitled to receive any type of medical care provided by the public and private sectors, irrespective of their migratory status, pursuant to the applicable legal and regulatory provisions. Irrespective of their migratory status, migrants shall be entitled to receive, without charge and without any restriction, any type of urgent medical care necessary to save their lives. In the provision of educational and medical services, no
application, based on technical indicators at both the national and municipal levels, of the rights and guaranteed access to acceptable and quality health services for migrant children and their family members; (3) recognize, pursuant to article 12 of the CRC, the right of migrant children to freely express their opinion in any health procedure, and ensure their opinions are duly taken into account; (4) guarantee, in fulfilment of article 17 of the CRC, that migrant C&As have access to information and material provided by various national and international sources, particularly information and material that aims to promote their social, spiritual and moral well-being, as well as their physical and mental health; (5) strictly respect the right to privacy and confidentiality of migrant C&As, including in relation to advice and consultations on health issues (article 16 of the CRC).97

1.2. The right of migrant children to education: Guaranteeing effective access and permanency in a quality and non-discriminatory educational system.

The right to education aims at the satisfaction, cost-free in certain cases, of adequate levels of instruction or education, in a context where other fundamental rights held by all persons are fully guaranteed.98 More specifically, for education to fulfill the minimum conditions required of a fundamental right, States should ensure that the following characteristics are fulfilled: (a) Availability: educational institutions and programmes have to be available in sufficient quantity; (b) Accessibility: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination; education must be physically accessible, either in terms of geographical location or via modern technology; and it must be affordable to all, free at the primary level and progressively free at the

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98 Rodrigo Uprimny Yepes and César Rodríguez Garavito, "Constitución, modelo económico y políticas públicas en Colombia: el caso de la gratuidad de la educación primaria", in Luis Eduardo Pérez Murcia, César Rodríguez Garavito and Rodrigo Uprimny Yepes, Los derechos sociales en serio: Hacia un diálogo entre derechos y políticas públicas, DeJusticia, IDEP, Ensayos y Propuestas collection No. 3, Bogotá, Colombia, 2007, pp. 46-47. Thus defined, the right to education is enshrined, among other international instruments, in article 26 of the Universal Declaration of Human Rights; articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights; article 10 of the Convention for the Elimination of All Forms of Discrimination against Women; article 5 of the International Convention for the Elimination of All Forms of Racial Discrimination; articles 28 and 29 of the CRC; article 2 of the Convention against Discrimination in Education; and article 13 of the Optional or Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). For an analysis of the content of the right to education in international human rights law, see N. Espejo Y. et. Al., (op cit, note 78 above), pp. 109-161.
secondary and higher levels; (c) **Acceptability**: curricula and teaching methods must be culturally appropriate and of good quality; (d) **Adaptability**: education has to be flexible so that it can satisfy the needs of diverse and evolving societies and communities.99

As noted by Contreras, Cortés and Fabio, from the perspective of international human rights standards, particularly the Covenant on Economic, Social and Cultural Rights (article 12) and articles 28 and 29 of the CRC, education also has the following aims: to help children develop their personal talents, and their physical and mental capacities to the limit of their possibilities; to develop respect for human rights and fundamental freedoms; to teach respect for their parents and their own cultural identity, and towards different civilizations; and to prepare for a responsible life in a free society, in a spirit of understanding, peace, tolerance, gender equity, and friendship among all peoples, ethnic, national and religious groups.100

Despite the fundamental importance of the right to education, migrant C&As (and also asylum-seeking and refugee children) encounter various barriers to equal access, when exercising this right. The various factors that impair the right of migrant C&As to education include the following: (a) a much higher risk of exclusion from education systems and opportunities compared to national students; (b) inadequate pedagogic responses for training in the language of the host country while preserving their first language; (c) insufficient quality and cultural relevance in the teacher profile; (d) inefficient processes and systems for accrediting formal and informal education; (e) lack of continuous education programmes for the migrant and refugee population; (f) cultural practices, such as marriage and early pregnancy, and different cultural expectations that force girls and women to participate in childcare and domestic chores; and (g) the invisibility of migrants, refugees and asylum seekers with disabilities, among other issues.101

In Chile, various positive measures have been adopted to ensure access to education for migrant and refugee children, among them: (1) Circular No. 6.232 of May 2003, issued by the Foreign Alien and Migration Department, and Official Notice (ORD) No. 07/1008 (1531) of August 2005 of the Ministry of Education, facilitating and promoting admission to the various general basic and secondary education schools by all migrant children living in Chile; (2) Exempt Resolution No.

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99 Committee on Economic, social and Cultural Rights, General Comment No. 13: “The right to education”, adopted at the twenty-first session, 1999, U.N. Doc. E/C.12/1999/10, paragraph 6 (a), (b), (c) and (d).


6.677 of November 2007, issued by the National Kindergarten Board (Junta Nacional de Jardines Infantiles – JUNJI), which aims to facilitate admission to preschool programs for the under-fives children of immigrant or refugee women, irrespective of their respective migratory status.  

Notwithstanding the importance of these administrative provisions, as was the case with access to the right to health, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has noted difficulties in exercising the right to education for migrant children. On this point the Committee has stated that:

34. While the Committee welcomes the issuance by the Ministry of Education of Communication No. 07/1008 (1531) of 2005 on the enrolment and presence in schools of migrant children in an irregular situation, it remains concerned about information received that, in some cases, migrant children in an irregular situation do not receive diploma because of their inability to provide required documents, that their grades and diploma are not entered into the national registry system, and that some schools refuse the re-enrolment of migrant children who have not regularized their immigration status.

35. The Committee recommends that the State party ensure the effective implementation of Communication No. 07/1008 (1503) of 2005 on the enrolment and presence of immigrant children in education, including by ensuring the dissemination of this Communication in all educational institutions and by establishing a monitoring mechanism for its implementation.

The difficulties identified by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families raises the need to strengthen mechanisms to guarantee the right to education for migrant children in Chile. This is crucial to overcome the difficulties faced by migrant C&As in certain critical areas, including:

1) Access to education: Whereas the immigration process for high-income families is supported by a number of facilitating factors that make the search for school access quite simple, in the case of low-income immigrant families the process is basically restricted by a lack of information and resources, which in turn restricts the search for, and chances of choosing, a school that their children can attend;

2) Permanency in the education system: Migrant C&As face two types of obstacles in this area: (a) those associated with lack of access to student benefits and other benefits that poor Chilean children can access without great difficulty; and (b) those arising from the impossibility of certifying their progress in the school system, because they do not have a definitive enrolment;

102 These provisions are systemized online at: http://www.extranjeria.gov.cl/filesapp/Convenios%20Sectoriales.pdf, viewed on 4 January 2012.

103 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, (op cit, note 1 above), paragraph 34-35.
(3) **Education quality:** Migrant children in the Chilean school system attend schools that systematically offer less opportunities for appropriate school progress, and whose performance in the education quality measurement system (*Sistema de Medición de Calidad de la Educación* – SIMCE) identifies them as having higher dropout and repetition rates, although this can be explained mainly by the socioeconomic condition of their students;

(4) **Respect and good treatment:** Although Chilean C&As are progressively assessing non-discrimination as adequate, this general assessment becomes more tenuous when the daily school experience involves coexisting with immigrant students. In other words, while the assessment of non-discrimination is declaratively strong, this is not borne out in practice in specific coexistence scenarios.\(^{104}\)

Accordingly, the effective guarantee of migrant children’s right to education for needs to be strengthened in various respects: (1) Recognize the rights and guarantees of effective access to the right to education for migrant C&As, under a single integrated legislative framework (and not spread across a series of norms, instructions and other administrative provisions);\(^{105}\) (2) Set up bodies and protocols to make it possible to verify the effective application, based on technical

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\(^{104}\) For a detailed discussion of these four dimensions of disadvantage and discrimination between Chilean C&As and migrant C&As in the right to education, see Daniel Contreras, Soledad Cortés and Candy Fabio, (op cit, note 100 above).

\(^{105}\) A number of good legislative practices in this area can be found in the laws of Argentina, Spain, Mexico and Uruguay. For example, Argentina: “Article 7. In no circumstances shall the irregular migratory status of a foreign national prevent his or her admission as a student in an educational establishment, whether public or private, national, provincial or municipal, primary, secondary, tertiary or university. The authorities of educational establishments shall provide guidance and advice on procedures for correcting irregular migratory status,” Migrations Law of the Argentine Federal Republic (Law 25 871), of 17 December 2003, Article 7. Spain: “Article 9. Right to Education. 1. Foreign nationals under 18 years of age have the right and duty to obtain education, which includes access to basic, cost-free and compulsory education. Foreign nationals under 18 years of age are also entitled to post-compulsory education. This right includes obtaining the corresponding academic diploma and access to the public system of scholarships and assistance under the same conditions as Spanish nationals. Upon reaching 18 years of age during their school career, they shall preserve this right until completion. 2. Foreign nationals over 18 years of age in Spain are entitled to education as established in education law. Foreign residents over 18 years of age are entitled to gain access to other post-compulsory education stages and obtain the corresponding diplomas, and to access the public system of scholarships under the same conditions as Spanish nationals. 3. The public authorities shall take steps to ensure foreign nationals can receive education for their better social integration”, Foreign Aliens Law of Spain (Organic Law 4/2000) of 11 January, on the rights and freedoms of foreign nationals in Spain and their social integration, drafted pursuant to Organic Laws 8/2000 of 22 December, 11/2003 of 29 September, 14/2003 of 20 November and 2/2009 11 December, Article 9. Mexico: “Article 8. Migrants can access education services provided by the public and private sectors, irrespective of their migratory status and pursuant to the applicable legal and regulatory provisions. In the provision of educational and medical services, no administrative action shall impose restrictions on the foreign national, greater than those generally established for Mexicans”, Migration Law published in the Official Gazette of the Federation (Diario Oficial de la Federación), 25 May 2011, Article 9. Uruguay: “Article 11. The children of migrants shall be entitled to the fundamental right of access to education under equal conditions with nationals. Access for the children of migrant workers to public or private schools cannot be denied or limited on the grounds of the irregular migratory status of their parents.” Migration Law of the Eastern Republic of Uruguay (Law 18.250) of 17 January 2008, Article 11.
indicators, at both national and municipal level of the rights and guarantees of access to quality education for migrant C&As; (3) Recognize effective mechanisms and procedures for lodging complaints, both at the administrative and at the jurisdictional level, to protect the right to education for migrant children and adolescents in cases where their rights are being violated; and (4) Promote a training policy on inclusive school coexistence, making it possible to strengthen the capacities of Chilean children and school staff to overcome discriminatory prejudices and practices, develop respect for cultural diversity, and consolidate the social inclusion of migrant C&As.

3. CONCLUSIONS AND GENERAL RECOMMENDATIONS ON MIGRATION LAW

This article has highlighted several of the main human rights standards that the State of Chile should consider when reformulating its migration law, to align it with the provisions of the CRC. It has drawn attention to a number of the main areas of progress and difficulties observed in the effective enjoyment of the rights of C&As, both in their civil and political dimension and in economic, social and cultural terms. In this regard, one of the key conclusions of this review is that the State of Chile needs to strengthen legal protection for the rights of migrant C&As, defining precise legal standards that can be verified on the basis of follow-up policies and processes in which the best interests of the child is the central State concern.

In particular, the following recommendations are made for reforming migration law:

1. Any reform proposal should explicitly uphold the principles of non-discrimination and the best interests of migrant C&As as a guiding principle for decisions adopted by all migratory, police, educational, health and jurisdictional authorities, which could have an impact on the rights of these children and adolescents;

2. Alongside the principle of the best interests of the migrant child, migration law should explicitly recognize the principles of non-penalization, due process, effective access to justice, parental co-responsibility and family reunification, applicable to all migrant C&As;

3. In terms of infringement of migration law, the legislation should avoid penalization or criminalization of irregular migration, given the serious impacts that this has on migrant C&As. It should always give preference to administrative measures aimed at regulating migratory flows and regularizing irregular migration;

4. In relation to expulsion and deportation, migration law should respect the principle of non-return of unaccompanied children, whereby children should only be repatriated if this is in their interests, in other words with the aim of contributing to family reunification, and with the due procedural guarantees;

5. In the framework of deportation procedures, migration law should ensure “age-appropriate” procedural guarantees, which, among other things, would include the rights of migrant C&As to consular assistance, having a guardian and legal representative, free legal advice, access to the legal
system, effective preparation, the use of an interpreter when necessary and, in particular, to be heard in any decision affecting them;

6. Deprivation of liberty for migrant C&As, whether as a sanction under migration law or as an interim administrative measure, should be explicitly prohibited. Should this occur, however, the following rights, in particular, must be guaranteed: a period of detention explicitly limited by law; detention periodically reviewed by an authority or competent, independent and impartial legal agency; adequate legal or other assistance; remain separate from adults; remain with direct family members; and their rights to personal integrity, health, education, and adequate food and housing should be upheld;

7. Migration law should guarantee the right of all migrant C&As to grow up under parental co-responsibility and not to be separated from their families. This requires the law to: recognize the principle of family unity as a guiding criterion for any migration decision; respect and guarantee access to justice in conformity with the rules of due process, for all migrants subject to the expulsion measure; and ensure that all administrative and judicial expulsion decisions are essential to guarantee the best interests of the migrant child, an issue which will always be important, and to guarantee the migrant child’s right to be heard in these processes;

8. With the aim of protecting and guaranteeing the right of migrant C&As to live in a family and not be separated from it, the law should require all migratory authorities to consider, in a positive, humanitarian and expeditious form, any request made by children or their parents to enter or leave any State, for the purpose of facilitating family reunification;

9. With regard to the right to a name, identity and nationality, migration law should recognize, guarantee and facilitate the right of migrant C&As to be registered and, in particular, pursuant to the principle of Ius Solis recognized by the Political Constitution, to grant nationality to children born in Chile to parents in an irregular migratory situation, when the latter cannot pass on their own nationality

10. Migration law should explicitly recognize the rights to education and health of migrant C&As;

11. With regard to the right to health, in particular, the law should create agencies and protocols to verify the effective application, based on technical indicators, both at the national and at the municipal level, of access to acceptable and quality health care for migrant C&As and members of their families; recognize the right of migrant children to express their opinion freely in any health proceeding, and to have their opinions taken duly into account; guarantee that migrant children have access to information and material from a variety of national and international sources, particularly information and material that aims to promote their social, spiritual and moral well-being, as well as their physical and mental health; and strictly respect the right to the privacy and confidentiality of migrant C&As, including in relation to advice and consultations on health issues;

12. On education, the law should establish bodies and protocols making it possible to verify effective application, based on technical indicators, both
at the national and municipal levels, of the rights and guarantees of access to quality education for migrant children; recognize effective mechanisms and procedures for lodging administrative and legal complaints, to protect migrant C&As’ entitlement to education in cases where their rights are violated; and legally require the implementation of a training policy on inclusive school coexistence, with a view to strengthening the capacities of Chilean children and school staff, to overcome prejudices and discriminatory practices, develop respect for cultural diversity and consolidate the social inclusion of migrant C&As.

13. Lastly, migration law should make it an explicit duty to keep data records, statistical databases and indicators, and to institute a national policy to protect migrant children, so as to be able to design, coordinate and implement a comprehensive system of child protection on migration issues.