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International  
Migration  
Law

# Migration and the Right to Health:

## A Review of International Law



IOM International Organization for Migration

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Compiled and edited by Paola Pace



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# FOREWORD

Migrants are often among the most disadvantaged and marginalized human beings on our planet. While the core motivation for migration is usually the pursuit of a better life, migrants often experience profound, systemic challenges to their physical, mental, and social well-being. They often face separation from their families, unfamiliar social and cultural norms, language barriers, appalling living standards, exploitative working conditions, as well as discriminatory access to health-related services. Migrants are precisely the sort of disadvantaged group that international human rights are designed to protect.

International human rights recognize the enjoyment of the highest attainable standard of health as a fundamental human right of every individual, regardless of race, religion, political belief, economic or social condition, and immigration status. The right to the highest attainable standard of health does not exclusively belong to nationals or migrants in a 'regular' situation. Just as a migrant who is charged with a criminal offence should not be denied his or her right to a fair trial, equally sick migrants should not be denied their human right to medical care without discrimination. There are many reasons for not discriminating against a migrant who needs medical care: ethical, humanitarian, public health, economic and human rights. But the right to health is not confined to medical care; it also extends to access to safe water and adequate sanitation, and other underlying determinants of health.

The right to the highest attainable standard of health has national and international dimensions. It places duties on States in relation to individuals within their jurisdictions. Second, those in a position to assist have a human rights responsibility of international assistance and cooperation in health. In other words, high-income countries have a human rights responsibility to provide international assistance and cooperation in health to developing countries.

Health-related rights, including the right to health, are recognized in numerous international instruments (as well as many national constitutions and statutes). Similarly, there is no single comprehensive international instrument protecting the rights of all those who migrate; their rights are recognized in several instruments and branches of international law. By consolidating and exploring the general and specific instruments that recognize and define the right to health, with a focus on migrants, this timely publication is an invaluable resource for those who seek to have a better understanding of the current state of international law concerning the right to health and its application to migrants.



Of course, the key challenge remains implementation of the law by way of policies, programmes and projects that are respectful of the human rights of all, including migrants. This publication is very warmly welcome as an important step in that direction.

Professor Paul Hunt

United Nations Special Rapporteur on the right to the highest attainable standard of health

(2002-2008)

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Paola Pace  
Geneva, 2009



## ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women / Committee on the Elimination of Discrimination against Women
CERD	Committee on Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child / Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRSSP	Convention relating to the Status of Stateless Persons
C 97	Convention No.97 concerning Migration for Employment (Revised)
C 143	Convention No.143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers
C 169	Convention No.169 concerning Indigenous and Tribal Peoples in Independent Countries
Geneva Convention IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

ILO	International Labour Organization
IOM	International Organization for Migration
OHCHR	Office of the High Commissioner for Human Rights
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
Protocol I	Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflict
Protocol II	Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-international Armed Conflict
Refugee Convention	Convention relating to the Status of Refugees
Trafficking in Persons Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
WHA	World Health Assembly
WHO	World Health Organization

## INTRODUCTION

*“Health will finally be seen not as a blessing to be wished for but as a human right to be fought for”.*

Kofi Annan<sup>1</sup>

*“At least in the case of public health, the best science (that is the knowledge that most effectively meets essential needs related to the health of human populations) springs from and is guided by an activist commitment to work with disadvantaged communities in realizing the economic and social rights”.*

Paul Farmer<sup>2</sup>

*“...No one stands so high as to be above the reach of their authority. No one falls so low as to be below the guard of their protection”.*

Sergio Vieira de Mello<sup>3</sup>

In view of the increase in global movement and the health implications migration<sup>4</sup> has for both migrating persons and host communities, it has become important to define the legal parameters of migration health.<sup>5</sup> Neglecting inequities in health status and health prevention, care and support for migrating populations versus that of the host population, can be costly for all the actors involved.

Currently, there is no comprehensive legal instrument at the international level establishing a legal framework for the governance of migration. However, several international instruments have important implications for the rights of those who migrate, including their right to health. These instruments are spread across different areas, such as human rights law, labour law, refugee law and international humanitarian law. Human rights

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<sup>1</sup> Kofi Annan served as the seventh Secretary-General of the UN from 1 January 1997 to 1 January 2007.

<sup>2</sup> Paul Farmer is the Presley Professor of Medical Anthropology in the Department of Social Medicine at Harvard Medical School; Associate Chief of the Division of Social Medicine and Health Inequalities at Brigham and Women's Hospital; and cofounder of Partners In Health.

<sup>3</sup> Sergio Vieira de Mello joined the UN in 1969. He spent the majority of his career working for the UNHCR in Geneva. He briefly held the position of Special Representative of the Secretary-General in Kosovo and also served as UN Transitional Administrator in East Timor. On 12 September 2002 he was appointed United Nations High Commissioner for Human Rights. In May of 2003, he was asked by the Secretary-General to take a four month leave of absence from his position as High Commissioner to serve in Iraq as Special Representative of the Secretary-General. It was there that he was tragically killed on 19 August 2003, <http://www.unhcr.ch/html/hchr/cv.htm>.

<sup>4</sup> Migration is a process of moving, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, uprooted people, and economic migrants. *Glossary on Migration*, International Migration Law Series, IOM, 2004.

<sup>5</sup> Migration health is a state of complete physical, mental and social well-being of those who migrate and host society, and not merely the absence of disease or infirmity. IOM applies the concept of health originally developed by the World Health Organization (WHO) to define migration health. See *Migration Health Annual Report 2006*, IOM, Geneva, 2006.

law is at the core of this protection. Knowledge of relevant norms is a necessary first step towards the application of such laws.

The present study concerns the heterogeneous group of individuals involved in the migration process. They include: migrants,<sup>6</sup> be they in a regular or an irregular situation including the victims of smuggling,<sup>7</sup> or intending a long or short term stay; victims of trafficking in persons;<sup>8</sup> asylum seekers;<sup>9</sup> refugees;<sup>10</sup> displaced persons<sup>11</sup> and others in need of international protection and assistance. Collectively, all these categories of individuals are referred to, in this publication, as migrating persons.

The objective of this publication is primarily to promote respect by the State for the right to health for those who migrate. Secondly, the publication aims more generally at guiding health and legal practitioners, students, academics, and those migrating themselves through the myriad of norms and principles contained in international instruments impacting on migrating persons' right to health. It includes both binding and non-binding instruments, or excerpts thereof. A short definition of the instruments' legal

<sup>6</sup> At the international level, no universally accepted definition of migrant exists. The term migrant is usually understood to cover all cases where the decision to migrate is taken freely by the individual concerned for reasons of "personal convenience" and without intervention of an external compelling factor. This term therefore applies to persons, and family members, moving to another country or region to better their material or social conditions and improve the prospects for themselves or their family. *Glossary on Migration*, loc. cit. n. 4.

<sup>7</sup> Victims of smuggling are individuals who are victims of the crime of smuggling of migrants. Smuggling is the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident (Art. 3(a), UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, 2000). Smuggling contrary to trafficking does not require an element of exploitation, coercion, or violation of human rights. *Glossary on Migration*, loc cit. n. 4.

<sup>8</sup> Victims of trafficking are individuals who are victims of the crime of trafficking in persons. Trafficking is "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation" (Art. 3(a), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Organized Crime, 2000).

<sup>9</sup> Asylum seekers are persons who have left their country of origin seeking safety from persecution or serious harm, have applied for asylum in another country, and are awaiting a decision on their application. They hope to obtain refugee status or protection on other humanitarian grounds in order to benefit from the legal protection and material assistance which is an automatic part of such protection. If the application is rejected after consideration and after all possible appeals, the applicant's right to asylum is dismissed and the State usually tries to remove or deport them, sometimes after detention. Not every asylum-seeker is a refugee, but every refugee is initially an asylum-seeker. See *Glossary on Migration*, loc cit. n. 4 and *Master Glossary of Terms*, UNHCR, June 2006.

<sup>10</sup> A "refugee" is a person who meets the eligibility criteria under the applicable refugee definition, as provided for in international or regional refugee instruments, under UNHCR's mandate, and/or in national legislation.

<sup>11</sup> "Displaced persons" broadly refers to persons who have not necessarily been exposed individually to persecution but have been forced to leave their homes and communities as a result of generalized violence, armed-conflict situations, or other man-made disasters. This category includes persons who are externally and internally displaced.

force and effect precedes the excerpts. There is a brief introduction on migrating persons' right to health and its international protection guaranteed by the various norms applying to those who migrate.

The instruments are divided into two sections: general and specific. The first section includes relevant human rights instruments whose guarantees are not reserved for nationals or a specific group of people, but apply to all individuals, nationals and non-nationals alike. The second section examines the right to health of specific categories of individuals involved in the migration process.

Finally, considering the importance of the application *de iure* and *de facto* of the human rights norms which, as aforesaid, are at the core of migrating persons' protection, examples of compliance or non-compliance by States with relevant articles of human rights instruments have been added in Part II. Such examples have been extracted from the UN Treaty Bodies' concluding observations relating to various country reports.

All documents are in the official English version together with citations of their original source. The reader is, however, encouraged to consult the original text for any details or updates on the status of each instrument. Finally, any act of selection is by definition subjective and considering the multitude of legal norms relating to the international movement of people,<sup>12</sup> it is impossible to be comprehensive. The desire of the author, however, is to acquaint the reader with the various international instruments relating to right to health of those who migrate with the aim of encouraging him or her to carry the research forward.

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<sup>12</sup> International Migration Law draws together the norms governing the legal relationships between States and those between States and individuals vis-à-vis movement of persons. It is an umbrella term for an area of law that has developed over time and indeed, continues to develop. For a comprehensive list of international instruments, see *Compendium of international migration law instruments*, edited by Richard Perruchoud and Katarína Tömolövä, Asser Press, 2007.





# **I. MIGRATION HEALTH IN THE INTERNATIONAL CONTEXT**



# 1. Health Across Centuries and the Right to Health

## 1.1 The Concept of Health

The word “health” shares its etymology with “hale”, “heal” and “whole”. All come from the Old English “hal”.<sup>13</sup>

From Aristotle to the preamble of the World Health Organization (WHO) Constitution, health has been understood as more than the absence of disease or infirmity, it is a highly-prized personal asset. However, although highly-valued by the ancient Greek philosophers, health was mainly considered physical in character and granted only to some. The Latin phrase *orandum est ut sit mens sana in corpore sano*<sup>14</sup> refers to the extension of the concept of health to include mental health and well-being. Before Juvenal wrote in the 1<sup>st</sup> Century A.D., Buddha was already referring to health for both body and mind in the 6<sup>th</sup> Century B.C.. With Christianity, health assumed a strong spiritual connotation and it was perceived as an asset for all rather than merely for a few.<sup>15</sup> In Judaism, human life and health are highly valued. Ritualistic eating proscriptions and personal hygiene practices underscores the notion that spiritual well-being is inextricably linked with the physical well-being of the Jewish people.<sup>16</sup> In Islam, health is placed as second only to faith.<sup>17</sup> The promotion and protection of health not only concerns one’s self but also others and the environment.<sup>18</sup>

A holistic and comprehensive approach to health must consider both mental and physical health, as well as social health. This approach recognizes the determinants of health as including socio-economic, cultural and environmental conditions as well as biological and genetic endowments. Finally, a holistic approach requires an effective and inclusive health system of good quality. It addresses preventive, curative and palliative

<sup>13</sup> For the ancients, to be healthy or to be healed was to become whole, and being whole meant to be hale and healthy. When one is whole all the parts of one’s being – body, mind, soul – are in perfect harmony. This is true for the individual as well as for the collective. When one of the parts becomes diseased so do all the others. In the past, the individual was considered as responsible for his/her health, wholeness and healing.

<sup>14</sup> “You should pray to have a sound mind in a sound body”, Juvenal (60-128 A.D.), *Satires*, x, 356.

<sup>15</sup> B. C. A. Toebes, *The Right to Health as a Human Right in International Law*, Antwerp/Groningen/Oxford, INTERSENTIA, 1999, p. 22.

<sup>16</sup> See F. Rosner, “Judaism and Medicine: Jewish Medical Ethics” in R. E. Ashcroft, et al. (eds.), *Principles of Health Care Ethics*, 2nd ed. 2007, p.110 and “Global Health and Wellness: A Response to International Health Threats: When the Right to Health and the Right to Religion Conflict: A Human Rights Analysis”, in *Michigan State Journal of International Law*, Volume 12, 2004, p. 253.

<sup>17</sup> M.H. Al-Khayat, *Health as a Human Right in Islam*, (The Right Path to Health: Health Education Through Religion; 9), WHO, Regional Office for the Eastern Mediterranean, 2004. See also M. A. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, 2003.

<sup>18</sup> *Ibidem*.

efforts, as health care is a determinant of the health of the population it serves, including vulnerable groups.<sup>19</sup>

The WHO Constitution defines health as a “state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.<sup>20</sup>

In spite of many attempts to find an alternative narrower definition of health, the WHO definition is the accepted starting point for further elaboration of the right to health in international, regional and national instruments. This definition focuses on the integration rather than contradiction of two concepts: one negative (absence of disease or infirmity) and one positive (promotion of human well-being). These two integrated concepts are necessary and relevant to conditions such as disease and well-being, which are not easily separable.<sup>21</sup> Additionally, the extensive definition of health contained in the Preamble to the WHO Constitution clearly shows the path to follow. In fact, it also takes into consideration mental and physical health, addresses preventive and curative health efforts, and refers to the responsibility of States for the health of those in their territory or subject to their jurisdiction, to non-discrimination, to maternal and child health, and to information and participation of the public.

<sup>19</sup> See E. Nolte, M. McKee and J. Pomerleau, “The Impact of Health Care on Population Health”, Section I, Chapter 5, in J. Pomerleau and M. McKee (eds.), *Issues in Public Health*, 2005, pp. 106-126.

<sup>20</sup> Constitutions of International Organizations are multilateral agreements according to public international law; therefore the WHO Constitution is binding upon States that are party to that Constitution. Consequently, these States have to comply with the right to health as set out in the Preamble to the WHO Constitution. The Preamble of the WHO Constitution states the following: (...)

*Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.*

*The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, political belief, economic or social condition.*

*The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.*

*The achievement of any State in the promotion and protection of health is of value to all.*

*Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.*

*Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.*

*The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.*

*Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.*

*Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.*

(...)

Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, No. 2, p. 100) and entered into force on 7 April 1948. A new draft of the preamble's first sentence includes the dynamic nature of the state of well-being including also the spiritual aspect.

<sup>21</sup> See P. Benciolini, “Il diritto alla salute”, in *Pace, diritti dell'uomo, diritti dei popoli*, 1988, p. 48.

There are other definitions of health that also take a holistic approach. They are contained in the provisions collected in the present volume. The following is an example: “the term health, in relation to work, indicates not merely the absence of disease or infirmity; it also includes the physical and mental elements affecting health which are directly related to safety and hygiene at work”.<sup>22</sup> Another example describes the attainment of the highest possible level of health as “a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector”.<sup>23</sup>

Thus, for the purpose of this volume health is: a state of complete physical, mental and social well being and not merely the absence of disease or infirmity.

## 1.2 The Right to Health

The “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, as stated in Article 12(1)<sup>24</sup> of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>25</sup> is abbreviated as the “right to health”.

This term is most commonly used at the international level. It clearly underlines the importance of recognizing not only the right to health care, which is a part of the right to health, but also a right to a certain number of underlying preconditions for health. These preconditions are: safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including with regard to sexual and reproductive health. Another important aspect is the participation of the population in all health-related decision-making at the community, national and international levels,<sup>26</sup> including those who have migrated.

<sup>22</sup> ILO Convention No. 155 concerning Occupational Safety and Health and the Working Environment, 1981, Article 3.

<sup>23</sup> Declaration of Alma-Ata, 1978, at p.125.

<sup>24</sup> Article 12 must be read in conjunction with Article 2 of the International Covenant on Economic, Social and Cultural Rights. The latter states that each State party to the Covenant undertakes to take steps with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures. Nonetheless, the Committee on Economic Social and Cultural Rights General Comment No. 14 on Article 12 of the Covenant specifies that “progressive realization means that States Parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of Article 12”.

<sup>25</sup> Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force, Jan. 3, 1976), at p. 52.

<sup>26</sup> UN Committee on Economic Social and Cultural Rights (CESCR), *General Comment No. 14: the right to the highest attainable standard of health (Art. 12)*, 11 Aug. 2000, E/C.12/2000/4, at p. 56. V. A. Leary, “The Development of the Right to Health”, in *Human Rights Tribune des droits humains*, Volume 11, No. 3, 2005.

Moreover, the right to health embraces a wide variety of socio-economic factors indispensable to the achievement of health. It contains freedoms such as the right to be free from non-consensual medical treatment and to be free from forced sterilization and discrimination, as well as entitlements, such as the right to a system of health protection.

“The right to health grants the right to a number of health-related services, claims and freedom, taking into account the available resources of a State and the health needs of its people”,<sup>27</sup> on a non-discriminatory basis.

At an international level the right to health is considered a fundamental human right that demands effective mechanisms of accountability. In a paper submitted to the workshop “The Right to Health”, Professor T. C. Van Boven, uses the term “right to health” to refer to provisions in the founding documents of international human rights law. He writes: “Three aspects of the right to health have been enshrined in the international instruments on human rights: the declaration of the right to health as a basic human right; the prescription of standards aimed at meeting the health needs of specific groups of persons; and the prescription of ways and means for implementing the right to health”.<sup>28</sup> Furthermore, the right to health is closely related to and dependent upon the realization of other human rights.

### 1.3 Other Human Rights Relating to the Right to Health

A number of rights touching on the right to health and firmly related to its fulfillment are contained in the International Bill of Rights that is comprised of the UDHR (1948), the ICCPR (1966) and ICESCR (1966). They include the rights to: food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition of torture, privacy, access to information, and the freedoms of association, assembly and movement.<sup>29</sup> Among these rights are those that cannot be restricted under any circumstances. These are: freedom from slavery or involuntary servitude; freedom from torture or cruel, inhuman or degrading treatment;

<sup>27</sup> B. C. A. Toebes, *The Right to Health as a Human Right in International Law*, Antwerp/Groningen/Oxford, INTERSENTIA, 1999, p. 19.

<sup>28</sup> Presentations at the Workshop are published in: R.-J. Dupuy (ed.), *The Right to Health as a Human Right, Workshop*, The Hague Academy of International Law and the United Nations University, Alphen aan den Rijn, The Netherlands, Sijthoff & Noordhoff, 1979, pp. 54-72, at pp. 54-55. Professor T. C. Van Boven is also cited in V. A. Leary, “The right to health in International Human Rights Law”, in *Health and Human Rights: An International Journal*, Volume 1, No. 1, 1994. In this article, V. A. Leary, after having discussed the concept of the right to health in international human right law, and after having stressed how the shorthand “right to health” emphasizes the link of health status to issues of dignity, non-discrimination, justice and participation, concludes that “(...) a more correct phraseology would be a right to health protection, including two components, a right to health care and a right to healthy conditions”.

<sup>29</sup> See CESCR, *General Comment No. 14*, loc. cit. n. 26.

and freedom from medical or scientific experimentation without the free consent of the person concerned.<sup>30</sup>

In contrast, there are other rights that can be subject to derogation or limitation at certain times, including on public health grounds.<sup>31</sup> These are, for example: freedom of movement; freedom of opinion; right of peaceful assembly; and right to freedom of association.<sup>32</sup> However, “Public health may be invoked as a ground for limiting certain rights” only “in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured”.<sup>33</sup> This is stated in the Siracusa Principles<sup>34</sup> that have become internationally accepted standards for the understanding of limitation provisions in human rights instruments. According to these Principles, action aimed at derogating or limiting rights must: be prescribed by law; have a legitimate objective that cannot be reached through less intrusive and restrictive means; be based on the best scientific evidence available; not be drafted or imposed arbitrarily; be limited in time; and subject to review.<sup>35</sup>

#### 1.4 Prohibition of Discrimination

The prohibition of discrimination is also linked to the right to health. Non-discrimination is, first of all, a right on its own – the right not to be discriminated against – and is enumerated among the civil rights.<sup>36</sup>

<sup>30</sup> See Human Rights Committee (HRC), *General Comment No. 29: states of emergency (Article 4)*, 3 Aug. 2001, CCPR/C/21Rev.1/Add.11.

<sup>31</sup> Other grounds for limiting the exercise of certain human rights are national security or the preservation of public order, morals or safety. See CESCR, *General Comment No. 14*, loc. cit. n. 26 concerning the limitations of rights.

<sup>32</sup> See International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 (entered into force, 23 Mar. 1976).

<sup>33</sup> See UN, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985), I. Limitation Clauses, B. Interpretative Principles Relating to Specific Limitation Clauses, iv. “public health”.

<sup>34</sup> Though the Siracusa Principles, drafted by academics and practitioners first and later adopted by the UN, are not binding, they have been used in pleadings before international tribunals and are generally accepted as key in understanding the limitation provisions in human rights treaties.

<sup>35</sup> *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, loc. cit. n. 33

<sup>36</sup> International Covenant on Civil and Political Rights, loc. cit. n. 32. The Inter-American Court of Human Rights ruled, in its Advisory Opinion OC-18 of 17 September 2003, that international principles of non discrimination prohibit discriminating against irregular migrant workers in the terms and conditions of work. It states that though neither States nor private individuals are obliged to hire irregular workers, once employment relations are established with an irregular worker “the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment.” The Court observes that the obligation not to discriminate includes reasonable working hours, safe and healthy working conditions, social security, the payment of fair wages for work performed, a right to rest and compensation, protection for women workers, access to State health care services, judicial and administrative guarantees and contribution to the State pension system. The Court portrayed these rights as



Additionally, being inherent to the idea of universal rights, the prohibition of discrimination is not just an independent human right; it is also a constitutive element of all rights, including social rights, such as the right to health, and is mentioned in various international instruments. The international provisions referring to non-discrimination are mostly limited to prohibiting instances of discrimination; that is, any distinction, exclusion or restriction made on various grounds, which occur in the recognition, enjoyment or exercise of the rights and freedoms laid down in the instruments in question.<sup>37</sup> The prohibition of discrimination does not preclude any differentiated treatment and measures being taken to address the specific needs of (particular) migrating persons. Differentiated treatment and measures may indeed not only be justified but required. The principle of non-discrimination does, however, require that any differentiation in treatment must be based on objective and reasonable criteria intended to rectify an imbalance within society.<sup>38</sup>

According to the Committee on Economic, Social and Cultural Rights General Comment No. 14,<sup>39</sup> in relation to health the principle of non-

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inalienable and necessary to ensure the dignity of workers and their families. Inter-American Court of Human Rights, *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Sep. 17 2003, Series A No. 18. See S. H. Cleveland, "Legal status and rights of undocumented workers. Advisory Opinion OC-18/03", *The American Journal of International Law*, Volume 99, No. 2, April 2005, pp. 460-465. Prior to this, a case indirectly involving a right of access to health care services was brought before the Human Rights Committee (HRC) that monitors the implementation of the International Covenant on Civil and Political Rights. This treaty body has adopted the practice of considering Article 26 of the Covenant as an autonomous provision that may include the prohibition of discriminatory action in terms of social rights. In the case *Hendrika S. Vos. v. the Netherlands*, the Committee considered whether a denial of a disability benefit represented a violation of the aforesaid Article 26. Although the HRC did not recognize such a violation in this specific case, the fact that the Committee considered the denial of sickness benefits as contrary to Article 26, shows it reads social rights into the nondiscrimination clause. See *Hendrika S. Vos. v. the Netherlands*, Communication No. 218/1986, adopted 29 March 1989, UN GAOR, Human Rights Committee, 44<sup>th</sup> Session, 1989, Supp. No. 40, at p. 232, U.N. Doc. A/44/40. See V. A. Leary, "The Right to Complain: The Right to Health", in A.P.M. Coomans and G.J.H. van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights* 87, 1995. See also M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, Kehl/Strasbourg/Arlington 1993 (2nd ed. published in 2005, Chinese translation published in 2003) and W. Kaelin, *Guiding Principles on Internal Displacement, Annotations*, American Society of International Law and The Brookings Institution Project on Internal Displacement, 2000.

<sup>37</sup> See e.g., Universal Declaration of Human Rights, G.A. Res. 217A(III), UN GAOR, 3d Sess., U.N. Doc. A/810 (12 Dec. 1948). Article 2; International Covenant on Economic, Social and Cultural Rights, Article 2(2); International Covenant on Civil and Political Rights, Article 2(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 Dec. 1990, U.N. Doc. A/Res/45/158 (entry into force 1 Jul. 2003), Article 1; Convention relating to the Status of Refugees, 28 Jul. 1951, 189 U.N.T.S. 137 (entry into force, 22 Apr. 1954), Article 3; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entry into force, 2 Sep. 1990), Article 2(1).

<sup>38</sup> Discrimination must be prohibited in theory and in practice, establishing equality in fact as well as formal equality in law. A State may be in violation of the prohibition against discrimination even if its laws formally prohibit discrimination. Consequently a State must ensure that discrimination is in fact prohibited to avoid condemnation and to respect its international obligation to prohibit discrimination. See the *Minority School in Albania* case of the Permanent Court of International Justice, P.C.I.J., Series A/B, No. 64, 1935, p. 19.

<sup>39</sup> Loc. cit. n. 26.

discrimination proscribes: “any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status, sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health”.<sup>40</sup> Even if an explicit prohibition of discrimination against migrants because of their status cannot be found in present international human rights treaties, there is a progressive development of the scope of the principle of non-discrimination in international human rights law. In particular, discussion arises around the prohibition of discrimination based on “other status” (e.g. Article 2 of the ICESCR; Articles 2 and 26 of the ICCPR;<sup>41</sup> and Articles 1 and 7 of the ICRMW). The latter could be interpreted broadly and covers the status of migrants. “The enjoyment of the right to be free from discrimination is not confined to the citizens of a state, but must also be protected in respect of all those persons who come within the state’s jurisdiction”.<sup>42</sup>

## 2. The Right to Health in the Context of Migration

In 2008, there were some 200 million international migrants<sup>43</sup> of which 90 million were migrant workers. Current trends indicate that the total number of international migrants could reach 214 million by 2010.<sup>44</sup>

They are, first of all, human beings who have inalienable rights that states have an obligation to uphold. Secondly, those who are socially integrated and gainfully employed contribute more to society than those who are exploited and socially excluded.

Migrants contribute to the human and economic development of their countries of origin through: private funds and material goods, the support provided by migrant diaspora organizations to their town or area of origin as well as to their community of origin.<sup>45</sup> Migrants can make also use of the

<sup>40</sup> CESCR *General Comment No. 14*, loc. cit. n. 26.

<sup>41</sup> “Other status” has been interpreted to include nationality, demonstrated by the case of *Gueye et al. v. France*, in which the Human Rights Committee found a violation of Article 26 of the ICCPR because of discrimination on the ground of nationality (Communication No. 196/1985).

<sup>42</sup> See R. Cholewinski, *Borders and Discrimination in the European Union*, Immigration Law Practitioners’ Association London, Migration Policy Group, Brussels, 2002, Chapter 3; *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford, Clarendon Press, 1997, in particular Chapters 2 and 4.

<sup>43</sup> See *World Migration 2008. Managing Labour Mobility in the Evolving Global Economy*, Geneva, IOM, 2008; *Migration in an interconnected world: New directions for action*, GCIM, October 2005.

<sup>44</sup> UN, Department of Economic and Social Affairs, Population Division (2009). Trends in International Migrant Stock: The 2008 Revision (UN database, POP/DB/MIG/Stock/Rev.2008).

<sup>45</sup> Concerning extra-economic dimensions of remittances, particularly the social and political meanings and uses of both individual and collective remittances, see L. Goldring, *Re-thinking*

skills and knowledge they acquired in their destination country once they return to their country of origin.<sup>46</sup>

Countries of destination also benefit from migrants' presence on their territory in terms of new skills and a diversified culture, a larger tax base and greater social security funds, higher levels of entrepreneurship and often a younger population in demographic terms. Regarding migrants' fiscal contribution in 2002 it was, for example, estimated that migrants in the UK contributed £31.2 billion in taxes, and increased public expenditure by £28.8 billion through their receipt of public goods and services, resulting in a net fiscal contribution of around £2.5 billion. In other words migrants in the UK reduced the amount that the existing population paid in taxes, or increased the amount they received in welfare and public services, by £2.5 billion.<sup>47</sup>

Addressing migration health<sup>48</sup> is a necessary precondition to full realization of the benefits of migration for those who migrate and for both countries of origin and destination. Sick people are more likely to become poor: and the poor are more vulnerable to disease and disability. Good health is central to creating the capabilities that the poor need to escape from poverty. In other words, good health is not just an outcome of development – it is a way of achieving development. The right to health has a vital role to play in tackling poverty and achieving development – it lies at the heart of our struggle for a fairer, more humane world.<sup>49</sup>

Several migration-related economic and social factors, including aspects of migrant behaviour, and many health-related influences associated with migration can persist long after permanent residence or nationality is attained.<sup>50</sup> Also, some biological and genetic determinants of health, as well as certain behaviourally influenced determinants, may extend over generations.<sup>51</sup> In this context, monitoring and studying the health implications and consequences of migration require a focus that goes beyond residence and nationality.<sup>52</sup>

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*remittances: social and political dimensions of individual and collective remittances*, Center for Research on Latin America and the Caribbean (CERLAC), York University, February 2003.

<sup>46</sup> See also *Mainstreaming Migration into Development Policy Agendas*, International Dialogue on Migration No. 8, IOM, 2005.

<sup>47</sup> UK Home Office, *The Migrant Population in the UK: fiscal effects*, Home Office RDS Occasional Paper No. 77, 2002, p. 11.

<sup>48</sup> Migration health is the health of those who migrate. See *Migration Health Report 2004*, IOM, 2004, p. 3.

<sup>49</sup> Opening remarks of Paul Hunt, UN Special Rapporteur on the Right to the Highest Attainable Standard of Health to the London launch of the 'call to action' on the right to health, 9 December 2005.

<sup>50</sup> J. Landman, J.K. Cruickshank, "A review of ethnicity, health and nutrition-related diseases in relation to migration in the United Kingdom" in *Public Health Nutrition*, 4, 2001, pp. 647–657.

<sup>51</sup> A. Sharareh, B. Carina, W. Sarah, "The health of female Iranian immigrants in Sweden: a qualitative six-year follow-up study" in *Health Care for Women International*, 28, 2007, pp. 339–359.

<sup>52</sup> "Migration and health of migrants", IOM contribution to *Resolution EUR/RC52/R7 case studies*:

In the context of health, successful integration in the receiving country requires, *inter alia*, a comprehensive interpretation of migration health beyond infectious disease control. It should encourage preventive and curative efforts in a holistic approach to health that involves migrants working and living in healthy conditions. Health services, goods and facilities should be provided for migrating persons' well-being and the fulfillment of their right to health, and for the health and wealth of affected communities.

The approach should be comprehensive covering not only infectious diseases but also non-infectious diseases and chronic conditions, mental health, and sexual and reproductive health, considering that about half of today's migrant workers are women<sup>53</sup> and in view of the high number of women among both victims of trafficking in persons and those internally displaced. Occupational health and safety among migrants is essential as studies show a large proportion of all reported occupational diseases and accidents occur among migrating persons. Low-skilled migrants as well as irregular migrants are at a high risk of being victims of occupational accident while working in high risk jobs with poor supervision. This is the case for migrants working in mining, construction,<sup>54</sup> heavy manufacturing and agriculture. In the agriculture sector, for example, chronic and unprotected exposure to pesticides and other chemical products is associated with high incidence of depression, headaches, neurological disorders and, in case of women, miscarriage.<sup>55</sup> The information and participation of migrating persons in setting priorities and procedures is fundamental to overcoming barriers to delivery of health and social services. Awareness by those who migrate of the benefits of access to health services as well as of the importance of health and its preconditions is beneficial to the local community in both the short and long term. The importance of safe and adequate food, nutrition and housing should not be disregarded given their interdependence with health. Migration in itself is not a risk factor for health. However, individually or collectively, the process of migration can result in vulnerability to physical and mental health problems, depending on the conditions to which migrating persons are exposed.<sup>56</sup> The factors affecting health and vulnerability of those who migrate are as follows:

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*how European health systems are addressing the health of socioeconomically disadvantaged groups [TBC]. Copenhagen, WHO Regional Office for Europe, 2008.*

<sup>53</sup> See *World Migration 2008*, loc. cit. n. 43; see also UN, Department of Economic and Social Affairs, Population Division (2009). *Trends in International Migrant Stock: The 2008 Revision* (UN database, POP/DB/MIG/Stock/Rev.2008).

<sup>54</sup> "Are You Happy to Cheat Us?" *Exploitation of Migrant Construction Workers in Russia*, Human Rights Watch, 2009.

<sup>55</sup> See P. Bollini and H. Siem, "No real progress towards equity: health of migrants and ethnic minorities on the eve of the year 2000", in *Social Science and Medicine*, Volume 41, No. 6, 1995, pp. 819-828; see also E. Q. Ahonen and F. G. Benavides, "Risk of fatal and non-fatal occupational injury in foreign workers in Spain", in J. Epidemiol (ed.), *Community Health*, No. 60, 2006, pp. 424-426.

<sup>56</sup> IOM, *Migrant Health for the Benefit of All*, MC/INF/275, IOM, Geneva, 2004.

firstly, their socio-economic and cultural background as well as their health history, together with the health care they had access to prior to departure; secondly, the circumstances surrounding the migration process, including the health environment in the place of origin, transit and destination (i.e., disease prevalence and the epidemiology of the diseases), as well as the different patterns of mobility influencing the condition of the journey.<sup>57</sup>

In the final analysis, the right to health should be fulfilled at each stage of the migration process: from the decision to move, to the journey itself, to reception in the new community and any eventual return.

Migrating persons' have no general recognized right to enter a country. However, states must exercise their sovereign powers to deny entry to or exclude migrating persons in a manner consistent with international law and human rights, including the principle of non-discrimination. As discussed above, this principle requires states not to treat persons intending to enter or reside on their territory differently solely due to their health status unless there is an objective and reasonable basis for doing so. Many countries justify such a differentiation on the grounds of protecting public health and avoiding excessive pressure on national health care resources. Indeed, various regulations are imposed with the purpose of preventing the entry or residence of migrating persons with certain diseases or conditions (such as HIV infection/AIDS<sup>58</sup> or physical or intellectual, psycho-social or cognitive impairments).<sup>59</sup> These range from health-related questions in visa application forms, to medical examinations by immigration officers at the border and mandatory HIV tests before departure or upon arrival.

However, it is questionable whether these justifications are objective and reasonable in all cases. For example, with respect to the refusal to grant entry to migrants living with HIV, this may, in fact, be counterproductive to protecting public health. Given the nature of HIV infection and its now significant presence in virtually every country in the world, the claim that denying the entry of people living with HIV could prevent or retard the spread of HIV within a country cannot be supported.<sup>60</sup> It is not the presence of carriers in the country that spreads the virus, but rather specific behaviors, such as unsafe sex or the sharing of infected blood or bodily fluids. Arguably, a better public health solution would be to educate the

<sup>57</sup> "Migration and health of migrants", loc. cit. n. 52.

<sup>58</sup> *UNAIDS/IOM Statement on HIV/AIDS-related Travel Restrictions*, Geneva, UNAIDS/IOM, 2004. See also forthcoming *UNAIDS/IOM Best legislative practices regulating the entry and residence of people living with HIV*, IOM and UNAIDS. See also *Discrimination, Denial, and Deportation Human Rights Abuses Affecting Migrants Living with HIV*, Human Rights Watch, 2009.

<sup>59</sup> The Memorandum by the International Law Commission Secretariat on the expulsion of aliens lists some national laws that enumerate "physical defects, mental illness or handicap or retardation" as grounds for the refusal of entry or the expulsion of those aliens who suffer from the specified health condition or are "disabled or handicapped and thus unable to work" (Document A/CN.4/565, p. 261).

<sup>60</sup> *UNAIDS/IOM Statement on HIV/AIDS-related Travel Restrictions*, loc. cit. n. 58.

population about and advocate for ways to prevent the spread of the virus. Mandatory HIV tests simply force many carriers to hide their HIV status (if necessary, through stopping their antiretroviral treatment) in order to enter the country, as well as discouraging migrants already residing there not to be tested for the virus. As mandatory testing can constitute a barrier to the access to health services, it contravenes the specific obligation of states not to limit or deny access to health services for all as provided for in international human rights instruments. Similarly, with regard to avoiding economic strain on the host state, this arguably ignores the fact that persons living with HIV are capable of working and are still an economic benefit to the state. This is especially true since improved medication is cheaper and life-expectancy is longer. It is also noteworthy that in many instances the justification of avoiding excessive pressure on national health care resources is not used to impose blanket bans for persons with other medical conditions that require costly treatment.

In order to conform with international human rights law, entry and residence restrictions based on health status should be applied on an individual basis, taking into account the real effect of excluding the applicant on public health grounds and the cost treatment would impose on the host state. Arguably, such restrictions on human rights would be objective and reasonable and would not be disproportionate and arbitrary as prohibited under the Siracusa Principles.<sup>61</sup> In principle, exclusion on the basis of HIV is *prima facie* arbitrary, because it is not related to a public health objective or to a public pursue objective.<sup>62</sup> Similarly the requirement to submit to screening is likely to be arbitrary in application, so far as it infringes the principle of free and informed consent as a fundamental prerequisite to every intervention, and may leave the applicant without possibility of counselling or treatment.<sup>63</sup> Furthermore, notwithstanding the discretion states have in determining whom to admit to their territory, discriminating on the basis of health status or disability is contrary to international law not only if the aim is illegitimate or the means used are disproportionate, but also if a protected right or interest is affected. For example, the right to be protected against *refoulement* is the cornerstone of international refugee law. The principle of equality of treatment may be violated if a distinction is based on prohibited grounds, including health status or disability, or if it has no objective and reasonable justification. The same can be said if an asylum seeker is denied entry into the country and access to asylum procedures on the basis of her/his health status or impairment, or if the applicant falls under the international provisions on children or the family, in particular the best interest of the child and the right of the family to

<sup>61</sup> See footnote 33.

<sup>62</sup> See G. S. Goodwin-Gill, "AIDS and HIV, Migrants and Refugees: International Legal and Human Rights Dimensions", in M. Haour-Knipe and R. Rector (eds.), *Crossing Borders: Migration, Ethnicity and AIDS*, Taylor&Francis, 1996.

<sup>63</sup> *Ibidem*.



reunification.<sup>64</sup>

A migrating persons' legal status may determine access to health and social services in the country of destination.<sup>65</sup> Particularly problematic is the situation of irregular migrants whose access to preventive, curative and palliative health services is often limited or denied. Legal obstacles to access to health services exist, for example, when health services providers are required by law to report to the authorities the presence of irregular migrants. Such requirement, therefore, has to be eliminated so that national legislation may comply with international law. Information accessibility plays also an important role, as there is often a lack of awareness of available health services, including a lack of awareness and training on the part of health workforce regarding migration health issues, a lack of understanding of the specific needs and expectations of migrating persons together with a lack of trust on the part of the migrating persons. Socio-economic conditions of migrants in the host country, including living and working conditions, physical and psycho-social environments, correlate directly to rates of long term illness and chronic diseases. Familiarity with the culture and language of the host community is also a factor influencing migrating persons' health and utilization of health services. Cultural barriers include also different ways of viewing illness and the relationship between health care providers and patients.<sup>66</sup> Moreover, factors such as separation from family, as well as the social stigma of certain illnesses and the legal status of the person can negatively impact on a person's health status and result in increased risky behavior.<sup>67</sup>

Being held in custody can, all too commonly, be a part of the migration process. Migrating persons are not only detained in connection with criminal offences like any other national of a State,<sup>68</sup> but too often for

<sup>64</sup> *Ibidem*; see also UNHCR, Note on HIV/AIDS and the Protection of Refugees, IDPs and Other Persons of Concern, UNHCR, 2006, pp. 50-69.

<sup>65</sup> See e.g., S. Gaur and P. C. Saxena, "Indian migrant workers in Lebanon and their access to health care", in *Asian and Pacific Migration Journal*, Volume 13, No. 1, 2004.

<sup>66</sup> See *Migration and the Right to Health: A Review of European Community Law and Council of Europe Instruments*, International Migration Law Series No. 12, IOM, 2007.

<sup>67</sup> See Y. Apostopoulos, S. Sonmez, J. Kronenfeld, E. Castillo, L. McLendon and D. Smith, "STI/HIV risks for Mexican migrant laborers: exploratory ethnographies", in 8 *Journal of Immigrant and Minority Health*, 2006, pp. 291-302; A. Faisel and J. Cleland, "Migrant men: a priority for HIV control in Pakistan?", in *Sexually Transmitted Infections*, 2006, Volume 82, No. 4, pp. 307-310; M. L. Marin, *HIV/AIDS Knows No Borders: Addressing HIV Vulnerability of Overseas Filipino Workers*, 2002; I. Wolffers, I. Fernandez, S. Verghis and M. Vink, "Sexual behavior and vulnerability of migrant workers for HIV infection", in *Culture, Health and Sexuality*, 2002, Volume 4, No. 4, pp. 459-473; K. M. Harris, "The health status and risk behavior of adolescents in immigrant families", in D. J. Hernandez (ed.), *Children of Immigrants: Health, Adjustment, and Public Assistance*, Washington, D.C., National Academy Press, 1999, pp. 286-347.

<sup>68</sup> See S. Slama, H. Wolff and L. Loutan, "The Right to Health in Prisons: Implications in a Borderless World" in A. Clapham and M. Robinson (eds.), *Realizing the Right to Health*, Swiss Human Rights Book Vol. 3, Rüffer & Rub, 2009. See also A. M. Van Kalmthout, F. B. A. M. Hofstee-van der Meulen, and F. Dünkel (eds.), *Foreigners in European Prisons*, Nijmegen: Wolf Legal Publishers, 2007. This book is the result of a European collaborative project, the EU Foreign Prisoners, Project, co-funded by the European Commission.

violating immigration laws or regulations. Detention refers to the restriction on freedom of movement, usually through enforced confinement, of an individual by government authorities. There are two types of detention: criminal detention, having as a purpose punishment for the committed crime; and administrative detention, guaranteeing that another administrative measure (such as deportation or expulsion) can be implemented. In many countries, irregular migrants are subject to administrative detention, as they have violated immigration laws and regulations, which is not considered to be a crime under national law. In many States, an alien<sup>69</sup> may also be detained pending a decision on refugee status or on admission to or removal from the State.

Detention of migrants, victims of smuggling of migrants and trafficking in persons, and of asylum seekers should conform to both national and international law and should only be used as a measure of last resort and for the shortest appropriate period of time.<sup>70</sup> Detention is subject to provisions of international human rights law, which will determine its legality.<sup>71</sup> As Ms. Gabriela Rodríguez Pizarro, the former United Nations Special Rapporteur on the human rights of migrants recommend, infractions of immigration laws and regulations should not be considered criminal offences under national legislation. Governments should consider the possibility of progressively abolishing all forms of administrative detention and, when this is not possible, take measures to ensure respect for the human rights of migrants deprived of their liberty.<sup>72</sup> Detention of migrants on the grounds of their irregular status should under no circumstance be of a punitive nature.<sup>73</sup> Further, legislation should prevent trafficked migrants and smuggled persons from being prosecuted, detained or punished for illegal entry or residence in the country, or for the activities they are involved in as a consequence of their situation as trafficked persons.<sup>74</sup> Where migrants are detained, international standards should apply to help ensure that they are held in centers specifically designed for that purpose and in conditions which do not violate their human rights, including their right to health. Detention facilities for migrants should be regulated according to the minimum standards for detention produced in instruments such as the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty, the 1990 Basic Principles for the Treatment of Prisoners and the 1988 Body of

<sup>69</sup> A person who is not a national of a given State. *Glossary on Migration*, loc. cit. n. 4.

<sup>70</sup> See the report of the Working Group on Arbitrary Detention, A/HRC/10/21 (16 February 2009). See also the report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, A/HRC/7/12 (25 February 2008).

<sup>71</sup> See S. Vohra, "Detention of Irregular Migrants and Asylum Seekers", in R. Cholewinski, R. Perruchoud and E. MacDonald (eds.), *International Migration Law: Developing Paradigms and Key Challenges*, Asser Press, 2007, at p. 50.

<sup>72</sup> *Specific Groups and Individuals, Migrant Workers: Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro*, submitted pursuant to Commission on Human Rights resolution 2002/62, U.N. Doc. E/CN.4/2003/85 (30 December 2002), at pp. 15-17.

<sup>73</sup> *Ibidem*.

<sup>74</sup> *Ibidem*.



Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. These can also provide guidelines for proper training and oversight of staff, as well as separation of ages<sup>75</sup> and gender, and keeping families together. Adhering to such standards, at a minimum, can prevent prolonged and indefinite detention which can lead to negative psychological results. The UNHCR has produced guidelines to respond to the reality of the detention of asylum seekers, while stressing the inherent undesirability of detaining them.<sup>76</sup> Asylum seekers have often endured mental or physical trauma, and respect for international legal standards is necessary to address their health needs while in custody. Sufficient provision of health services, hygienic conditions, as well as adequate safety and security are essential for the right to health of all detainees.

Finally, the return of migrating persons to their country of origin may imply returning to an area with higher disease prevalence compared to the country where the migrant resided. The migrants' return could also imply the introduction of health conditions acquired during the migration process into the community of origin.<sup>77</sup> Return conditions, as with entry and residence conditions, must not breach international law. As a result, for example, persons with life-threatening medical conditions who cannot continue with their treatment in their country of origin may not, at the risk of hastening death in distressing circumstances and thus causing inhuman treatment, be returned. Health status has, in fact, been considered a possible ground to limit sovereign power to expel a foreigner. According to the Human Rights Committee General Comment No. 31,<sup>78</sup> states are prohibited from expelling an individual to a state where "he would be at risk of irreparable harm or from where he would be transferred to another country in which he would face the same risks".<sup>79</sup> Mention can also be made of the jurisprudence of the European Court of Human Rights. The Court has interpreted the protection against torture of inhuman or degrading treatment as prescribed by article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>80</sup> as applying to cases in which an expulsion seriously affects the health of the individual expelled.<sup>81</sup> The

<sup>75</sup> For unaccompanied and separated children outside their country of origin, see UN Committee on the Rights of the Child (CRC), *General Comment No. 6: treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sep. 2005, CRC/GC/2005/6, at p. 336.

<sup>76</sup> UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, Feb. 1999.

<sup>77</sup> *Ibidem*.

<sup>78</sup> HRC, *General Comment No. 31: the nature of the general legal obligation imposed on parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 at p. 144.

<sup>79</sup> The Memorandum by the International Law Commission Secretariat on expulsion of aliens, loc. cit n. 59, p. 338.

<sup>80</sup> European Treaty Series No. 5, 4 Nov. 1950.

<sup>81</sup> See *Vedran Andric v. Sweden*, *D. v. United Kingdom*, *B.B. v. France*, but see *Bendaid v. the United Kingdom* and *Arcila Henao v. the Netherlands*; see generally *Pretty v. United Kingdom* in which the Court states that "(...). The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether

national laws of some states have taken into consideration the effects of an expulsion to a particular country on the health of the alien<sup>82</sup> concerned.<sup>83</sup> Thus, for humanitarian reasons an alien otherwise subject to expulsion may be allowed to remain in the territory of the state for at least a limited period of time.<sup>84</sup> A state may also place conditions on the expulsion of an alien injured while working in its territory, or when the deportation may have exceptionally grave effects on the alien's health.<sup>85</sup> Moreover, some national courts have held that aliens suffering from severe medical conditions cannot be expelled since such an expulsion would constitute a violation of human rights.<sup>86</sup> A case-by-case consideration of factors such as availability and physical and economic accessibility of treatment in the country of origin, as well as presence of family or other support, must be taken into account in order to determine the legality of expulsion.

Assisting voluntary return<sup>87</sup> and reintegration of people living with HIV or with other health conditions requiring treatment and support may be particularly problematic if specific conditions are not met. Recently, a report on the situation faced by a group of migrants living with HIV in the Netherlands looked at conditions for sustainable return and reintegration, and listed the following conditions as minimum ones: the necessary medical treatment is available and accessible; the returnee can acquire an income that is sufficient to cover regular expense for her/him and the family and to cover all costs related to medical treatment in the country of return; the returnee finds a place with a supportive social network and has the ability to cope with possible stigma from society as a whole. The report concludes that such conditions can be assessed only by taking into consideration the individual's specific situation and the context in which she or he would return.<sup>88</sup>

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flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible." See *Migration and the Right to Health: A Review of European Community Law and Council of Europe Instruments*, loc. cit. n. 66, at pp. 151-153. See also the view of the Committee Against Torture (CAT) expressed in *G. R. B. v. Sweden*, CAT/C/20/D/83/1997 (15 May 1998), paragraph 6.7; and the one of the Human Rights Committee (HRC) in *C. v. Australia*, CCPR/C/76/D/990/1999 (28 October 2002), paragraph 6.

<sup>82</sup> See footnote 69.

<sup>83</sup> Memorandum by the International Law Commission Secretariat, loc. cit. n. 59, p. 363.

<sup>84</sup> *Ibidem*. See also *Undocumented and Seriously Ill: Residence Permits for Medical Reasons in Europe*, PICUM, 2009.

<sup>85</sup> Memorandum by the International Law Commission Secretariat, loc. cit. n. 59, pp. 363-364.

<sup>86</sup> *Ibidem*, p. 363.

<sup>87</sup> Voluntary return is the assisted or independent return to the country of origin, transit or another third country based on the free will of the returnee. Assisted voluntary return (AVR) is the logistical and financial support to rejected asylum seekers, trafficked migrants, stranded students, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin. *Glossary on Migration*, loc. cit. n. 4. For an in depth discussion about what is voluntary return, see *Health, Hope and Home? The possibilities and constraints of voluntary return for African rejected asylum seekers and irregular migrants living with HIV in the Netherlands*, IOM, January 2009, at pp. 37-40.

<sup>88</sup> *Health, Hope and Home? The possibilities and constraints of voluntary return for African rejected asylum seekers and irregular migrants living with HIV in the Netherlands*, loc. cit. n. 87.

### 3. Migration and the Protection Offered by International Law

#### 3.1 Human Rights Law as the Core of Protection

##### 3.1.1 Dispersion of the Rules Governing Migration

As noted, there is no single comprehensive instrument at the international level governing the migration process, or indeed protecting the rights of all migrating persons. On the contrary, the rules governing migration are found in a number of instruments disseminated in different branches of international law. Human rights law may be used as the basis for the norms and sources protecting migrating persons. Not only can human rights law be considered to be the core protector of those who migrate but it also operates as a link between different branches of international law.

Those involved in the migration process are often considered to be aliens<sup>89</sup> within the territory of a host state. However, this is not necessarily always the case, with examples to the contrary including the phenomenon of return migration, internal migration and situations of internal displacement.<sup>90</sup> Furthermore, attempting to understand migrating persons through the spectrum of nationality alone overlooks the fundamental element of migration – its dynamic character. The essence of migration is, in fact, a population movement. Nevertheless, in a world characterized by states and borders, nationality is a central concept that may be used as a starting point to consider migration and international law. As such, an alien is subject to the laws of the host state by virtue of the principle of territorial sovereignty,<sup>91</sup> but is simultaneously tied to his or her country of origin, which has a legal interest in the situation of its nationals abroad by virtue of the principle of personal competence,<sup>92</sup> which is most notably expressed through the mechanism of diplomatic protection.<sup>93</sup>

Whereas the international law of aliens was centered upon the defense of

<sup>89</sup> See footnote n. 69.

<sup>90</sup> This publication considers international migration, which is the movement of persons who leave their country of origin, or country of habitual residence, to establish themselves either permanently or temporarily in another country. Consequently, in international migration, an international frontier is crossed. However, internally displaced persons (IDPs) are also included although they have not crossed an internationally recognized State border. For the definition of IDPs, see Guiding Principles on Internal Displacement, 11 Feb. 1998, U.N. Doc. E/CN.4/1998/53/Add.2. For definitions of terms relating to migration, see also IOM, *Glossary on Migration*, loc. cit. n. 4.

<sup>91</sup> Territorial sovereignty refers to the exclusive competence of the State over its territory.

<sup>92</sup> Personal competence covers the exercise of a number of State's attributes over its nationals, including when they are abroad.

<sup>93</sup> "Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility". International Law Commission, *Draft Articles on Diplomatic Protection*, 2006, Article 1; see R. Perruchoud, "Consular Protection and Assistance", in *International Migration Law: Developing Paradigms and Key Challenges*, loc. cit. n. 71, pp. 71-85.

state sovereignty, the advent of international human rights law at the end of World War II represented major progress in the sense that individuals (including aliens) were from this point in time directly protected by international law. International human rights law applies to all persons, according to the principle of non distinction regarding the nationality or the status of the person. Consequently, non-nationals are protected by the provisions of human rights instruments.

The International Bill of Rights<sup>94</sup> can be considered the cornerstone of international human rights law. Despite its symbolic importance, the Declaration of Human Rights is a resolution of the General Assembly of the UN and, as such, is not binding; although many of its Articles have become a part of international customary law over time.<sup>95</sup> The protection offered by these texts is further elaborated upon by several instruments relating to special rights as well as special categories of individuals; among them, the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989). Other instruments specifically deal with migration issues, such as the Guiding Principles on Internal Displacement (1998), which considers situations of internal displacement.<sup>96</sup>

The present volume deals only with universal aspects of human rights protection. It does so by gathering international legal standards relevant to health and migration, as well as providing some examples of quasi-judicial mechanisms monitoring State accountability such as the human rights treaty bodies.<sup>97</sup>

<sup>94</sup> See p. 10.

<sup>95</sup> See the section on binding and non binding instruments, at p. 45.

<sup>96</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 15 Nov. 2000, U.N. Doc. A/55/383 [hereinafter Trafficking Protocol], is also included. It should be noted that the Trafficking Protocol is not a human rights instrument. Certain provisions therein, however, are related to victims' human rights.

<sup>97</sup> Other UN human rights supervisory mechanisms are the Special Procedures. They are UN Charter-based bodies. Special procedures are either an individual (called "Special Rapporteur", "Special Representative of the Secretary-General", "Representative of the Secretary-General" or "Independent Expert") or a working group usually composed of five members (one from each global region). They are mandated by the Commission on Human Rights and, since March 2006, by the Human Rights Council to monitor, examine and report on either a particular human rights issue or the human rights situation in a particular country or territory. Particularly relevant is the mandate of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health that was created by resolution 2002/31 of the Commission on Human Rights, and assumed by the Human Rights Council in 2006. Moreover other UN Special Procedures are also significant. In particular, important for the right to health of migrating persons are the respective mandates of Special Rapporteurs on the human rights of migrants; on the right to food; on the right to adequate housing as a component of the right to an adequate standard of living; on the right to education; on trafficking in persons, especially women and girls; on violence against women, its causes and consequences; on the sale of children, child prostitution and child pornography; on torture and other cruel, inhuman or degrading treatment or punishment. Additionally, important is the mandate of working groups, including the one on Arbitrary Detention.

Human rights have also been proclaimed in regional binding and non-binding instruments, in particular in the African, American and European regions (see *Migration and the Right to Health: A Review of European Community Law and Council of Europe Instruments*, IOM, 2007).

Furthermore, regional bodies and courts, including the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights as well as the European Court of Human Rights, the European Committee on Human Rights and the European Committee of Social Rights are increasingly dealing with economic, social and cultural rights, including the right to health, often shedding light on the scope of these rights and playing an important role in their protection.

The right to health is also enshrined in numerous national constitutions.<sup>98</sup> 67.5 per cent of the constitutions of all nations have provisions regarding health and health care. The presence of these constitutional provisions exhibits a national commitment to an important human right. They also establish a policy imperative for legislative and administrative action.<sup>99</sup> Constitutional provisions have generated significant national jurisprudence on the right to health.<sup>100</sup> National courts are a critical means of ensuring that the State respects the human right to health. Finally, administrative and political mechanisms complement judicial mechanisms of accountability.

### 3.1.2 Human Rights Law and other Related Branches of Law - Labour Law, Refugee Law and International Humanitarian Law

Labour law is made up of the ILO Standards, which are intertwined with human rights law. Despite the fact that the ILO was created in 1919 – before the advent of international human rights law – human rights have always been central to the ILO's mission and the standards produced by the Organization. The ILO has produced several conventions protecting the rights of all workers, including migrant workers, as well as specific instruments, mainly Convention No. 97 of 1949 concerning Migration for Employment and Convention No. 143 of 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is a human rights instrument that recognizes the rights of migrant workers and members of their families, be they in a regular or an irregular situation.

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<sup>98</sup> E. Kinney and B. Clark, 'Provisions for Health and Health Care in the Constitutions of the Countries of the World', in *Cornell International Law Journal*, Volume 37, 2004, p. 285.

<sup>99</sup> *Ibidem*.

<sup>100</sup> See Paul Hunt, former UN Special Rapporteur on the right to the highest attainable standard of physical and mental health, "Taking Economic, Social and Cultural Rights Seriously," Human Rights Law Resource Centre in Melbourne, Australia, 29 April 2006.

Refugee law, as well as international humanitarian law, is deeply rooted in classical international law in the sense that it is based on the *summa divisio* between nationals and aliens.<sup>101</sup> Refugees therefore appear as a particularly vulnerable group of aliens as they are deprived of the protection of their national state. It is this particular vulnerability that compels their protection under international law. There is a close link between refugee law and human rights law since refugee law finds its justification in human rights violations that then require a response based on human rights law.

Humanitarian law is an ancient part of international law that regulates armed conflict situations – mainly international armed conflicts. Geneva Convention IV,<sup>102</sup> which addresses the protection of civilians in time of war, is still considerably different from human rights law, even though it is the component of humanitarian law that is the closest to human rights law as it grants to civilians fundamental rights. Rather than protecting the entire population, humanitarian law contains precise rules regarding the protection of persons who “find themselves [...] in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.<sup>103</sup> Among such civilians are included enemy nationals, i.e., civilians of enemy nationality living on the territory of a belligerent state or in simpler terms: migrants. There is proximity between humanitarian law and human rights law, which is to be found in the common goal of both laws to protect human beings.<sup>104</sup>

### 3.2 Instruments Recognizing Migrating Persons’ Right to Health

Migrant workers benefit from both specific provisions of the ILO Conventions and Recommendations related to migrant workers as well as general human rights norms as they evolve. The protection of the right to health of a refugee can build on, but is not confined to, the relevant provisions of the 1951 Convention relating to the Status of Refugees (namely, Articles 23 and 24). Refugees equally can benefit from the

<sup>101</sup> V. Chetail, “Le droit des réfugiés à l’épreuve des droits de l’homme: bilan de la jurisprudence de la Cour européenne des droits de l’homme sur l’interdiction du renvoi des étrangers menacés de torture et de traitements inhumains ou dégradants”, in *Revue belge de droit international*, Volume 1, 2004, p. 156.

<sup>102</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV], Article 4. One of the main objectives of international humanitarian law is to ensure to the civilian population a decent standard of living given the exceptional situation of war, in particular by ensuring that civilians are not forced to leave their places of residence. Nevertheless, when civilians have no choice but to flee their home, they are protected by the provisions of humanitarian law, i.e., humane treatment, protection and respect of the wounded and sick, without distinction based in particular on race, nationality, religion or political opinion.

<sup>103</sup> Geneva Convention IV, loc. cit. n. 102.

<sup>104</sup> For further developments, see e.g., A. Eide, “The laws of war and human rights — differences and convergences”, in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, p. 675; L. Doswald-Beck and S. Vité, “Le droit international humanitaire et le droit des droits de l’homme”, in *Revue internationale de la Croix-Rouge*, No. 800, 1993, p. 99.



subsequent developments of international human rights law related to the right to health (e.g., under the ICESCR), except where such applicability *vis à vis* refugees is explicitly precluded or made subject to specific conditions (e.g. Article 3(d) of the ICRMW).

### 3.2.1 Human Rights Law

#### *General instruments*

The right to health is recognized as a basic human right in numerous international instruments, which extend protection to non-nationals as well as nationals.

Article 25(1) of the Universal Declaration of Human Rights affirms that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including” (but not limited to) “food, clothing, housing and medical care and necessary social services (...) and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. The latter element in paragraph one is closely related to Article 22, which deals with the right to social security. Article 25(2) contains the entitlement to special care and assistance during motherhood and childhood. Secondly, it provides for the equal enjoyment of social protection by all children, whether born in or out of wedlock.

The right to health recognized in Article 12 of the International Covenant on Economic, Social and Cultural Rights, as aforesaid, is not the right to be healthy, in the sense of imposing on States a duty to eradicate all diseases and infirmity. This article describes the right to health as consisting of freedoms, including the right to control over one’s body and the right to be free from interference, as well as entitlements to a system of health protection of good quality and cultural propriety. The Committee on Economic Social and Cultural Rights’ General Comment No. 14 on Article 12 of the Covenant lists, in a non-exhaustive catalogue, the steps States Parties shall take to this end. They include the improvement of: child and maternal health; environmental and industrial hygiene; prevention, treatment and control of epidemic, endemic, occupational and other diseases; and medical services in the event of sickness. The Committee considers that “the highest attainable standard of health” take into account both the individual’s biological and socio-economic preconditions and a State’s available resources. Consequently, States Parties with the resources to implement Article 12 cannot lawfully decide to refrain from taking the necessary steps to implement the said article. The States with insufficient resources are, nonetheless, under an obligation of progressive realization of the right to health through the taking of concrete steps intended to fully

implement the right to health, while guaranteeing that the right will be exercised without discrimination. States must “refrain from denying or limiting equal access to health care for all persons, including (...) asylum seekers and illegal immigrants”.<sup>105</sup> One of the core obligations of States Parties, regardless of their situation, is to ensure the satisfaction of the right to essential primary health care<sup>106</sup> on a non-discriminatory basis, particularly for vulnerable and marginalized groups, including irregular migrants, asylum seekers and refugees.<sup>107</sup> Recognizing a mere right to emergency health care is too narrow for an adequate realization of the right to health. The core content of the right to health includes, in fact, a right to appropriate preventive and curative treatment of diseases and injuries as well as a right to provision of essential drugs. Together with a non-discriminatory access to health care facilities, goods and services, the core obligations include access to basic and safe housing, sanitation, water and food. To ensure accountability for its duty to implement the right to health, no State may be exempted from enacting and implementing a transparent and socially inclusive public health strategy that gives priority to the needs of vulnerable and marginalized groups.

The right to health is also recognized in Article 5 of the International Convention on Eradication of Racial Discrimination. This Article provides that States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, as well as the enjoyment of the social rights, in particular the right to public health, medical care, social security and social services. In General Recommendation XXX on discrimination against non citizens the Committee on Elimination of Racial Discrimination recommends that States “Ensure that States Parties respect the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their access to preventive, curative and palliative health services”.

The 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment<sup>108</sup> may be applied in cases where individuals have been subjected especially to cruel, inhuman, or degrading treatment or punishment based on their health and/or migration status, whether in a health care facility, detention center, or other institution. Article 10 specifies that the training of law enforcement, medical, civil, and military personnel and other public officials must include the prohibition

<sup>105</sup> See CESCR, *General Comment No. 14*, loc. cit. n. 26.

<sup>106</sup> See the Declaration of Alma-Ata, 1978 at p. 125.

<sup>107</sup> Concerning refugees’ access to health care, see J. C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp. 507-514.

<sup>108</sup> The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 10 December 1984, U.N.G. A. Res. 39/46, 1465 U.N.T.S. 85. This convention is not included in the second section.



of torture during the custody, interrogation, or treatment of any individual subjected to arrest, detention, or imprisonment. Article 13 ensures that any person alleging that he/she has been subjected to torture has the right to complain to, and have his/her case promptly and impartially reviewed by the competent authorities. Article 14 calls on legal systems of State Parties to provide redress to victims, who have an “enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”.

### *Specific instruments*

The instruments listed in this second section aim at protecting the right to health of specific groups, including migrants.

Firstly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)<sup>109</sup> provides for the right to equal treatment regarding access to social and health services for regular migrant workers<sup>110</sup> and members of their family<sup>111</sup> and nationals. Further, there is Article 28 of the ICRMW. It recognizes the right to emergency medical treatment for all migrant workers and members of their families regardless of whether their stay or employment is irregular. In recognizing only necessary emergency medical treatment, the Convention fails to guarantee access to preventive medical treatment, such as early diagnosis and medical follow-up as well as to palliative health services.<sup>112</sup> Emergency health care represents a minimum standard for those migrants in an irregular situation. Moreover, although there is no common understanding as to what urgent or emergency health care entails, some Council of Europe countries reported that “a shift” can be noted “from a strict interpretation of urgent care (essential treatment, which can not reasonably be delayed) to a more flexible one of “necessary care” on the basis of which doctors consider regular follow-ups and vaccinations also to be part of “urgent treatment”. With regard to the treatment preventive care that has been undertaken to protect public health is also regularly being considered as falling under the notion of “urgent care”. The interpretation of what is emergency care is evolving and in common one understands that undocumented persons should be covered for the following: outpatient and hospital care which is urgent or otherwise essential even if continuous; medical programmes, which are preventive or which safeguard individual

<sup>109</sup> See *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, International Steering Committee for the Campaign for Ratification of the Migrants Rights Convention, April 2009.

<sup>110</sup> See Art. 43.

<sup>111</sup> See Art. 45.

<sup>112</sup> See *Migration and the Right to Health: A Review of European Community and Council of Europe Law*, loc. cit. n. 66. See R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg, Council of Europe Publication, 2005.

and collective health; maternity coverage; coverage of the health of minors; vaccinations foreseen by public health law; diagnosis, treatment, and prevention of infective diseases; activities of international prevention".<sup>113</sup> This is in line with a more integrated concept of health care and with the conclusions of the Committee on Economic, Social and Cultural Rights (CESCR).<sup>114</sup> It is important to notice that Article 81(1) of the ICRMW ensures that nothing in the Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of the law or practice of a State Party; or any bilateral or multilateral treaty in force for the State Party concerned. The ICESCR and ICERD are among the multilateral treaties that recognize a more favourable right to health for all. There are examples of States that comply with their obligation to ensure equitable access to preventive, curative and palliative health services of appropriate quality for all those residing in their territory. Sometimes health professionals have advocated for migrating persons' right to health. In some States, the lobbying of health professionals has transformed restrictive legislation. Furthermore, national legislation has also evolved due to the *contra legem* practical reality of widened access to health services by irregular migrants.

Secondly, there is the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live.<sup>115</sup> This stipulates, in Article 8, that aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, rights such as the right to safe and healthy working conditions; the right to health protection, medical care, social security, social services, education, rest and leisure. Article 8 has been used to support the argumentation that human rights apply to non-nationals only as far as they are lawfully present. Nevertheless, Article 8 of the Declaration cannot supersede the interpretation of the ICESCR which affords economic and social rights to *all* persons regardless of legal status. The right to health is certainly not the sole privilege of nationals.<sup>116</sup>

<sup>113</sup> See Exploratory Report on the Access to Social Protection for Illegal Labour Migrants, P. Schoukens and D. Pieters, European Committee for Social Cohesion (CDCC), CDCS (2004)55, p. 12.

<sup>114</sup> See Ryszard Cholewinski (CDMG (2004) 29, p. 42.

<sup>115</sup> Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live Who are Not Nationals, adopted by General Assembly resolution 40/144 of 13 December 1985.

<sup>116</sup> "Vulnerable Migrants have a Right to Health" in *Lancet*, 370, 2007, pp. 827-828.

Thirdly, there are the Guiding Principles on Internal Displacement.<sup>117</sup> Principle 18 provides that all internally displaced persons (IDPs) have the right to an adequate standard of living. Furthermore, it states that, regardless of the circumstances and without discrimination, competent authorities shall provide IDPs with and ensure safe access to: essential food and drinking water; basic shelter and housing; suitable clothing and essential medical services and sanitation. Principle 19 refers to all wounded and sick IDPs<sup>118</sup> as well as those with disabilities. Such persons shall receive the medical care they require as quickly as possible, due to the risk of contagious and infectious diseases resulting from difficult living conditions, especially during emergencies. When needed, IDPs shall have access to psychological and social services. Finally, special attention should be paid to the health needs of displaced women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual and other abuses.<sup>119</sup>

Fourthly, the Trafficking Protocol contains provisions relating to the protection of victims of this abusive form of migration.<sup>120</sup> In particular, Article 6 deals with assistance to and protection of victims of trafficking in persons. It states that each State Party shall implement measures to provide for the physical, psychological and social recovery of victims of trafficking in persons. These include the provision of: appropriate housing; counseling and information, in particular regarding their legal rights, in a language that the victims of trafficking in persons can understand; medical, psychological and material assistance; and employment, educational and training opportunities. In applying such provisions, each State Party shall take into account the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking<sup>121</sup> are also included among the relevant instruments.

The following are specific instruments dealing with detainees, indigenous peoples, women, children,<sup>122</sup> elderly persons, persons with disabilities.

Regarding detainees, the Standard Minimum Rules for the Treatment of Prisoners<sup>123</sup> lay down a number of detailed principles for the treatment of

<sup>117</sup> Loc. cit. n. 90, p. 227.

<sup>118</sup> See Geneva Convention IV, loc. cit. n. 102 at p. 199.

<sup>119</sup> See C. Phuong, *The International Protection of Internally Displaced Persons*, Cambridge University Press, 2004, pp. 143-145.

<sup>120</sup> Loc. cit. n. 8 and 96.

<sup>121</sup> OHCHR, *Recommended Principles and Guidelines on Human Trafficking*, 20 May 2002, U.N. Doc. E/2002/68/Add.1, at p. 192.

<sup>122</sup> The Convention on the Rights of the Child refers to children as all persons under the age of 18 years.

<sup>123</sup> Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955, by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611,

sick prisoners. The principles concern the availability of medical services and qualified doctors and contain rules for the examination of prisoners. Other relevant, although non binding, instruments include: the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>124</sup> which applies to all persons within the territory of any given State, without distinction of any kind; the Basic Principles for the Treatment of Prisoners,<sup>125</sup> stating that prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty,<sup>126</sup> which should also be applied without discrimination of any kind. These rules deal with the management of juvenile facilities, including medical care. The latter should be both preventive and remedial, including dental, ophthalmologic and mental health care, as well as pharmaceutical products and special diets, as medically indicated. Prior to medical care, some rules address meaningful activities and programmes that would serve to promote and sustain the health and self-respect of juveniles detained in facilities. Finally, the UNHCR revised guidelines on applicable criteria and standards concerning the detention of asylum seekers<sup>127</sup> make clear that freedom from arbitrary detention<sup>128</sup> is a fundamental human right and the use of detention is, in many instances, contrary to the norms, principles and standards of international law. Such norms, principles and standards apply to all individuals, including asylum seekers and irregular migrants, and to both administrative and criminal

annex I, E.S.C. res. 663C, 24 UN ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 UN ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), at p. 233.

<sup>124</sup> Particularly Principles 22, 24 and 25, at p. 237-238.

<sup>125</sup> Basic Principles for the Treatment of Prisoners G.A. Res. 45/111, U.N. Doc. A/Res/45/111 (14 Dec. 1990), at p. 239.

<sup>126</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. Doc. A/Res/45/113 (14 Dec. 1990), at p. 240.

<sup>127</sup> See UNHCR, *Revised Guidelines on Applicable Criteria and Standards Concerning the Detention of Asylum Seekers*, Feb. 1999, Guideline 7, *Detention of Vulnerable Persons, including unaccompanied elderly persons, torture or trauma victims and persons with a mental or physical disability*; Guideline 8, *Detention of Women*; and Guideline 10, *Conditions of Detention*, at p. 246-247; see also Working Group on Arbitrary Detention, *Situation, Deliberation No. 5: Regarding Immigrants and Asylum Seekers*, U.N. Doc. E/CN.4/2000/4, Annex II.

<sup>128</sup> Article 9 of the Universal Declaration of Human Rights states that “no one shall be subject to arbitrary arrest or detention.” Universal Declaration of Human Rights, loc. cit. n. 37. Article 9 of the International Covenant on Civil and Political Rights establishes that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before the court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” International Covenant on Civil and Political Rights, loc. cit. n. 32. The Human Rights Committee states, in its General Comment No. 8, that these provisions are applicable to all deprivations of liberty by arrest or detention, including in cases of immigration control. HRC, *General Comment No. 8: right to liberty and security of persons (Article 9)*, 30 Jun. 1982. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/Res/43/173 (9 Dec. 1988), at footnote 124. Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXX on discrimination against non-citizens*, 1 Oct. 2004. This Committee, monitoring the Convention on the Elimination of Racial Discrimination, recommends to “ensure the security of non-citizens, with regard to arbitrary detention (...).” Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families follows the same logic.

proceedings.<sup>129</sup>

The principal binding legal instrument related to the rights of indigenous peoples<sup>130</sup> is the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.<sup>131</sup> There is also the UN Declaration on the Rights of Indigenous Peoples (UNDECRIPS) adopted in September 2007 which sets out the rights of indigenous peoples that countries should aspire to recognize, guarantee and implement.<sup>132</sup> The CESCR advocates for indigenous peoples to have the right to specific measures to improve their access to health services and care.<sup>133</sup> The World Health Assembly Resolution WHA54.16 ‘International Decade of the World’s Indigenous People’ urges Member States to recognize and protect the right of indigenous people to enjoyment of the highest attainable standard of health as set out in the Constitution of the WHO, within overall national development policies; to make adequate provisions for indigenous health needs in their national health systems, including through improved collection and reporting of statistics and health data;<sup>134</sup> to respect, preserve and maintain traditional healing practices and remedies, consistent with nationally and internationally accepted standards, and to seek to ensure that indigenous people retain this traditional knowledge and its benefits.

Article 12<sup>135</sup> of the Convention on the Elimination of All Forms of Discrimination against Women requires states to eliminate discrimination against women in health care in order to ensure, on a basis of equality between men and women, access to health care services, including those related to family planning, pregnancy and post-natal care. The Committee on the Elimination of Discrimination against Women, which monitors the implementation of the above mentioned Convention, recognizes that societal factors may operate as barriers preventing or discouraging

<sup>129</sup> See *Specific Groups and Individuals, Migrant Workers: Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro*, loc. cit. 72; see also D. Wilsher, “The administrative detention of non-nationals pursuant to immigration control: International and Constitutional Law perspectives”, *International and Comparative Law Quarterly*, Volume 53, No. 4, 2004, pp. 897-934.

<sup>130</sup> There is no formal universal definition of indigenous peoples. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) applies to ‘...Peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural or political institutions.’

<sup>131</sup> Only 20 countries, mostly in the Americas, Europe, Asia and the Pacific have ratified ILO Convention No. 169.

<sup>132</sup> For a list of other international standard setting conventions, see UN Development Group Guidelines on Indigenous Peoples, February 2008, p. 10.

<sup>133</sup> These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. See the CESCR *General Comment No. 14*, loc. cit. n. 26.

<sup>134</sup> CESCR, *General Comment No. 14*, loc. cit. n. 26 requires States to provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health.

<sup>135</sup> See also Article 11, which refers to the right to protection of health and to safety in working conditions, and Article 14, which addresses the special needs of women in rural areas, at p. 257-259.

women from making full use of available health care services.<sup>136</sup> Thus, the Committee recommends granting special attention to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women. The Committee further notes that the full realization of women's right to health can be achieved only when States Parties fulfill their obligation to respect, protect and promote women's human right to nutritional well-being throughout their lifespan by means of a food supply that is safe, nutritious and adapted to local conditions. The Committee also refers to its earlier General Recommendations on female circumcision,<sup>137</sup> human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS),<sup>138</sup> disabled women,<sup>139</sup> violence against women<sup>140</sup> and equality in marriage and family relations.<sup>141</sup> In November 2008, the Committee adopted a General Recommendation on women migrant workers<sup>142</sup> highlighting that women migrant workers often suffer from inequalities that threaten their health. The Recommendation calls on countries of origin to deliver or facilitate free or affordable gender and rights-based predeparture information and training programmes that raise prospective women migrant workers' awareness of potential exploitation. These should include: rights and entitlements in countries of employment, procedures for invoking formal and informal redress mechanisms; information about safety in transit including airport and airline orientations and information on general and reproductive health, including HIV/AIDS prevention. Again regarding countries of origin, States Parties should ensure the provision of standardized and authentic health certificates if required by countries of destination and require prospective employers to purchase medical insurance for women migrant workers. All required predeparture HIV/AIDS testing or pre-departure health examinations must be respectful of the human rights of women migrants. Special attention should be paid to voluntariness, the provision of free or affordable services and to the problems of stigmatization. Among other specific responsibilities, countries of destination have to ensure non-discrimination and the equal rights of

<sup>136</sup> UN Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 24: women and health (Article 12)*, 20<sup>th</sup> Sess., 1999, U.N. Doc. A/54/38/Rev.1 at p. 266.

<sup>137</sup> CEDAW, *General Recommendation No. 14: female circumcision*, 9<sup>th</sup> Sess., 1990, U.N. Doc. A/45/38 Supp. No. 38, at p. 260.

<sup>138</sup> CEDAW, *General Recommendation No. 15: avoidance of discrimination against women in national strategies for the prevention and control of acquired immune deficiency syndrome (AIDS)*, 9<sup>th</sup> Sess., 1990, U.N. Doc. A/45/38 Supp. No. 38, at p. 262.

<sup>139</sup> CEDAW, *General Recommendation No. 18: disabled women*, 10<sup>th</sup> Sess., 1991, U.N. Doc. A/46/38 Supp. No. 38, at p. 264.

<sup>140</sup> CEDAW, *General Recommendation No. 12: violence against women*, 8<sup>th</sup> Sess., 1989, U.N. Doc. A/44/38 Supp. No. 38.

<sup>141</sup> CEDAW, *General Recommendation No. 21: equality in marriage and family relations*, 13<sup>th</sup> Sess., 12 Apr. 1994, U.N. Doc. A/49/38 at p. 265.

<sup>142</sup> CEDAW, *General Recommendation No. 26: women migrant workers*, 42<sup>nd</sup> Sess., 2008, CEDAW/C/2009/WP.1/R at p. 276.



women migrant workers. In particular, States Parties should make sure that occupations dominated by women migrants workers such as domestic work and some forms of entertainment, are protected by labour laws including wage and hour regulations, health and safety codes, holiday and vacation leave regulations. These laws should include mechanisms by which to monitor work place conditions of migrant women especially in the kinds of jobs they dominate. Additionally, States Parties should provide mandatory awareness-raising programmes concerning the rights of migrant women workers and gender sensitivity training for health care providers. Further, States Parties should ensure that linguistically and culturally appropriate gender sensitive services for women migrant workers are available, including health care services, and programmes designed especially for isolated women migrant workers such as domestic workers and others secluded in the home, in addition to victims of domestic violence. States Parties should ensure that women migrant workers who are in detention do not suffer discrimination or gender-based violence, and that pregnant and breastfeeding mothers as well as women of ill-health have access to appropriate services. They should review, eliminate or reform laws, regulations, or policies that result in a disproportionate number of women migrant workers being detained for migration-related reasons. Finally, protection of undocumented women migrant workers is considered and States Parties are reminded that they have an obligation to protect their basic human rights. The General Recommendations mentioned above are included in the present study because they all refer to matters that are integral to full compliance with women's right to health.<sup>143</sup>

Article 24 of the Convention on the Rights of the Child<sup>144</sup> recognizes the right of the child<sup>145</sup> to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. It stresses the State Parties' duty to ensure that health care services are available and accessible to all. The formulation that no child should be deprived of these services stresses, furthermore, that there must be no discrimination in access, irrespective of the child's, parents' or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status.<sup>146</sup> Children must also be protected against any discrimination by third parties on the basis of the status, activities, opinions, or beliefs of their parents,

<sup>143</sup> Convention on the Elimination of All Forms of Discrimination against Women, loc. cit. n. 136, Art. 12.

<sup>144</sup> Article 24 must be interpreted and applied in the light of the other rights guaranteed in the Convention on the Rights of the Child. In particular, see Articles 3, 6, 19, 23, 26 and 27. The latter sets out the right of the child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. For an in-depth analysis of Article 24, see A. Eide and W. B. Eide, "Article 24. The Right to Health", in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Leiden Martinus, Nijhoff Publishers, 2006.

<sup>145</sup> Loc. cit. n. 122.

<sup>146</sup> Convention on the Rights of the Child, loc. cit. n. 144, Art. 2.

legal guardians or family members.<sup>147</sup> States Parties are obliged to ensure that unaccompanied and separated children have the same access to health care as children who are nationals.<sup>148</sup> Special attention must be given to the access to preventive,<sup>149</sup> curative and rehabilitation health care services for children and adolescents belonging to especially vulnerable groups, including separated and unaccompanied children, asylum seekers, refugees, internally displaced persons, irregular migrants and those who belong to minorities.<sup>150</sup> Services should be culturally appropriate, considering traditional preventive care, healing practices and medicines, unless such practices lead to neglect or abuse of the child's needs.<sup>151</sup> States are also obligated to fully respect *non-refoulement* obligations deriving from international human rights, humanitarian and refugee law by assessing the risks of serious violations of rights guaranteed under the convention, taking into account the serious consequences for children of insufficient food and lack of health services.

Article 39 of the Convention on the Rights of the Child places a duty on states to provide rehabilitation services to children who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhumane and degrading treatment or armed conflict.

When children are detained, conditions of detainment must be governed by the best interests of the child, which include appropriate medical treatment and psychological counseling while in detention.<sup>152</sup>

Article 22(2) of the Convention on the Rights of the Child requires states (where government capacity is limited) to accept and facilitate assistance offered by UNICEF, WHO, UNAIDS, UNHCR and other organizations

<sup>147</sup> *Ibidem*.

<sup>148</sup> CRC *General Comment No. 6*, loc. cit. n. 75. Article 16 of the Convention on the Rights of the Child furthermore requires States Parties to respect the confidentiality of information received in relation to separated or unaccompanied children including matters of health.

<sup>149</sup> Preventive measures cover a broad area and include those mentioned in the *General Comment No. 3: HIV/AIDS and the rights of the child* of the CRC, 32<sup>nd</sup> Sess., 17 Mar. 2003, U.N. Doc. CRC/GC/2003/3, at p. 303. This General Comment highlights that vulnerability to HIV/AIDS is most acute for children living in refugee and IDP camps, children in detention, children living in institutions, as well as children living in extreme poverty, children living in situations of armed conflict, child soldiers, economically and sexually exploited children, and disabled, migrant, minority, indigenous and street children.

<sup>150</sup> The Roma, for example, face increasing difficulties in accessing health care services in many countries of Central and Eastern Europe. This is also due to the transition to a market economy on the basis of which privatization of health care services and increasing requirements of user fees put those who cannot pay at a disadvantage. For instance, the Committee on the Rights of the Child expresses serious concerns that some 90 per cent of Roma have no health insurance. This results in their *de facto* exclusion from access to health care services. See CRC, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Bosnia and Herzegovina*, 21 Sep. 2005, U.N. Doc. CRC/C/15/Add.260, para. 47. The problems faced by minorities as such are not the subject of this publication.

<sup>151</sup> See Convention on the Rights of the Child, loc. cit. n. 144, Art. 24(3).

<sup>152</sup> See *Ibidem*. at Art. 37(a) and (c). See *General Comment No. 10: children's rights in juvenile justice*, 44<sup>th</sup> Sess., 15 January - 2 February 2007, U.N. Doc. CRC/C/GC/10.



in order to meet the health and health-care needs of unaccompanied and separated children.<sup>153</sup>

Excerpts from the Optional Protocols to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography and to the Convention on the Rights of the Child on the involvement of children in armed conflict are included in Part II. The former highlights that States must take all feasible measures with the aim of ensuring all appropriate assistance to victims of sale, prostitution and pornography. The latter requires the same for children within their jurisdiction recruited or used in hostilities, including their full social reintegration and their full physical and psychological recovery.

The following two important non-binding instruments relate to the promotion and protection of the child's well-being. These are: the World Declaration on the Survival, Protection and Development of Children and the World Medical Association Declaration of Ottawa on the Right of the Child to Health Care. In the first instrument, States represented at the World Summit for Children<sup>154</sup> committed themselves to protect the rights of the children and to improve their lives. They agreed to work to improve the plight of millions of children who live under especially difficult circumstances, including children of migrant workers, displaced children and victims of natural and man-made disasters, the socially disadvantaged and exploited and refugee children. The second instrument emphasizes that every child<sup>155</sup> has an inherent right to access the appropriate facilities for health promotion, the prevention and treatment of illness and the rehabilitation of health on a non-discriminatory basis.

The main instrument devoted to elderly persons is the United Nations Principles for Older Persons. It states, *inter alia*, that elderly persons should have access to health care, thereby helping them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.<sup>156</sup>

Concerning persons with disabilities, three instruments are considered:<sup>157</sup>

<sup>153</sup> CRC *General Comment No. 6*, loc. cit. n. 75, extends it further with "other competent intergovernmental organizations or non-governmental organizations in order to meet the health and health-care needs of unaccompanied and separated children".

<sup>154</sup> Out of the 159 Governments represented at the World Summit for Children, 73 signed the Joint Declaration and the Plan of Action on 30 September 1990. See p. 385.

<sup>155</sup> In the context of this Declaration a child signifies a human being between the time of birth and the end of her/his seventeenth year, unless under the law applicable in the country concerned children are legally recognized as adults at some other age. See p. 390.

<sup>156</sup> See p. 399.

<sup>157</sup> See also G.A. Res. 37/52, U.N. Doc. A/RES/37/52 (3 December 1982) and U.N. Doc. E/CN.4/2004/L.76 (15 April 2004). R. Kayess and P. French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" in *Human Rights Law Review*, Volume 8, No. 1, 2008, pp. 1-34.

the Principles for the protection of persons with mental illness and the improvement of mental health care,<sup>158</sup> the Standard Rules on the Equalization of Opportunities for Persons with Disabilities<sup>159</sup> and the Convention on the Rights of Persons with Disabilities,<sup>160</sup> which recently entered into force. Article 25 of the latter prescribes that “States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive, including health-related rehabilitation”.

### 3.2.2 Labour Law

The Conventions and Recommendations of the ILO deal with occupational safety and health matters. They refer to safe and healthy working conditions, access to health care facilities at work, health insurance and maternity protection. This study contains only extracts of those instruments strictly related to migrants,<sup>161</sup> that being: Convention No.97 concerning Migration for Employment (Revised 1949);<sup>162</sup> Recommendation No.86 concerning Migration for Employment (Revised 1949);<sup>163</sup> Convention No.143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers;<sup>164</sup> Recommendation No. 151 concerning Migrant Workers.<sup>165</sup>

### 3.2.3 Refugee Law

No provision of the Convention relating to the Status of Refugees<sup>166</sup> confers a right to health. However, the two Articles relating to such a right are Articles 23 and 24. Article 23 recognizes national treatment in terms of relief and assistance to refugees lawfully staying in the territory of the

<sup>158</sup> G.A. Res. 46/119, U.N. Doc. A/Res/46/119 (17 Dec. 1991).

<sup>159</sup> G.A. Res. 48/96, annex, U.N. Doc. A/RES/48/96 (20 December 1993).

<sup>160</sup> 13 Dec. 2006, U.N. Doc. A/61/611 (entered into force 3 May 2008). See UNDESA, OHCHR, IPU, *From Exclusion to Equality. Realizing the rights of persons with disabilities*. Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, N° 14 - 2007. R. Kayess and P. French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”, loc. cit. n. 157.

<sup>161</sup> See ILO, *Migrant Workers*, Geneva, ILO publication, 1999.

<sup>162</sup> ILO Convention No. 97 concerning Migration for Employment (Revised), (1949), at p. 173.

<sup>163</sup> ILO Recommendation No. 86 concerning Migration for Employment (Revised), (1949), at p. 176.

<sup>164</sup> ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975), at p. 182.

<sup>165</sup> ILO Recommendation No. 151 concerning Migrant Workers, (1975), at p. 184.

<sup>166</sup> Convention relating to the Status of Refugees, loc. cit. n. 37, at p. 223. See also A. Grahl-Madsen, *Commentary on the Refugee Convention 1951*, Geneva, 1997, pp. 88-89. Regarding refugees' concerns in terms of health status and access to health care, see J. C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp. 507-514. Regarding asylum seekers' right to health, see M. Rancourt, *Les droits économiques et sociaux des réfugiés et demandeurs d'asile*, CÉDIM, 2004.

State,<sup>167</sup> which predated the major international human rights instruments by decades. Relief and assistance should be provided on the same terms as for nationals who are unemployed, affected by physical or mental disease and incapable because of their conditions or age to earn a livelihood for themselves and their family, as well as for children with no support.<sup>168</sup> Furthermore, public relief cannot be refused to refugees who are destitute because of infirmity, illness or age.<sup>169</sup> Public relief encompasses medical treatment, measures of relief for the blind and emergency relief.<sup>170</sup> Article 24 deals with labour legislation and social security.<sup>171</sup>

### 3.2.4 International Humanitarian Law

International humanitarian law governs two distinct types of conflict. Firstly, international armed conflict i.e., the use of armed force between States; and secondly, non-international armed conflict i.e., the use of armed force, under certain conditions, within a given State, between governmental authorities and organized armed groups or between these armed groups. As a general rule, the regulation of international armed conflicts is much more detailed than the regulation of non-international armed conflicts.

The law of international armed conflict contains broad provisions regarding the civilian population as a whole, such as: the protection of the wounded and the sick; free passage of medical supplies, food and clothing in order to attenuate the consequences of a blockade; and the establishment of places of refuge i.e., areas meant to offer shelter to combatant and non-combatant wounded and sick, as well as civilians.

The core of humanitarian law's protection of civilians is the rights granted to "protected persons", including civilians of enemy nationality living on the territory of a belligerent State. These aliens are entitled to leave the territory at the outset of, or during, the conflict. Humanitarian law contains provisions regarding the conditions of safety, hygiene, sanitation and food during a repatriation. Under certain circumstances, however, the

<sup>167</sup> A refugee may be "lawfully in the territory" of a Contracting Party even if he or she is not lawfully staying there. The expression includes, in fact, all refugees who are physically present in the territory, provided that their presence is not unlawful. Thus, it embraces short term visitors and persons merely travelling through the country. Additionally, further relating to the limitation of rights according to the lawfulness of the presence or residence of the refugee, it has been argued that a State would not be justified in withholding normally available treatment, for example, for a life-threatening health condition from an asylum seeker or from a person whose claim to refugee status has been rejected. See T. Clark in cooperation with F. Crépeau, "Mainstreaming refugee rights. The 1951 Refugee Convention and International Human Rights Law", in *Netherlands Quarterly of Human Rights*, Volume 17, No. 4, 1999, pp. 389-410.

<sup>168</sup> U.N. Doc. E/AC.32/2, p. 39.

<sup>169</sup> *Ibidem*.

<sup>170</sup> This was stressed during the discussion in the Ad Hoc Committee. See U.N. Doc. E/AC.32/SR.15, pp. 5-8.

<sup>171</sup> See A. Grahl-Madsen, *Commentary on the Refugee Convention 1951*, Geneva, 1997, at pp. 90-99.

internment of protected persons is authorized by humanitarian law. In such situations, a detailed regime of protection, inspired by the prisoners of war regime will apply under which numerous provisions concerning the health of internees and more generally, food, hygiene and location, are provided. Among these provisions are included: the obligation to install an adequate infirmary under the direction of a qualified doctor; the obligation to effectuate monthly medical inspections; and the obligation to admit internees in need of medical treatment at any institution where adequate treatment can be given, under conditions not inferior to that provided to the general population. Moreover, every transfer of protected persons must be performed humanely, in respect of the health of the persons.

In contrast, the law of non-international armed conflict contains no specific provisions applicable to aliens although there is a general principle of humane treatment, and of protection of the wounded and sick. More specifically, Protocol Additional II to the Geneva Conventions (1977) gives particular attention to the health of persons deprived of liberty. Finally, humanitarian law prohibits forced movement of civilians. Nevertheless, these displacements can exceptionally be ordered if imperative military reasons or the security of civilians so demand. These transfers of populations must be performed in a humane way, in respect of the health of the person.<sup>172</sup>

#### **4. Conclusions**

The present study highlights that migration is a varied, dynamic and often cyclical phenomenon involving heterogeneous groups of people. It includes the movement not only of migrants, be they in a regular or irregular situation, or intending a long or short term stay; but also of victims of trafficking in persons; asylum seekers; refugees; displaced persons; and returnees.

Migration in itself is not a risk factor to health. Individually or collectively, the process of migration can, however, result in migrating persons being made vulnerable to physical and mental health problems. Indeed, inequities in health status and in access to preventive, curative and palliative health services between migrating and host populations are evident in various studies. The health status of a population is determined by safe drinking water, food and nutrition as well as adequate sanitation and housing, occupational health, environmental health, health-related information and access to health services including sexual and reproductive care. Consequently, denying or limiting migrating populations' enjoyment of

<sup>172</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609 (entry into force 7 Dec 1978) [hereinafter Additional Protocol II], Art. 17.

their right to health together with the other rights touching on it<sup>173</sup> can be costly in human and economic terms for individuals and communities.

Both migrating and non-migrating persons would benefit greatly from a broader implementation of the right to health in practice. Accountability mechanisms at national and regional levels are fundamental. At the international level, it is essential that States report on the implementation of the various human rights treaties they are party to with respect to migrating persons. The individual complaints mechanisms or inquiries procedures incorporated in some treaties<sup>174</sup> are also important. The role played by the Special Rapporteurs is significant concerning the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

While the right to health has been discussed in this study from a legal point of view, it is a concept that requires a multi-disciplinary approach. This study is the result of the combined effort by the International Migration Law and Legal Affairs Department and the Migration Health Department of IOM that aims at showing how cooperation among different disciplines helps to view issues from complementary and hence a more comprehensive perspective. Medicine, public health, and human rights have much common ground.<sup>175</sup> To one degree or another, each field stresses the importance of the underlying determinants of health and good-quality medical care, looks beyond the health sector, struggles against discrimination and disadvantage, demands respect for cultural diversity, and attaches importance to public information and education.<sup>176</sup> As research evidence increasingly shows, the protection of human rights of all migrating persons, including their right to health, enhances the development and productivity impact of migration. It cannot be forgotten that migrating persons are, first of all, human beings who have inalienable rights that States have an obligation to uphold. The right to health is one of these rights. It is paramount that this right is respected, protected and fulfilled during the entire migration process.

As States have the primary responsibility in protecting, respecting and fulfilling the right to health for all, the involvement of international actors is only of a subsidiary nature. International actors will only engage in assistance measures related to the right to health, where States have not fully implemented the right to health. The ultimate aim of any international

<sup>173</sup> They are the ones previously mentioned in the introduction, namely the rights to: food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition of torture, privacy, access to information, and the freedoms of association, assembly and movement.

<sup>174</sup> See the Human Rights Fact Sheet No. 30, *The United Nations Human Rights Treaty System, An introduction to the core human rights treaties and the treaty bodies*, published by the Office of the United Nations High Commissioner for Human Rights, United Nations Office, Geneva.

<sup>175</sup> G. Backman, P. Hunt et al., "Health systems and the right to health: an assessment of 194 countries" in *Lancet* 2008, Volume 372, pp. 2047–2085.

<sup>176</sup> *Ibidem*.

assistance programme is, in fact, building the capacity of the government to secure the enjoyment of the right to health by all individuals on their territory or under their jurisdiction. Nevertheless, such efforts to develop the capacity of governments or non-governmental organizations does not preclude international actors, including IOM, from assisting in the sector of health.



## **II. INTERNATIONAL INSTRUMENTS**





## Binding and Non Binding Instruments<sup>177</sup>

Binding instruments, composed of Treaties (which can also be referred to as Conventions, Covenants, Protocols and Agreements) confer legally binding rights and duties upon States Parties.

Non-binding documents, mainly composed of Declarations and Recommendations, provide, as a rule, guidelines and principles and impose moral obligations. They are not legally binding instruments.

Both binding and non-binding instruments can have an international, regional or sub regional scope.

This compilation includes binding and non-binding instruments applicable at the international level.

## Binding Instruments

Binding instruments, or ‘hard law’, establish rules expressly recognized by the contracting States.

States should explicitly express their consent to be bound to the terms of a treaty through a specific procedure. The procedure of adoption<sup>178</sup> and entry into force<sup>179</sup> of treaties was codified by the Vienna Convention on the Law of Treaties adopted on 22 May 1969. It is composed of three main stages: negotiation (to reach an agreement on the text), authentication (formalized by the signature) and ratification.<sup>180</sup> Ratification should be

<sup>177</sup> See U.N.E.S.C.O. portal.

<sup>178</sup> “Adoption” is the formal act by which the form and content of a proposed treaty text are established. As a general rule, the adoption of the text of a treaty takes place through the expression of the consent of the States participating in the treaty-making process. Treaties that are negotiated within an international organization will usually be adopted by a resolution of a representative organ of the organization whose membership more or less corresponds to the potential participation in the treaty in question. A treaty can also be adopted by an international conference which has specifically been convened for setting up the treaty, by a vote of two thirds of the States present and voting, unless, by the same majority, they have decided to apply a different rule. Vienna Convention of the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entry into force 27 Jan. 1980), Article 9.

<sup>179</sup> Typically, the provisions of the treaty determine the date on which the treaty enters into force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating States have consented to be bound by the treaty. Bilateral treaties may provide for their entry into force on a particular date, upon the day of their last signature, upon exchange of the instruments of ratification or upon the exchange of notifications. In cases where multilateral treaties are involved, it is common to provide for a fixed number of States to express their consent for entry into force. Some treaties provide for additional conditions to be satisfied, for example, by specifying that a certain category of States must be among those who consent. The treaty may also provide for an additional time period to elapse after the required number of States have expressed their consent or the conditions have been satisfied. A treaty enters into force for those States which gave the required consent. A treaty may also provide that, upon certain conditions having been met, it shall come into force provisionally. *Ibidem.* at Art. 24.

<sup>180</sup> Ratification defines the international act whereby a State indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties,

made in accordance with the constitutional law of each country. In general, States must obtain the authorization of their national legislative body to do so. Once this procedure is accomplished, the Head of State deposits a ratification instrument with the depositary of the treaty (generally the head of the intergovernmental organization or the hosting country of the international conference through which the treaty was adopted).

Through ratification, States explicitly recognize their obligation to respect the terms of the treaty. States that have not signed the document may also become a party to the treaty by using a simplified procedure called adherence, accession or acceptance.<sup>181</sup>

Every treaty contains normative provisions defining the legal obligations, and operating provisions describing the technical conditions for its entry into force, including the minimum required number of ratifications to be obtained. Once these conditions are satisfied the treaty enters into force and becomes legally binding for States Parties.

In accordance with the principle of primacy of international law over national law, States Parties are bound to adapt their national legislation to the provisions of the treaty and introduce all relevant measures in their national legal system to implement their obligations under this treaty. States cannot invoke national law as a reason to ignore their international obligations.<sup>182</sup>

## Non-Binding Instruments

Non-binding instruments, or ‘soft law’, provide guidelines of conduct, which are neither binding norms of law, nor irrelevant political maxims. They operate in a grey zone between law and politics. Attention should be paid to the fact that some instruments, such as the Guiding Principles on Internal Displacement, while not legally binding, do reflect and are consistent with international human rights law and international humanitarian law.<sup>183</sup> They

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ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all States, keeping all parties informed of the situation. The institution of ratification grants States the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty. *Ibidem* at Art. 2(1)(b), 14(1) and 16.

<sup>181</sup> “Accession” is the act whereby a State accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other States. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other States or for a limited and defined number of States. In the absence of such a provision, accession can only occur where the negotiating States had agreed or subsequently agree on accession in the case of the State in question. *Ibidem*. at Art. 2(1)(b) and 15.

<sup>182</sup> “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46”. *Ibidem* at Art. 27.

<sup>183</sup> See Guiding Principles on Internal Displacement, loc. cit. n. 90, Introduction, para. 3.

may, therefore, benefit from the underlying legal obligations undertaken by States. The fact that a principle or standard is reflected in a “soft law” instrument, does not necessarily mean that the standard is non-binding.

The main examples of non-binding instruments referred to in this publication are declarations, resolutions and recommendations as well as general comments and recommendations by the treaty bodies. Particularly important are declarations and resolutions. They might, in fact, identify a common *opinio juris*, which is one of the constitutive elements for the establishment of customary international law.

Declarations, as “soft law”, do not create legal obligations for the States that adopt them. They reflect principles on which these States agree at the time of their adoption, which though non-binding, impose moral obligations. Declarations may become ‘semi-binding’ as is the case of the Universal Declaration of Human Rights adopted in 1948, which contains a number of provisions, now considered to be customary international law. The history of the progressive development of human rights law has shown that declarations often precede the adoption of a binding instrument. For example, amongst many others, the adoption of the Convention on the Rights of the Child in 1989 was preceded by the adoption of the Declaration on the Rights of the Child in 1959; and the adoption of the Convention on the Elimination of All Forms of Discrimination against Women in 1979 was preceded by the proclamation of the Declaration on the Elimination of All Forms of Discrimination against Women in 1967.

Resolutions<sup>184</sup> are a generic term to qualify a non binding instrument.

Recommendations are another form of non-binding instrument, which are suggestions of international organs inviting States to take legislative or other steps. As such, recommendations are intended to influence the development of national laws and practices.

General comments and recommendations reflect, in a consolidated manner, a treaty body’s<sup>185</sup> interpretation of the content of human rights provisions,

<sup>184</sup> See, in particular, General Assembly Resolutions on Protection of Migrants: A/RES/54/166 of 2000; A/RES/55/92 of 2000; A/RES/56/170 of 2001; A/RES/57/218 of 2002; A/RES/58/190 of 2003; A/RES/59/194 of 2004; A/RES/60/169 of 2005; A/RES/61/165 of 2006; A/RES/62/156 of 2007.

<sup>185</sup> The human rights treaty bodies, also referred to as treaty monitoring, are the committees of experts that monitor the implementation of the provisions of the core human rights treaties by States Parties. The eight treaty bodies are: 1) the Human Rights Committee (HRC) that monitors implementation of the International Covenant on Civil and Political Rights; 2) the Committee on Economic, Social and Cultural Rights (CESCR) that monitors implementation of the International Covenant on Economic, Social and Cultural Rights; 3) the Committee on the Elimination of Racial Discrimination (CERD) that monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination; 4) the Committee on the Elimination of Discrimination against Women (CEDAW) that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women; 5) the Committee Against Torture

either related to a specific article or to a broader thematic issue. General comments often aim at clarifying the reporting duties of State to the treaty with respect to certain provisions.

Due to space considerations, the compilation of non-binding instruments includes only declarations, recommendations and general comments or recommendations.

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(CAT) that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment; 6) the Committee on the Rights of the Child (CRC) that monitors implementation of the Convention on the Rights of the Child and its optional protocols; and 7) the Committee on Migrant Workers (CMW) that monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and 8) the Committee on the Rights of Persons with Disabilities (CRPD) that monitors implementation of the Convention on the Rights of Persons with Disabilities by the States Parties. Two treaty bodies, CERD and CEDAW, call the interpretation of the content of human rights provisions general recommendations instead of general comments. *The United Nations Human Rights Treaty System, An introduction to the core human rights treaties and the treaty bodies*, loc. cit n. 174.

## **II.1 GENERAL INTERNATIONAL INSTRUMENTS**



## **1. Universal Declaration of Human Rights (excerpts), 1948<sup>186</sup>**

**Adoption: 10 December 1948**

(...)

### **Article 2**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

(...)

### **Article 22**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

(...)

### **Article 24**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

### **Article 25**

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

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<sup>186</sup> Source: U.N.G.A. Res. 217 A (III), loc. cit. n. 37.



## **2. International Covenant on Economic, Social and Cultural Rights (excerpts), 1966<sup>187</sup>**

**Adoption: 16 December 1966**

**Entry into force: 3 January 1976**

(...)

### **PART II**

#### **Article 2**

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.<sup>188</sup>

(...)

#### **Article 4**

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature

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<sup>187</sup> Source: U.N.G.A. Res. 2200 A (XXI), 993 U.N.T.S. 3, loc. cit. n. 25.

<sup>188</sup> The one exception to no distinctions drawn between nationals and aliens in the Covenant is Article 2(3), which permits developing countries to determine to what extent they will guarantee the economic rights in the Covenant to non-nationals. However, "The very fact that developing countries are permitted to restrict the economic rights of non-nationals indicates a prohibition on such restrictions by developed States, and a prohibition on restrictions on non-economic rights by all States". See R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford, Clarendon Press, 1997, p. 60 and M. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development*, 1995, p. 172.

of these rights and solely for the purpose of promoting the general welfare in a democratic society.

### **PART III**

(...)

#### **Article 7**

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (...)

(b) Safe and healthy working conditions;

(...)

#### **Article 9**

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

(...)

#### **Article 11**

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

## Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>189</sup>
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

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<sup>189</sup> Recognition of the right to health obviously does not mean that beneficiaries of this right have a right to be healthy. Rather, the Covenant stresses the obligation of State Parties to ensure for everyone “the highest attainable standard of . . . health” as aforesaid. The Committee on Economic, Social and Cultural Rights has spent increasing energy on clarifying and monitoring health rights, having held a general discussion on the topic and adopted a general comment on the rights of persons with disabilities (CESCR, *General Comment No. 5: persons with disabilities*, 9 Dec. 1994, 11<sup>th</sup> Sess., U.N. Doc. E/1995/22, Annex IV). The rights of people with HIV/AIDS have also received increasing attention from the Committee in recent years (CESCR, *General Comment No. 14*, loc. cit. n. 26).

**CESCR General Comment No. 5: persons with disabilities (excerpts), 1994<sup>190</sup>**

**Adoption: 9 December 1994**

(...)

**IV. Specific provisions of the Covenant**

**F. Article 12: The right to physical and mental health**

34. According to the Standard Rules, “States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society” (31). The right to physical and mental health also implies the right to have access to, and to benefit from, those medical and social services - including orthopaedic devices - which enable persons with disabilities to become independent, prevent further disabilities and support their social integration (32). Similarly, such persons should be provided with rehabilitation services which would enable them “to reach and sustain their optimum level of independence and functioning” (33). All such services should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity.

Notes

31. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993. Rule 2, paragraph 3.
32. See the Declaration on the Rights of Disabled Persons (General Assembly Resolution 3447 (XXX) of 9 December 1975), paragraph 6; and the World Programme of Action concerning Disabled Persons (see note 3 above), paragraphs 95-107.
33. Standard Rules, Rule 3.

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<sup>190</sup> Source: E/1995/22, eleventh session, 1994, General Comment by the CESCR, loc. cit. n. 189. See section A.II on the physically and mentally disadvantaged.

**CESCR General Comment No. 14: the right to the highest attainable standard of health (art. 12), 2000<sup>191</sup>**

**Adoption: 11 August 2000**

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable. (1)
2. The human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: “Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”. The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, while article 12.2 enumerates, by way of illustration, a number of “steps to be taken by the States parties ... to achieve the full realization of this right”. Additionally, the right to health is recognized, *inter alia*, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples’ Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights, (2) as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments. (3)

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<sup>191</sup> Source: E/C.12/2000/4, twenty-second session, Geneva, 25 April-12 May 2000, loc. cit. n. 26. See also CESCR, E/C.12/1993/SR.4, ninth session, 41<sup>st</sup> meeting, Geneva, 6 December 1993. General discussion on the right to health (minimum core content and non-discrimination dimensions) as recognized in Article 12 of the Covenant. Available online at: <http://www.unhcr.ch/tbs/doc.nsf>.

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.
4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. However, the reference in article 12.1 of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.
5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognizes the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of article 12 in many States parties.
6. With a view to assisting States parties’ implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses on the normative content of article 12 (Part I), States parties’ obligations (Part II), violations (Part III) and implementation at the national level (Part IV), while the obligations of actors other than States parties are addressed in Part V. The General Comment is based on the Committee’s experience in examining States parties’ reports over many years.

## I. NORMATIVE CONTENT OF ARTICLE 12

7. Article 12.1 provides a definition of the right to health, while article 12.2 enumerates illustrative, non-exhaustive examples of States parties’ obligations.

8. The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.
9. The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.
10. Since the adoption of the two International Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict. (4) Moreover, formerly unknown diseases, such as Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the rapid growth of the world population, have created new obstacles for the realization of the right to health which need to be taken into account when interpreting Article 12.
11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international

levels.

12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

(a) *Availability*. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs. (5)

(b) *Accessibility*. Health facilities, goods and services (6) have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

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. (7)

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.

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.



Information accessibility: accessibility includes the right to seek, receive and impart information and ideas (8) concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

(c) *Acceptability*. 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.

(d) *Quality*. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

13. The non-exhaustive catalogue of examples in article 12.2 provides guidance in defining the action to be taken by States. It gives specific generic examples of measures arising from the broad definition of the right to health contained in article 12.1, thereby illustrating the content of that right, as exemplified in the following paragraphs. (9)

Article 12.2 (a). The right to maternal, child and reproductive health

14. “The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child” (art. 12.2 (a)) (10) may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, (11) emergency obstetric services and access to information, as well as to resources necessary to act on that information. Article 12.2 (b). The right to healthy natural and workplace environments

15. “The improvement of all aspects of environmental and industrial hygiene” (art. 12.2 (b)) comprises, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. (13) Furthermore, industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment. (14) Article 12.2 (b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition,

and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.

Article 12.2 (c). The right to prevention, treatment and control of diseases

16. “The prevention, treatment and control of epidemic, endemic, occupational and other diseases” (art. 12.2(c)) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to States’ individual and joint efforts to, *inter alia*, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

Article 12.2 (d). The right to health facilities, goods and services (15)

17. “The creation of conditions which would assure to all medical service and medical attention in the event of sickness” (art. 12.2 (d)), both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.

Article 12. Special topics of broad application

Non-discrimination and equal treatment

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other

opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls General Comment No. 3, paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health. (16) Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

#### Gender perspective

20. The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

#### Women and the right to health

21. To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality

and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

### Children and adolescents

22. Article 12.2 (a) outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children. Subsequent international human rights instruments recognize that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness. (17)

The Convention on the Rights of the Child directs States to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services. There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children. (18) Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

23. States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.
24. In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration.

### Older persons

25. With regard to the realization of the right to health of older persons, the Committee, in accordance with paragraphs 34 and 35 of General Comment No. 6 (1995), reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.

### Persons with disabilities

26. The Committee reaffirms paragraph 34 of its General Comment No. 5, which addresses the issue of persons with disabilities in the context of the right to physical and mental health. Moreover, the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.

### Indigenous peoples

27. In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples, (19) the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect

on their health.

### Limitations

28. Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. Consequently a State party which, for example, restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, refuses to allow doctors to treat persons believed to be opposed to a government, or fails to provide immunization against the community's major infectious diseases, on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.
29. In line with article 5.1, such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.

## II. STATES PARTIES' OBLIGATIONS

### General legal obligations

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health. (20)
31. The progressive realization of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realization means that States parties have a specific and continuing obligation to move as

expeditiously and effectively as possible towards the full realization of article 12. (21)

32. As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources. (22)
33. The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. (23) The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

#### Specific legal obligations

34. In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. (24)

In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well



as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

35. Obligations to *protect* include, *inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.
36. The obligation to *fulfil* requires States parties, *inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as



well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services. (25)

37. The obligation to *fulfil (facilitate)* requires States *inter alia* to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to *fulfil (provide)* a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to *fulfil (promote)* the right to health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include: (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information; (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; (iv) supporting people in making informed choices about their health.

### International obligations

38. In its General Comment No. 3, the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health. In the spirit of article 56 of the Charter of the United Nations, the specific provisions of the Covenant (articles 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health. In this regard, States parties are referred to the Alma-

Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries. (26)

39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required. (27) States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.
40. States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

41. States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.
42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.

#### Core obligations

43. In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development, (28) the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, these core obligations include at least the following obligations:
  - (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
  - (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
  - (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
  - (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
  - (e) To ensure equitable distribution of all health facilities, goods and services;

(f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

44. The Committee also confirms that the following are obligations of comparable priority:

(a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;

(b) To provide immunization against the major infectious diseases occurring in the community;

(c) To take measures to prevent, treat and control epidemic and endemic diseases;

(d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;

(e) To provide appropriate training for health personnel, including education on health and human rights.

45. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide “international assistance and cooperation, especially economic and technical” (29) which enable developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44 above.

### III. VIOLATIONS

46. When the normative content of article 12 (Part I) is applied to the obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to health. The following paragraphs provide illustrations of violations of article 12.

47. In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations

under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.

48. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligations under the right to health, outlined in paragraph 43 above, constitutes a violation of the right to health. Violations through *acts of commission* include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health.
49. Violations of the right to health can also occur through the omission or failure of States to take necessary measures arising from legal obligations. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health as well as occupational health services, and the failure to enforce relevant laws.

#### Violations of the obligation to respect

50. Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components

of the right to health; and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.

#### Violations of the obligation to protect

51. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.

#### Violations of the obligation to fulfil

52. Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks; the failure to take measures to reduce the inequitable distribution of health facilities, goods and services; the failure to adopt a gender-sensitive approach to health; and the failure to reduce infant and maternal mortality rates.

#### IV. IMPLEMENTATION AT THE NATIONAL LEVEL

##### Framework legislation

53. The most appropriate feasible measures to implement the right to health will vary significantly from one State to another. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks. The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.
54. The formulation and implementation of national health strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.
55. The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.
56. States should consider adopting a framework law to operationalize their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time-frame for their achievement; the means by which right to health benchmarks could



be achieved; the intended collaboration with civil society, including health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, States parties should identify the factors and difficulties affecting implementation of their obligations.

#### Right to health indicators and benchmarks

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the ongoing work of WHO and the United Nations Children's Fund (UNICEF) in this field. Right to health indicators require disaggregation on the prohibited grounds of discrimination.
58. Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of scoping with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of article 12. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.

#### Remedies and accountability

59. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. (30) All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.
60. The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be



encouraged in all cases. (31) Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

61. Judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions.
62. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

## V. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES

63. The role of the United Nations agencies and programmes, and in particular the key function assigned to WHO in realizing the right to health at the international, regional and country levels, is of particular importance, as is the function of UNICEF in relation to the right to health of children. When formulating and implementing their right to health national strategies, States parties should avail themselves of technical assistance and cooperation of WHO. Further, when preparing their reports, States parties should utilize the extensive information and advisory services of WHO with regard to data collection, disaggregation, and the development of right to health indicators and benchmarks.
64. Moreover, coordinated efforts for the realization of the right to health should be maintained to enhance the interaction among all the actors concerned, including the various components of civil society. In conformity with articles 22 and 23 of the Covenant, WHO, The International Labour Organization, the United Nations Development Programme, UNICEF, the United Nations Population Fund, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system, should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates. In particular, the international financial institutions, notably the World Bank and the International Monetary Fund, should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes. When examining the reports of States parties and their ability to meet the obligations under article 12, the Committee will consider the effects of the assistance provided by all other actors. The adoption of a human rights-based approach

by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to health. In the course of its examination of States parties' reports, the Committee will also consider the role of health professional associations and other non-governmental organizations in relation to the States' obligations under article 12.

65. The role of WHO, the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross/Red Crescent and UNICEF, as well as non governmental organizations and national medical associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies, including assistance to refugees and internally displaced persons. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.

### Notes

1. For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.
2. In its resolution 1989/11.
3. The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 (resolution 46/119) and the Committee's General Comment No. 5 on persons with disabilities apply to persons with mental illness; the Programme of Action of the International Conference on Population and Development held at Cairo in 1994, as well as the Declaration and Programme for Action of the Fourth World Conference on Women held in Beijing in 1995 contain definitions of reproductive health and women's health, respectively.
4. Common article 3 of the Geneva Conventions for the protection of war victims (1949); Additional Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, article 75 (2) (a); Additional Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts, article 4 (a).
5. See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.

6. Unless expressly provided otherwise, any reference in this General Comment to health facilities, goods and services includes the underlying determinants of health outlined in paras. 11 and 12 (a) of this General Comment.
7. See paras. 18 and 19 of this General Comment.
8. See article 19.2 of the International Covenant on Civil and Political Rights. This General Comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.
9. In the literature and practice concerning the right to health, three levels of health care are frequently referred to: *primary health care* typically deals with common and relatively minor illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low cost; *secondary health care* is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed at community level, using specialty-trained health professionals and doctors, special equipment and sometimes in-patient care at comparatively higher cost; *tertiary health care* is provided in relatively few centres, typically deals with small numbers of minor or serious illnesses requiring specialty-trained health professionals and doctors and special equipment, and is often relatively expensive. Since forms of primary, secondary and tertiary health care frequently overlap and often interact, the use of this typology does not always provide sufficient distinguishing criteria to be helpful for assessing which levels of health care States parties must provide, and is therefore of limited assistance in relation to the normative understanding of article 12.
10. According to WHO, the stillbirth rate is no longer commonly used, infant and under-five mortality rates being measured instead.
11. *Prenatal* denotes existing or occurring before birth; *perinatal* refers to the period shortly before and after birth (in medical statistics the period begins with the completion of 28 weeks of gestation and is variously defined as ending one to four weeks after birth); *neonatal*, by contrast, covers the period pertaining to the first four weeks after birth; while *post-natal* denotes occurrence after birth. In this General Comment, the more generic terms pre- and post-natal are exclusively employed.
12. Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods

of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.

13. The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”, as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.
14. ILO Convention No. 155, art. 4.2.
15. See para. 12 (b) and note 8 above.
16. For the core obligations, see paras. 43 and 44 of the present General Comments.
17. Article 24.1 of the Convention on the Rights of the Child.
18. See World Health Assembly resolution WHA47.10, 1994, entitled “Maternal and child health and family planning: traditional practices harmful to the health of women and children”.
19. Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous peoples.

20. See General Comment No. 13, para. 43.
21. See General Comment No. 3, para. 9; General Comment No. 13, para. 44.
22. See General Comment No. 3, para. 9; General Comment No. 13, para. 45.
23. According to General Comments Nos. 12 and 13, the obligation to fulfil incorporates an obligation to *facilitate* and an obligation to *provide*. In the present General Comment, the obligation to fulfil also incorporates an obligation to *promote* because of the critical importance of health promotion in the work of WHO and elsewhere.
24. General Assembly resolution 46/119 (1991).
25. Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).
26. Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, "Health for All" Series, No. 1, WHO, Geneva, 1978.
27. See para. 45 of this General Comment.
28. Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex, chaps. VII and VIII.
29. Covenant, art. 2.1.
30. Regardless of whether groups as such can seek remedies as distinct holders of rights, States parties are bound by both the collective and

individual dimensions of article 12. Collective rights are critical in the field of health; modern public health policy relies heavily on prevention and promotion which are approaches directed primarily to groups.

31. See General Comment No. 2, para. 9.

## **CESCR Concluding Observations**

### **Greece<sup>192</sup>**

(...)

#### **B. Positive aspects**

(...)

8. The Committee notes with satisfaction that the State party adopted an Integrated Action Plan for the Social Integration of Greek Roma (2001-2008), which aims at improving the housing situation of the Greek Roma and their enhanced access to basic health services, i.e. through the development of new, and the improvement of existing, settlements, the establishment of socio-medical centres in these settlements and the deployment of mobile health units to encampments of the itinerant Roma population, especially in remote areas. The Committee also welcomes the implementation, since 2002, of a programme of housing loans for the Roma, under which some 4,700 grants of €60,000 each have been granted to applicants.

(...)

#### **D. Principal subjects of concern**

(...)

11. While acknowledging the State party's efforts to promote the social integration of Greek Roma, the Committee remains deeply concerned about the persistent discrimination against Roma people in the fields of housing, health and education. It is particularly concerned about reported instances of police violence against Roma, sweeping arrests, and arbitrary raids of Roma settlements by the police.
12. The Committee notes with concern that economic, social and cultural rights normally also guaranteed to non-citizens, such as the right to non-discrimination or the right to free education, are reserved to Greek citizens under the State party's Constitution.

(...)

<sup>192</sup> CESCR, *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Greece*, 7 June 2004 E/C.12/Add.97.

15. The Committee is concerned that low income persons, the Roma, and documented and undocumented immigrants and their families may not have access to social services.

(...)

18. The Committee expresses its concern about the high numbers of trafficked women and children who are subjected to forced labour and sexual exploitation, and who are often deported to their countries of origin rather than being granted a residence permit, reportedly in an expeditious manner and without the necessary procedural safeguards.

(...)

39. The Committee urges the State party to ensure respect for the necessary procedural safeguards when deporting victims of trafficking in persons, particularly when such victims are children. The State party should also continue and intensify its cooperation with neighbouring countries in combating trafficking in persons, provide medical, psychological and legal support to such victims, and include detailed information on these measures in its second periodic report.

#### **Latvia<sup>193</sup>**

(...)

#### **D. Principal subjects of concern**

(...)

11. The Committee regrets that it did not receive full and adequate information on the fulfillment of the obligation of the State party to guarantee the enjoyment of rights enshrined in the Covenant without discrimination, as stipulated in article 2, paragraph 2, of the Covenant, with respect to non-citizens with permanent resident status who make up some 20 per cent of the population in Latvia.

(...)

26. The Committee is concerned that, despite the fact that budget allocation on health, including public health, has increased in the

<sup>193</sup> CESCR, *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Latvia*, 7 January 2008 E/C.12/LVA/CO/1.



State party, the overall funds available for the healthcare system remain insufficient. The Committee is also concerned about the regional disparities in health-care coverage and the increasing shortage of medical personnel due to economic migration.

(...)

29. While commending the State party for its efforts to reform the mental health-care system, including the adoption of new legislation on mental health, the Committee remains concerned that institutional care continues to be the dominant form of care for mental patients, and that community-based services are still underdeveloped.

(...)

37. The Committee urges the State party to ensure that the lack of citizenship of permanent residents does not hinder their equal enjoyment of economic, social and cultural rights, including employment, social security, health services and education. The Committee also requests the State party to provide, in its next periodic report, detailed and comprehensive information on the enjoyment of all economic, social and cultural rights, disaggregated by citizen/non-citizen status.

(...)

51. The Committee urges the State party to undertake the necessary measures to improve its health services by, *inter alia*, increasing the budgetary allocation to the health sector and extending basic health services to rural areas. The Committee invites the State party to include, in its next periodic report, information and comparative statistical data on poverty-related diseases, with particular attention to rural areas.

#### **Monaco<sup>194</sup>**

(...)

#### **D. Principal subjects of concern**

(...)

10. The Committee is concerned that non-Monegasques continue to

<sup>194</sup> CESCR, *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Monaco*, 13 June 2006 E/C.12/MCO/CO/1.

be subject to a five-year residence requirement which prevents them from enjoying the right to housing and access to social welfare and medical treatment (arts. 2, para. 2, and 11 of the Covenant).

### **E. Suggestions and recommendations**

(...)

18. The Committee recommends that the State party reduce the five-year residence requirement for non-Monegasques to enjoy the right to housing and access to social welfare and medical treatment.

#### **Norway<sup>195</sup>**

(...)

### **E. Suggestions and recommendations**

(...)

39. The Committee encourages the State party to adopt effective measures to address the underlying causes of regional disparities in health indicators.
40. The Committee urges the State party to strengthen measures taken to ensure adequate health and psychiatric services for asylum-seeking children.

#### **Serbia and Montenegro<sup>196</sup>**

(...)

### **B. Positive aspects**

6. The Committee notes with appreciation the considerable legislative and policy reforms which have been adopted in the State party, in particular in the Republic of Montenegro, with a view to achieving the enjoyment of economic, social and cultural rights by all, including by disadvantaged and marginalized persons.

<sup>195</sup> CESCR, *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Norway*, 23 June 2005 E/C.12/1/Add.109.

<sup>196</sup> CESCR, *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Serbia and Montenegro*, 23 June 2005 E/C.12/1/Add.108.

## **D. Principal subjects of concern**

13. The Committee is deeply concerned that, despite the State party's efforts to improve the economic and social situation of Roma through National Plans of Action for the implementation of the Decade of Roma Inclusion (2005-2015) in both Republics, widespread discrimination against Roma persists with regard to employment, social security, housing, health care and education.

(...)

33. The Committee is concerned about the limited access to primary health care in rural areas, especially for refugees and other vulnerable groups, and that 7 per cent of the Serbian population are not covered by the compulsory health insurance.

(...)

35. While acknowledging the State party's efforts to devise a strategy to address the HIV/AIDS pandemic, the Committee notes the absence of national benchmarks against which the State party's achievements in this or other areas of health could be assessed.

36. The Committee regrets the absence of information on mental health services in the State party's report, including provision of psychological rehabilitation to victims of physical and sexual violence and other traumatizing experiences related to armed conflict.

(...)

41. The Committee recommends that the State party ensure adequate participation of Roma representatives in the implementation of the plans of action adopted or envisaged by both Republics with regard to non-discrimination, gender equality, employment, social protection, housing, health and education of Roma, and to allocate sufficient funds to these and other relevant programmes.

(...)

60. The Committee recommends that the State party ensure universal

access to affordable primary health care, i.e. by increasing the number of family doctors and community health centres, and include all members of society, including refugees, internally displaced persons and Roma, in the compulsory health insurance scheme.

(...)

62. The Committee invites the State party to identify disaggregated indicators and appropriate national benchmarks in relation to priority health concerns, including HIV/AIDS, in line with the Committee's general comment No. 14 (2000), and to include information on the process of identifying such indicators and benchmarks in its next report.

63. The Committee requests the State party to ensure the provision of adequate counseling and other assistance to victims of physical and sexual violence and other traumatizing experiences related to armed conflict, in particular women and children, and to include information on these and other mental health services, as well as on the number of victims of such violence, in its next report.

### Spain<sup>197</sup>

(...)

#### **B. Positive aspects**

4. The Committee welcomes the adoption and implementation of a number of measures aimed at strengthening the protection of economic, social and cultural rights in the State party, including the Plan for the Equality of Opportunities between Women and Men 2003-2006, the creation of the General Secretariat of Equality Policies, the establishment of the Ministry for Housing, the establishment within the Ministry of Labour and Social Affairs of a new office to address the issues of migrant workers and the adoption of the Second National Plan of Action for Social Inclusion 2003-2005, which includes, *inter alia*, initiatives to improve the situation of Roma (*Gitano*) populations.

(...)

<sup>197</sup> CESCR, *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Spain*, 7 June 2004 E/C.12/1/Add.99.

#### **D. Principal subjects of concern**

7. While noting that undocumented immigrants residing in the State party enjoy a number of fundamental rights and freedoms, including the right to basic social services, health care and education, on the condition that they register with their local municipality, the Committee remains concerned about the precarious situation of the large number of those undocumented immigrants who only enjoy a limited protection of their economic, social and cultural rights.

(...)

9. The Committee is concerned that, in spite of the existence of a range of programmes at the national and regional levels aimed at improving the situation of the Roma (*Gitano*) population, including the Second National Plan of Action for Social Inclusion 2003-2005 and the Roma Development Programme, the Roma remain in a vulnerable and marginalized situation in the State party, especially with regard to employment, housing, health and education.

(...)

40. The Committee recommends that the State party monitor closely the incidence of abortions among adolescent women and adopt necessary measures, legislative or otherwise, to address this problem, including by intensifying specific programmes on sexual and reproductive health among adolescent women, and provide information on this subject of concern in its next periodic report.

#### **Venezuela<sup>198</sup>**

(...)

#### **D. Principal subjects of concern**

(...)

11. The Committee is concerned that the non-issue of personal documentation to refugees and asylum-seekers by the State authorities seriously hinders their enjoyment of economic,

<sup>198</sup> CESCR, *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Venezuela*, 21 May 2001 E/C.12/1/Add.56.

social and cultural rights, including the rights to work, health and education.

12. The Committee deplores the discrimination against indigenous people, particularly with regard to access to land ownership, housing, health services and sanitation, education, work and adequate nutrition. The Committee is particularly concerned about the adverse effects of the economic activities connected with the exploitation of natural resources, such as mining in the Imataca Forest Reserve and coal-mining in the Sierra de Perijá, on the health, living environment and way of life of the indigenous populations living in these regions.

(...)

23. The Committee requests the State party to provide, in its next period report, more detailed information relating to articles 6 and 7 of the Covenant, including in particular an account of the role of labour inspectors, and urges the State party to implement the 1986 Health and Safety Act, which determines safe and healthy conditions of work.

(...)

29. The Committee requests the State party to provide, in its next periodic report, detailed information about the functioning of the social security system, the privatization of the health-care system and the integration of vulnerable groups, including indigenous people, into the health-care system.

### **3. International Covenant on Civil and Political Rights (excerpts), 1966<sup>199</sup>**

**Adoption: 16 December 1966**

**Entry into force: 23 March 1976**

(...)

## **PART II**

### **Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

(...)

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<sup>199</sup> Source: U.N.G.A. Res. 2200 A (XXI), 999 U.N.T.S. 171, loc cit. n. 32.

## **PART III**

### **Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. (...)

### **Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

(...)

### **Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.



## **HRC General Comment No. 6: the right to life (Article 6), 1982<sup>200</sup>**

**Adoption: 30 April 1982**

(...)

5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

(...)

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<sup>200</sup> 30 Apr. 1982, reprinted in UN Econ. & Soc. Council (ECOSOC) Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (29 July 1994), p. 7.

## HRC Concluding Observations

### Kenya<sup>201</sup>

(...)

#### C. Principal subjects of concern and recommendations

(...)

19. While taking note of efforts made by the State party to improve conditions of detention and to ease prison overcrowding through passage of the Community Service Orders Act, the Committee continues to be concerned at the situation in prisons, particularly in the areas of sanitation and access to health care and adequate food. It is concerned at the extreme overcrowding of prisons, which was acknowledged by the delegation and which, combined with sanitation and health-care deficiencies, may result in life-threatening conditions of detention (articles 7 and 10 of the Covenant).

**The State party must guarantee the right of detainees to be treated humanely and with respect for their dignity, in particular their right to live in hygienic facilities and to have access to health care and adequate food. The State party's next periodic report should include detailed information on measures taken to address the problem of prison overcrowding.**

(...)

25. The Committee is concerned about allegations of trafficking of children and instances of child prostitution, as well as the State party's failure to prosecute and punish trafficking offences that have come to the authorities' knowledge and to afford adequate protection to victims (articles 8 and 24 of the Covenant).

**The State party should adopt specific anti-trafficking legislation, including for the protection of the human rights of victims, and actively investigate and prosecute trafficking offences. It should implement policy across Government for the eradication of trafficking and for the provision of support to victims of trafficking.**

<sup>201</sup> HRC, *UN Human Rights Committee: Concluding Observations, Kenya*, 29 April 2005 CCPR/CO/83/KEN.

## Mauritius<sup>202</sup>

(...)

### C. Principal subjects of concern and recommendations

(...)

6. The Committee reiterates its concern over the failure to integrate all the rights guaranteed under the Covenant into national legislation, more particularly the maintenance of legislative and constitutional provisions at variance with the Covenant. It stresses once again that the Mauritian legal system does not provide effective remedies in all cases of violations of the rights guaranteed by the Covenant (Covenant, art. 2). The Committee notes yet again that the maintenance of article 16 of the Constitution, by virtue of which the prohibition of discrimination does not apply to personal-status laws and to foreigners, might well result in the violation of articles 3 and 26 of the Covenant.

**The State party should give full effect to the provisions of the Covenant in its domestic legislation prohibiting all forms of discrimination.**

(...)

9. The Committee notes with concern that section 235 of the Penal Code penalizes abortion even when the mother's life is in danger, and thus may encourage women to resort to unreliable and illegal abortion, with inherent risks for their life and health (Covenant, art. 6).

**The State party should review its legislation to ensure that women are not forced to carry pregnancies to term in violation of the rights guaranteed by the Covenant.**

(...)

18. The Committee notes that expulsion procedures contain no provisions guaranteeing respect for the rights protected by the Covenant (Covenant, art. 13).

<sup>202</sup> HRC, *UN Human Rights Committee: Concluding Observations, Mauritius*, 27 April 2005 CCPR/CO/83/MUS.

**The State party should integrate into its legislation all the safeguards which should accompany an expulsion procedure.**

**Norway<sup>203</sup>**

(...)

### **C. Principal subjects of concern and recommendations**

(...)

16. The Committee is concerned about the practice of not allowing infants to remain with their mothers while in custody and in particular, the unequal treatment of mothers, on the basis of the nationality, regarding the possibility of leave from prison when breastfeeding their babies, which amounts to discrimination. (arts. 10, 17 and 26) The State party should review its practice of separating infants from their mothers and of using nationality as a criterion to decide on requests for leave from prison when breastfeeding. It should further consider imposing appropriate non-custodial measures in such cases.

**Republic of Korea<sup>204</sup>**

(...)

<sup>203</sup> HRC, *UN Human Rights Committee: Concluding Observations, Norway*, 25 April 2006 CCPR/C/NOR/CO/5.

<sup>204</sup> HRC, *UN Human Rights Committee: Concluding Observations, Republic of Korea*, 28 November 2006 CCPR/C/KOR/CO/3. Regarding Paragraph 12 of the Concluding Observations, the Government of the Republic of Korea stated as follows: 13. It is strongly viewed that "ensuring equal access to social services and educational facilities" for migrant workers as recommended by the Human Rights Committee in Paragraph 12 of the Concluding Observations falls under the purview of Articles 9 and 13 of the International Covenant on Economic, Social and Cultural Rights and not the International Covenant on Civil and Political Rights. However, we respond to this matter as follows, respecting the recommendation by the Human Rights Committee. The Government guarantees migrant workers' equal access to social services and educational facilities including the four major insurance schemes (i.e. national pension, industrial accident compensation insurance, employment insurance, and health insurance) in accordance with Article 22 (prohibition of discrimination) of the Act on Employment of Foreign Workers stated in Paragraphs 33, 34, and 53 of the Third Periodic Report. Illegal residents are entitled to industrial accident compensation insurance only, not the national pension, employment insurance, or health insurance. In light of this situation, the Government has consistently borne, in part or in whole, the cost of hospitalization and operations of illegal migrant workers and their children since 2005 as part of its efforts to redress the lack of health insurance coverage for them. During the period from January to September 2007 alone, the Government spent KRW 4.7 billion on 3,003 migrant workers or their children not entitled to health insurance. *Comments by the Government of the Republic of Korea on the Concluding Observations of the Human Rights Committee*, 29 February 2008 CCPR/C/KOR/CO/3/Add.1.

### C. Principal areas of concern and recommendations

12. The Committee is concerned that migrant workers face persistent discriminatory treatment and abuse in the workplace, and are not provided with adequate protection and redress. The confiscation and retention of official identification papers of such workers is also of concern (arts. 2, 22 and 26).

**The State party should ensure to migrant workers enjoyment of the rights contained in the Covenant without discrimination. In this regard, particular attention should be paid to ensuring equal access to social services and educational facilities, as well as the right to form trade unions and the provision of adequate forms of redress.**

**Thailand**<sup>205</sup>

(...)

### C. Principal subjects of concern and recommendations

(...)

16. The Committee is concerned at the overcrowding and general conditions of places of detention, particularly with regard to sanitation and access to health care and adequate food. The Committee is also concerned that the right of detainees of access to lawyers and members of the family is not always observed in practice. The Committee considers the duration of detention before a person is brought before a judge to be incompatible with the requirements of the Covenant. The Committee deplores the continued shackling of death row prisoners and reports of prolonged solitary confinement. Pretrial detainees frequently are not segregated from convicted prisoners. Furthermore, the Committee is concerned at the significant number of women in the prison population and the fact that juveniles are often held in adult cells (arts. 7, 10 and 24).

**The State party should bring prison conditions into line with the United Nations Standard Minimum Rules for the Treatment of Prisoners as a matter of priority. The State party should guarantee the right of detainees to be treated humanely and with respect for their dignity, particularly**

<sup>205</sup> HRC, *UN Human Rights Committee: Concluding Observations, Thailand*, 8 July 2005 CCPR/CO/84/THA.

**with regard to hygienic conditions, access to health care and adequate food. Detention should be viewed only as a last resort, and provision should be made for alternative measures. The use of shackling and long periods of solitary confinement should be stopped immediately. Special protection should be provided for juveniles, including their compulsory segregation from adults.**

(...)

20. Notwithstanding the serious efforts undertaken by the State party to address the issue of trafficking in persons, including the establishment in March 2005 of the National Committee on Prevention and Suppression of Human Trafficking, and while welcoming the planned enactment of the new law on human trafficking, the Committee remains concerned that Thailand is a major country of origin, transit and destination for trafficking in persons for purposes of sexual exploitation and forced labour. The Committee is also concerned that child prostitution remains widespread. The Committee notes with concern that certain groups are at a particularly higher risk of being sold, trafficked and exploited, i.e. street children, orphans, stateless persons, migrants, persons belonging to ethnic minorities and refugees/asylum-seekers (arts. 8 and 24).

**The State party should continue and strengthen its measures to prosecute and punish trafficking and to adequately protect the human rights of all witnesses and victims of trafficking, in particular by securing their places of refuge and opportunities to give evidence. The State party should enact the Suppression of Human Trafficking Bill without delay.**

21. The Committee is concerned about the significant proportion of children, often stateless or of foreign nationality, in the State party who engage in labour and, as explained by the delegation, are often victims of trafficking (arts. 8 and 24).

**The State party should strengthen the enforcement of the existing legislation and policies against child labour. Victims of trafficking must be afforded adequate protection. The State party should make every effort, including preventive measures, to ensure that children who engage in labour do not work under conditions harmful to them and that**

**they continue to have access to education. The State party should take action to implement policies and legislation for the eradication of child labour, *inter alia* through public-awareness campaigns and education of the public on the protection of the rights of children.**

22. Notwithstanding the corrective measures taken by the State party, most notably through the Central Registration Regulations 1992 and 1996, to address the issue of statelessness among ethnic minorities, including the Highlanders, the Committee remains concerned that a significant number of persons under its jurisdiction remain stateless, with negative consequences for the full enjoyment of their Covenant rights, as well as the right to work and their access to basic services, including health care and education. The Committee is concerned that their statelessness renders them vulnerable to abuse and exploitation. The Committee is also concerned about the low levels of birth registration, especially among Highlander children. (arts. 2 and 24).

**The State party should continue to implement measures to naturalize the stateless persons who were born in Thailand and are living under its jurisdiction. The State party should also review its policy regarding birth registration of children belonging to ethnic minority groups, including the Highlanders, and asylum-seeking/refugee children, and ensure that all children born in the State party are issued with birth certificates.**

23. The Committee is concerned about the lack of full protection of the rights of registered and unregistered migrant workers in Thailand, particularly with regard to liberty of movement, access to social services and education, and access to personal documents. The deplorable conditions in which migrants are obliged to live and work indicate serious violations of articles 8 and 26 of the Covenant. The Committee notes that ethnic minorities and migrants from Myanmar are particularly vulnerable to exploitation by employers as well as to deportation by the Thai authorities. The Committee is also concerned that a significant number of migrant workers, mainly from Myanmar, are still missing in the aftermath of the tsunami in December 2004 and that others were not provided with the necessary humanitarian assistance due to their lack of legal status (arts. 2, 8 and 26).

**The State party must take measures to effectively implement the existing legislation providing for the rights of migrant workers. Migrant workers should be afforded full and effective access to social services, educational facilities and personal documents, in accordance with the principle of non-discrimination. The State party should consider establishing a governmental mechanism to which migrant workers can report violations of their rights by their employers, including illegal withholding of their personal documents. The Committee also recommends that humanitarian assistance be effectively provided to all victims of the tsunami disaster without discrimination, regardless of their legal status.**

**Yemen<sup>206</sup>**

(...)

### **C. Principal subjects of concern and recommendations**

(...)

11. The Committee regrets that insufficient information was provided on the extent to which female genital mutilation is practised in Yemen. While noting that female genital mutilation can no longer be practised in hospitals and health centres, it notes with concern that, according to various sources of information, no general prohibition of those practices has been enacted (arts. 3, 6, and 7).

**The State party should increase its efforts to eradicate female genital mutilation and enact a law prohibiting all persons from carrying out the practice. The State party should provide more detailed information on this issue, including (a) statistical data on the number of women and girls concerned; (b) information on proceedings, if any, instituted against perpetrators of female genital mutilation; and (c) information on the effectiveness of programmes and awareness-raising campaigns implemented in order to combat the practice.**

(...)

<sup>206</sup> HRC, *UN Human Rights Committee: Concluding Observations, Yemen*, 9 August 2005 CCPR/CO/84/YEM.



17. The Committee is concerned about reports of trafficking of children out of Yemen and of women coming to or through the country, as well as the practice of expelling trafficked persons from the country without appropriate arrangements for their care (art. 8).

**The State party should increase its efforts to combat such practices, while fully addressing the human rights entitlements and needs of the victims. More detailed information, including statistical data, should be included in the next periodic report.**

(...)

21. The Committee notes with concern that the Personal Status Act allows children aged 15 to marry, and that early marriage of girls, sometimes below the age fixed by the law, persists. It is also concerned about marriages of under-age children contracted by their guardians. This practice jeopardizes the effectiveness of the consent given by spouses, their right to education and, in the case of girls, their right to health (arts. 3, 23 and 24).

**The State party should raise the minimum age of marriage and ensure that it is respected in practice.**

#### **4. International Convention on the Elimination of all Forms of Racial Discrimination (excerpts), 1965<sup>207</sup>**

**Adoption: 21 December 1965**

**Entry into force: 4 January 1969**

(...)

### **PART I**

#### **Article 1**

1. In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

(...)

#### **Article 5**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate

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<sup>207</sup> Source: U.N.G.A. Res. 2105 A (XX), 660 U.N.T.S. 195.

racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(...)

(e) Economic, social and cultural rights, in particular:

(...)

(iv) The right to public health, medical care, social security and social services;

## **CERD General Recommendation XX on non-discriminatory implementation of rights and freedoms (Article 5), 1996<sup>208</sup>**

### **Adoption: 15 March 1996**

1. Article 5 of the Convention contains the obligation of States parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination. Note should be taken that the rights and freedoms mentioned in article 5 do not constitute an exhaustive list. At the head of these rights and freedoms are those deriving from the Charter of the United Nations and the Universal Declaration of Human Rights, as recalled in the preamble to the Convention. Most of these rights have been elaborated in the International Covenants on Human Rights. All States Parties are therefore obliged to acknowledge and protect the enjoyment of human rights, but the manner in which these obligations are translated into the legal orders of States Parties may differ. Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights.
2. Whenever a State imposes a restriction upon one of the rights listed in article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards. To ascertain whether this is the case, the Committee is obliged to inquire further to make sure that any such restriction does not entail racial discrimination.
3. Many of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State; others such as the right to participate in elections, to vote and to stand for election are the rights of citizens.
4. The States parties are recommended to report about the non-discriminatory implementation of each of the rights and freedoms referred to in article 5 of the Convention one by one.
5. The rights and freedoms referred to in article 5 of the Convention and any similar rights shall be protected by a State party. Such

<sup>208</sup> UN General Assembly, 51<sup>st</sup> Sess., *Report of the Committee on the Elimination of Racial Discrimination*, Supp. No. 18, U.N. Doc. A/51/18, p. 124, Official Record, New York, 8 Mar. 1996.

protection may be achieved in different ways, be it by the use of public institutions or through the activities of private institutions. In any case, it is the obligation of the State party concerned to ensure the effective implementation of the Convention and to report thereon under article 9 of the Convention. To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.

**CERD General Recommendation XXX on discrimination against non citizens (excerpts), 2004<sup>209</sup>**

The Committee on the Elimination of Racial Discrimination,

(...)

Recommends,

Based on these general principles, that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures:

(...)

VII. Economic, social and cultural rights

29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;

(...)

36. Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services;

(...)

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<sup>209</sup> UN General Assembly, 51<sup>st</sup> Sess., *Report of the Committee on the Elimination of Racial Discrimination*, Supp. No. 18, U.N. Doc. A/59/18, Official Record, New York, 8 Mar. 1996.

**CERD General Recommendation XXVII on discrimination against Roma (excerpts), 2000<sup>210</sup>**

**Adoption: 16 August 2000**

*The Committee on the Elimination of Racial Discrimination,*

(...)

*Taking into account* the provisions of the Convention,

*Recommends* that the States parties to the Convention, taking into account their specific situations, adopt for the benefit of members of the Roma communities, *inter alia*, all or part of the following measures, as appropriate.

(...)

4. Measures to improve living conditions

(...)

33. To ensure Roma equal access to health care and social security services and to eliminate any discriminatory practices against them in this field.
34. To initiate and implement programmes and projects in the field of health for Roma, mainly women and children, having in mind their disadvantaged situation due to extreme poverty and low level of education, as well as to cultural differences; to involve Roma associations and communities and their representatives, mainly women, in designing and implementing health programmes and projects concerning Roma groups.

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<sup>210</sup> UN General Assembly, 56<sup>th</sup> Sess., *Report of the Committee on the Elimination of Racial Discrimination*, Supp. No. 18, U.N. Doc. A/55/18, p. 154, Official Record, New York, 2000.

## CERD Concluding Observations

### Azerbaijan<sup>211</sup>

(...)

#### **B. Positive aspects**

(...)

8. The Committee welcomes the adoption of the National Poverty Reduction Strategy for 2003-2005, which targets internally displaced persons as a vulnerable group.

(...)

#### **D. Concerns and recommendations**

(...)

12. The Committee expresses its concern that asylum-seekers, refugees, stateless persons, displaced persons and long-term residents residing in Azerbaijan experience discrimination in the areas of employment, education, housing and health (article 5).

**The Committee urges the State party to continue taking necessary measures in accordance with article 5 of the Convention to ensure equal opportunities for full enjoyment of their economic, social and cultural rights by asylum-seekers, refugees, stateless persons, displaced persons and long-term residents of Azerbaijan. The Committee requests the State party to include, in its next periodic report, information on measures taken in this regard, and draws the attention of the State party to its general recommendation XXX on discrimination against non-citizens.**

<sup>211</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Azerbaijan*, 14 April 2005 CERD/C/AZE/CO/4.



**Bahrain<sup>212</sup>**

(...)

**B. Positive aspects**

(...)

5. The Committee appreciates the establishment of trade unions in 2002 for the first time in Bahrain as well as of cultural associations composed of foreigners.

(...)

**C. Concerns and recommendations**

(...)

14. The Committee remains concerned at the situation of migrant workers, in particular regarding their enjoyment of economic, social and cultural rights.

**In light of article 5 (e) (i) and of general recommendation XXX on non-citizens, the Committee urges the State party to take all necessary measures to extend full protection from racial discrimination to all migrant workers and remove obstacles that prevent the enjoyment of economic, social and cultural rights by these workers, notably in the areas of education, housing, employment and health. In addition, the State party should provide information in its next periodic report on any bilateral agreements it has entered into with the countries of origin of a significant or substantial number of migrant workers in Bahrain.**

(...)

16. The Committee notes with concern the reportedly disparate treatment of and discrimination faced by members of some groups, in particular the Shia, that may be distinguishable by virtue of their tribal or national origin, descent, culture or language; the Committee is especially concerned about apparently disparate opportunities that are afforded to such groups.

<sup>212</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations*, Bahrain, 14 April 2005 CERD/C/BHR/CO/7.

**The Committee recommends that the State party ensure that everyone, without distinction as to race, colour, or national or ethnic origin, enjoys the rights to work and to health and social security, adequate housing and education in accordance with article 5 (e) (i), (iii), (iv) and (v) of the Convention.**

**Bosnia Herzegovina<sup>213</sup>**

(...)

**D. Concerns and recommendations**

(...)

13. While noting with favour the existence of several criminal law provisions punishing acts of racial discrimination, the Committee is concerned about the absence of comprehensive antidiscrimination legislation, including especially legislation and regulations in the civil and administrative fields, which make unlawful acts of racial discrimination that may not constitute criminal offences (Art. 2 (1) (d)).

**The Committee recommends that the State party enact comprehensive administrative, civil and/or criminal antidiscrimination legislation, which prohibits acts of racial discrimination in employment, housing, healthcare, social security (including pensions), education and public accommodations.**

(...)

17. The Committee is deeply concerned about the difficulties that many Roma experience in obtaining personal documents, including birth certificates, identification cards, passports and documents related to the provision of health insurance and social security benefits (Art. 5 (e)).

**The Committee urges the State party to take immediate steps, e.g. by removing administrative obstacles, to ensure that all Roma have access to personal documents that are necessary for them to enjoy, *inter alia*, their economic, social**

<sup>213</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Bosnia and Herzegovina*, 11 April 2006, CERD/C/BIH/CO/6.

**and cultural rights, such as employment, housing, health care, social security and education.**

(...)

21. The Committee notes that although pension benefits are significantly higher in the Federation than in the Republika Srpska, pensioners who previously received their pensions in the Federation, but who were internally displaced to the Republika Srpska, continue to receive pensions from the Republika Srpska Pension Fund upon their return to the Federation. Furthermore, most internally displaced persons returning to their pre-armed conflict Entity of residence keep their health insurance status in the Entity where they resided while displaced because of complicated registration procedures and fear of discrimination in the places of their pre-armed conflict residence, despite the significant financial burdens imposed on them by virtue of having to commute between Entities to receive treatment or, alternatively, to bear the full costs of health services in the Entity to which they have returned (Art. 5 (e) (iv)).

**The Committee requests that the State party ensure that pension and health care benefits are provided on a non-discriminatory basis, without regard to ethnicity, especially where minority returnees are involved. The Committee further recommends that the State party review the deployment of its pension benefits and health care services and, for the time being, implement the Inter-Entity Agreement on health care.**

**Canada**<sup>214</sup>

(...)

## **B. Positive aspects**

(...)

9. The Committee also notes with satisfaction the decision taken by the State party to halve the Right of Permanent Residence Fee (RPRF), aimed at lessening the financial burden upon new immigrants arriving in Canada.

<sup>214</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Canada*, 25 May 2007 CERD/C/CAN/CO/18.

(...)

### C. Concerns and recommendations

17. The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (arts 2. 1(d)d),

4 (a) and 5(e)).

**In light of article 2.1 (d) and article 4 (a) and (b) of the Convention and of its general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard.**

(...)

23. The Committee is concerned that undocumented migrants and stateless persons, particularly those whose application for refugee status is rejected but who cannot be removed from Canada, are excluded from eligibility for social security and health care, as it requires proof of residence in one of the provinces in the State party. The Committee is concerned about allegations that in some of the provinces, stateless children and undocumented migrant children are not eligible for schooling (art. 5 (e)).

**The Committee recommends that the State party consider ratifying the 1954 Convention relating to Status of Stateless Persons and the International Convention on the Protection**

**of the Rights of All Migrants Workers and Members of Their Families. The Committee urges the State party to take necessary legal and policy measures to ensure that undocumented migrants and stateless persons whose asylum applications have been rejected are provided with access to social security, health care and education in all provinces and territories, in line with article 5 (e) of the Convention. The Committee also recommends that the State party consider amending the Immigration and Refugee Protection Act (IRPA) so as to explicitly include statelessness as a factor of humanitarian and compassionate consideration.**

**Estonia<sup>215</sup>**

(...)

### **B. Positive aspects**

4. The Committee notes the decisions of the Supreme Court on the principles of equality and protection of family life, which declared unconstitutional several decisions that had refused the granting of residence permits on the sole basis of immigration quotas.
5. The Committee commends the State party for its continuing efforts to encourage social integration of non-citizens in Estonia, including the planned adoption of a new State programme in 2007.
6. The Committee welcomes the fact that non-citizens in Estonia have the right to participate in local elections.
7. The Committee also welcomes the efforts made by the State party to combat trafficking in persons, including the adoption, in January 2006, of the National Action Plan against Trafficking in Human Beings.

(...)

<sup>215</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Estonia*, 19 October 2006 CERD/C/EST/CO/7.

### C. Concerns and recommendations

(...)

11. While acknowledging the amendments to the Penal Code of July 2004, which establish different degrees of penalties for acts of racial discrimination, and the fact that the State party has expressed its intention to transpose European Union Directive 2000/43/EC against racial discrimination into the domestic legal order, the Committee remains concerned about the absence of comprehensive anti-discrimination legislation, in particular legislation and regulations in the civil and administrative fields (art. 2 (1) (d)).

**The Committee recommends that the State party enact comprehensive anti-discrimination legislation in accordance with the provisions of the Convention, in particular in the fields of housing, health care, social security (including pensions), education and access to public services, and that it transpose European Union Directive 2000/43/EC into its domestic legal order.**

(...)

17. While acknowledging the State party's efforts to implement programmes and projects in the field of health, in particular for the prevention and treatment of HIV/AIDS, the Committee is concerned at the high rate of HIV/AIDS among persons belonging to minorities (Article 5 (e) (iv)). The Committee recommends that the State party continue to implement programmes and projects in the field of health, with particular attention to minorities, bearing in mind their disadvantaged situation; to this end, the Committee encourages the State party to take further measures to combat HIV/AIDS.

**The Committee recommends that the State party continue to implement programmes and projects in the field of health, with particular attention to minorities, bearing in mind their disadvantaged situation; to this end, the Committee encourages the State party to take further measures to combat HIV/AIDS.**

## Iran (Islamic Republic of)<sup>216</sup>

(...)

### B. Positive aspects

(...)

4. The Committee welcomes the social, economic and cultural measures taken by the State party, in accordance with article 2, paragraph 2, of the Convention, such as the new Economic, Social and Cultural Development Plan, which aims to enhance basic social and infrastructural services in less developed areas inhabited by ethnic minority groups, as well as to improve the living conditions of nomadic groups.
5. The Committee commends the State party's efforts to host a large population of refugees from neighbouring countries such as Afghanistan and Iraq.

(...)

## Israel<sup>217</sup>

(...)

### D. Concerns and recommendations

(...)

16. The Committee welcomes the fact that several pieces of legislation prohibit racial discrimination, for example in the field of health, employment, education, and access to products and services, and takes into consideration the information provided by the delegation relating to the jurisprudence of the Supreme Court. The Committee remains concerned

<sup>216</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Islamic Republic of Iran*, 10 December 2003 CERD/C/63/CO/6.

<sup>217</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Israel*, 14 June 2007 CERD/C/ISR/CO/13. On Paragraph 34, the Government of Israel states as follows: 64. Thus, even though restrictions on movement are imposed, many efforts are made to relieve the local population, either by verifying the existence of reasonable alternatives for the movement of Palestinians in the area, and also by facilitating the freedom of movement of ambulances, medical crews, and those residents who are in need of medical care *Information received from the Government of Israel on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination*, 16 December 2008 CERD/C/ISR/CO/13/Add.1.

however that no general provision for equality and prohibition of racial discrimination has been included in the Basic Law: Human Dignity and Liberty (1992), which serves as Israel's bill of rights. (Article 2 of the Convention)

**The Committee recommends that the State party ensure that the prohibition of racial discrimination and the principle of equality be enacted as general norms of high status in domestic law.**

(...)

24. The Committee notes the efforts made by the State party to promote development within the Arab sector, in particular through the Multi-year Plan (2001-2004). It remains concerned however that the lower level of education provision for Arab Israeli citizens is a barrier to their access to employment, and that their average income is significantly lower than that of Jewish citizens. It is also concerned by the discrepancies still remaining between the infant mortality rates and life expectancy rates of Jewish and non-Jewish populations, and by the fact that minority women and girl children are often the most disadvantaged. (Articles 2 and 5 (e) of the Convention)

**The Committee recommends that the State party increase its efforts to ensure the equal enjoyment of economic, social and cultural rights by Arab Israeli citizens, in particular their right to work, health and education. The State party should assess the extent to which the alleged discriminatory attitudes of employers against Arabs, scarcity of jobs near Arab communities, and lack of daycare centers in Arab villages are a cause of high unemployment rates among Arabs. Bearing in mind its general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, the Committee also recommends that the State party pay particular attention to the situation of Arab women in this regard.**

(...)

34. The Committee is deeply concerned that the severe restrictions on the freedom of movement in the Occupied Palestinian Territories, targeting a particular national or ethnic group, especially through the wall, checkpoints, restricted roads and



permit system, have created hardship and have had a highly detrimental impact on the enjoyment of human rights by Palestinians, in particular their rights to freedom of movement, family life, work, education and health. It is also concerned that the Order on Movement and Travel (Restrictions on Travel in an Israeli Vehicle) (Judea and Samaria), of 19 November 2006, which bans Israelis from transporting Palestinians in their vehicles in the West Bank, except in limited circumstances, has been suspended but not cancelled. (Articles 2, 3 and 5 of the Convention)

**The State party should review these measures to ensure that restrictions on freedom of movement are not systematic but only of temporary and exceptional nature, are not applied in a discriminatory manner, and do not lead to segregation of communities. The State party should ensure that Palestinians enjoy their human rights, in particular their rights to freedom of movement, family life, work, education and health.**

#### Japan<sup>218</sup>

(...)

#### C. Concerns and recommendations

(...)

19. The Committee, while noting the recent increase in the number of refugees accepted by the State party, is concerned that different standards of treatment are applicable to Indo-Chinese refugees, on one hand, and the limited number of refugees of other national origins, on the other. Whereas Indo-Chinese refugees have access to accommodation, financial aid and State-funded Japanese language courses, such assistance is as a rule not available to other refugees. The Committee recommends that the State party take the necessary measures to ensure equal entitlement to such services by all refugees. In this context, it is also recommended that the State party ensure that all asylum-seekers have the right, *inter alia*, to an adequate standard of living and medical care.

<sup>218</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Japan*, 27 April 2001 CERD/C/304/Add.114.

## Lithuania<sup>219</sup>

(...)

### C. Concerns and recommendations

(...)

14. The Committee is concerned by the new Law on the Legal Status of Aliens which restricts considerably the possibility for asylum seekers to be granted refugee status and only provides them with humanitarian protection (art.5).

**The Committee draws the attention of the State party to its general recommendation 30 on non-citizens and recommends that it ensure that all persons entitled to refugee status under the Convention relating to the Status of Refugees be granted such status. It also recommends to the State party that it enhance the capacity of administrative courts to deal effectively with asylum appeals cases and to provide information thereon in its next periodic report, including statistical data. It also recommends to the State party to ensure that persons granted humanitarian protection have adequate access to social security and health care services.**

(...)

22. The Committee is alarmed at the critical health situation of some Roma communities, which is largely a consequence of their poor living conditions (art.5).

**The Committee recommends that the State party continue to implement programmes and projects in the field of health for Roma, bearing in mind their disadvantaged situation resulting from extreme poverty and low levels of education. To this end, the Committee encourages the State party to take further measures to address the issues of drinking water supplies and sewage disposal systems in Roma settlements**

<sup>219</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Lithuania*, 11 April 2006 CERD/C/LTU/CO/3.

**Mexico**<sup>220</sup>

(...)

**C. Concerns and recommendations**

(...)

16. The Committee remains concerned at the situation of migrant workers who originate principally from indigenous communities in Guatemala, Honduras and Nicaragua, particularly as regards women, who are victims of such abuses as long working days, lack of health insurance, physical and verbal ill-treatment, sexual harassment, and threats that they will be handed over to the migration authorities because they are undocumented. (Art.5 (e) (i))

**Bearing in mind general recommendation No. 30 on non-citizens, the Committee recommends that the State party should ensure the proper Implementation in practice of programmes for migrant workers, such as the Programme of Documentation for the Legal and Migratory Security of Guatemalan Farm Workers, the Regularization of Migration Programme, the Programme for upgrading migrant holding centres, the Plan of Action for Cooperation in Migratory Matters and Consular Protection with El Salvador and Honduras and the Agricultural day labourers' programme. The Committee calls on the State party to include in its next periodic report information on progress made in relation to the situation of migrant workers in the State party.**

17. While the Committee welcomes the criminalization of forced sterilization under article 67 of the General Health Law, it reiterates its concern at the reproductive health situation of indigenous men and women in Chiapas, Guerrero and Oaxaca as far as the alleged practice of forced sterilization is concerned. (Art.5 (e) (iv))

**The Committee urges the State party to take all necessary steps to put an end to practices of forced sterilization, and to impartially investigate, try and punish the perpetrators of such practices. The State party should also ensure that fair**

<sup>220</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Mexico*, 4 April 2006 CERD/C/MEX/CO/15.

**and effective remedies are available to the victims, including those for obtaining compensation.**

**Norway<sup>221</sup>**

(...)

**B. Positive aspects**

(...)

9. The Committee welcomes the establishment of the Norwegian Centre for Minority Health Research in 2003, the mandate of which is to promote the best possible health services for groups of refugee and immigrant backgrounds.
10. The Committee also welcomes the setting up of the Directorate of Integration and Diversity in 2006 which aims at promoting diversity and improving the living conditions of immigrants through employment, integration and participation.

(...)

**C. Concerns and recommendations**

(...)

21. The Committee is concerned that many municipalities do not provide sufficient protection from disease in health services for asylum-seekers, refugees and persons reunified with their families (art. 5 (e) (iv)).

**In light of its general recommendation 30, the Committee recommends that the State party take all necessary measures to ensure the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, improving their access to preventive, curative and palliative health services.**

<sup>221</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Norway*, 19 October 2006 CERD/C/NOR/CO/18.

## **Saudi-Arabia<sup>222</sup>**

(...)

### **B. Positive aspects**

(...)

6. The Committee welcomes the recent initiative to include non-Saudis in a health insurance system. The Committee has also noted with satisfaction that measures have been taken to put an end to the practice of employers retaining the passports of their foreign employees, in particular domestic workers. It also notes the high number of schools that have been authorized to offer programmes for the education of children of migrant workers that have been designed in their country of origin.

(...)

### **C. Concerns and recommendations**

(...)

20. The Committee requests the State party to include in its next periodic report statistics, disaggregated by migrants' national origin, which would provide a better understanding of the economic and social standing of non-citizens in Saudi Arabia.

## **South Africa<sup>223</sup>**

(...)

### **D. Concerns and recommendations**

(...)

20. While acknowledging the State party's programmes for the prevention and treatment of HIV/AIDS, the Committee is concerned at the high rate of HIV/AIDS among persons belonging to the most vulnerable groups (article 5 (e)). The Committee recommends that the State party strengthen its programmes in the field of health, with particular attention to minorities, bearing in mind their disadvantaged situation

<sup>222</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Saudi Arabia*, 2 June 2003 CERD/C/62/CO/8.

<sup>223</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, South Africa*, 19 October 2006 CERD/C/ZAF/CO/3.

resulting from poverty and lack of access to education, and encourages the State party to take further measures to combat HIV/AIDS.

**The Committee recommends that the State party strengthen its programmes in the field of health, with particular attention to minorities, bearing in mind their disadvantaged situation resulting from poverty and lack of access to education, and encourages the State party to take further measures to combat HIV/AIDS.**

**Sweden<sup>224</sup>**

(...)

## **B. Positive aspects**

(...)

6. The Committee welcomes the adoption of the Aliens Act in 2006, which provides for the right to appeal to an independent appellate body and the increased use of oral hearings in asylum proceedings, expands the scope of application of the definition of refugees to include women escaping gender-based violence, and offers complementary forms of protection to persons escaping generalized violence.

(...)

8. The Committee notes with appreciation the efforts by the State party to promote the rights of the Roma minority, including convening a working conference on Roma women's rights in December 2007, aimed at sharing information and best practices among policy-makers and Roma networks across Europe.
9. The Committee notes with appreciation the State party's acceptance of new methods to investigate and combat discrimination, including pilot projects in situation testing and anonymous job applications, and for substantially raising the level of damages awarded to victims of racial discrimination.

<sup>224</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Sweden*, 23 September 2008 CERD/C/SWE/CO/18.

## C. Concerns and recommendations

(...)

17. The Committee notes the State party's continued commitment to the integration of foreign-born persons. Nevertheless, it remains concerned that despite such efforts, de facto discrimination against persons of foreign origin persists in a number of areas. It is particularly concerned about the lower employment rate among persons of immigrant origin, especially women. It regrets the lack of information on concrete measures taken to prevent discrimination in the area of health. The Committee is also concerned about the prevalence of de facto discrimination in the housing sector. (arts. 5 (e) and (f))

**The Committee recommends that the State party intensify its efforts to combat discrimination against persons of foreign origin. In particular, the State party should improve the effectiveness of its legislation and policies aimed at eliminating discrimination in the labour market and improving employment opportunities for persons with immigrant backgrounds. The State party is invited to provide additional information on the results of the project of anonymous job applications, which is aimed at providing equal access to employment, in its next periodic report. The State party is also encouraged to review its health-care policies, with a view to offering equal access to health care to all persons, irrespective of ethnic origin. The Committee recommends that the State party strengthen its efforts to combat de facto discrimination in the housing sector, including by ensuring transparent and clear criteria in allocation of public housing.**

**United Kingdom of Great Britain and Northern Ireland<sup>225</sup>**

(...)

## B. Positive aspects

(...)

8. The Committee welcomes the establishment of the National Asylum Support Service in 2000 as an important step in

<sup>225</sup> CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, United Kingdom of Great Britain and North Ireland*, 10 December 2003 CERD/C/63/CO/11.

providing support to eligible asylum-seekers and ensuring that they can access necessary services.

(...)

### C. Concerns and recommendations

(...)

13. The Committee is concerned about the increasing racial prejudice against ethnic minorities, asylum-seekers and immigrants reflected in the media and the reported lack of effectiveness of the Press Complaints Commission in dealing with this issue. The Committee recommends that the State party consider further how the Press Complaints Commission can be made more effective and can be further empowered to consider complaints received from the Commission for Racial Equality as well as other groups or organizations working in the field of race relations. The Committee further recommends that the State party include in its next report more detailed information on the number of complaints of racial offences received as well as the outcome of such cases brought before the courts.

14. The Committee remains concerned at reports of attacks on asylum-seekers. In this regard, the Committee notes with concern that antagonism towards asylum-seekers has helped to sustain support for extremist political opinions. The Committee recommends that the State party adopt further measures and intensify its efforts to counter racial tensions generated through asylum issues, *inter alia* by developing public education programmes and promoting positive images of ethnic minorities, asylum-seekers and immigrants, as well as measures making the asylum procedures more equitable, efficient and unbiased.

(...)

23. The Committee expresses concern about the discrimination faced by Roma/Gypsies/Travellers that is reflected, *inter alia*, in their higher child mortality rate, exclusion from schools, shorter life expectancy, poor housing conditions, lack of available camping sites, high unemployment rate and limited access to health services. The Committee draws the attention of the State party to its general recommendation XXVII on discrimination against Roma and recommends that the State party develop further



appropriate modalities of communication and dialogue between Roma/Gypsy/Traveller communities and central authorities. It also recommends that the State party adopt national strategies and programmes with a view to improving the situation of the Roma/Gypsies/Travellers against discrimination by State bodies, persons or organizations.

24. The Committee reiterates its concern that besides the Roma/Gypsy/Traveller populations, certain other minority groups or individuals belonging to them experience discrimination in the areas of employment, education, housing and health. The Committee urges the State party to continue taking affirmative measures in accordance with article 2, paragraph 2, of the Convention to ensure equal opportunities for full enjoyment of their economic, social and cultural rights. Moreover, the Committee encourages the State party to submit in its next periodic report more detailed information on achievements under the State party's programmes aimed at narrowing the employment gap and improving housing conditions among different ethnic groups.

## 5. Declaration of Alma-Ata, 1978<sup>226</sup>

The International Conference on Primary Health Care, meeting in Alma-Ata this twelfth day of September in the year Nineteen hundred and seventy-eight, expressing the need for urgent action by all governments, all health and development workers, and the world community to protect and promote the health of all the people of the world, hereby makes the following

### Declaration:

#### I

The Conference strongly reaffirms that health, which is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector.

#### II

The existing gross inequality in the health status of the people particularly between developed and developing countries as well as within countries is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.

#### III

Economic and social development, based on a New International Economic Order, is of basic importance to the fullest attainment of health for all and to the reduction of the gap between the health status of the developing and developed countries. The promotion and protection of the health of the people is essential to sustained economic and social development and contributes to a better quality of life and to world peace.

#### IV

The people have the right and duty to participate individually and collectively in the planning and implementation of their health care.

<sup>226</sup> Source: <http://www.healthydocuments.info/public/doc9.html>. The Declaration of Alma Ata was adopted at the International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978 by WHO and UNICEF Member States. The Declaration identified primary health care as the key to the attainment of the goal of health for all throughout: evolution of local and national conditions; application of interdisciplinary and operational research; priorities of the communities; integration of promotive, preventive, curative and rehabilitative services; community participation and self-reliance; an integrated health care system; intersectoral collaboration; and collaboration of responsive health workers.

## V

Governments have a responsibility for the health of their people which can be fulfilled only by the provision of adequate health and social measures. A main social target of governments, international organizations and the whole world community in the coming decades should be the attainment by all peoples of the world by the year 2000 of a level of health that will permit them to lead a socially and economically productive life. Primary health care is the key to attaining this target as part of development in the spirit of social justice.

## VI

Primary health care is essential health care based on practical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families in the community through their full participation and at a cost that the community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination. It forms an integral part both of the country's health system, of which it is the central function and main focus, and of the overall social and economic development of the community. It is the first level of contact of individuals, the family and community with the national health system bringing health care as close as possible to where people live and work, and constitutes the first element of a continuing health care process.

## VII

Primary health care:

1. reflects and evolves from the economic conditions and socio-cultural and political characteristics of the country and its communities and is based on the application of the relevant results of social, biomedical and health services research and public health experience;
2. addresses the main health problems in the community, providing promotive, preventive, curative and rehabilitative services accordingly;
3. includes at least: education concerning prevailing health problems and the methods of preventing and controlling them; promotion of food supply and proper nutrition; an adequate supply of safe water and basic sanitation; maternal and child health care, including family planning; immunization against the major infectious diseases; prevention and control of locally endemic diseases; appropriate treatment of common diseases and injuries; and provision of essential drugs;

4. involves, in addition to the health sector, all related sectors and aspects of national and community development, in particular agriculture, animal husbandry, food, industry, education, housing, public works, communications and other sectors; and demands the coordinated efforts of all those sectors;
5. requires and promotes maximum community and individual self-reliance and participation in the planning, organization, operation and control of primary health care, making fullest use of local, national and other available resources; and to this end develops through appropriate education the ability of communities to participate;
6. should be sustained by integrated, functional and mutually supportive referral systems, leading to the progressive improvement of comprehensive health care for all, and giving priority to those most in need;
7. relies, at local and referral levels, on health workers, including physicians, nurses, midwives, auxiliaries and community workers as applicable, as well as traditional practitioners as needed, suitably trained socially and technically to work as a health team and to respond to the expressed health needs of the community.

## VIII

All governments should formulate national policies, strategies and plans of action to launch and sustain primary health care as part of a comprehensive national health system and in coordination with other sectors. To this end, it will be necessary to exercise political will, to mobilize the country's resources and to use available external resources rationally.

## IX

All countries should cooperate in a spirit of partnership and service to ensure primary health care for all people since the attainment of health by people in any one country directly concerns and benefits every other country. In this context the joint WHO/UNICEF report on primary health care constitutes a solid basis for the further development and operation of primary health care throughout the world.

## X

An acceptable level of health for all the people of the world by the year 2000 can be attained through a fuller and better use of the world's resources, a considerable part of which is now spent on armaments and military conflicts. A genuine policy of independence, peace, détente and

disarmament could and should release additional resources that could well be devoted to peaceful aims and in particular to the acceleration of social and economic development of which primary health care, as an essential part, should be allotted its proper share.

The International Conference on Primary Health Care calls for urgent and effective national and international action to develop and implement primary health care throughout the world and particularly in developing countries in a spirit of technical cooperation and in keeping with a New International Economic Order. It urges governments, WHO and UNICEF, and other international organizations, as well as multilateral and bilateral agencies, nongovernmental organizations, funding agencies, all health workers and the whole world community to support national and international commitment to primary health care and to channel increased technical and financial support to it, particularly in developing countries.

The Conference calls on all the aforementioned to collaborate in introducing, developing and maintaining primary health care in accordance with the spirit and content of this Declaration.

## **II.2 SPECIFIC INTERNATIONAL INSTRUMENTS**



## **II.2.1 NON-NATIONALS**





## **CERD General Recommendation XI on non-citizens (Article 1), 1993<sup>227</sup>**

### **Adoption: 19 March 1993**

1. Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination. Article 1, paragraph 2, excepts from this definition actions by a State party which differentiate between citizens and non-citizens. Article 1, paragraph 3, qualifies article 1, paragraph 2, by declaring that, among non-citizens, States parties may not discriminate against any particular nationality.
2. The Committee has noted that article 1, paragraph 2, has on occasion been interpreted as absolving States parties from any obligation to report on matters relating to legislation on foreigners. The Committee therefore affirms that States parties are under an obligation to report fully upon legislation on foreigners and its implementation.
3. The Committee further affirms that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

<sup>227</sup> UN General Assembly, 42<sup>nd</sup> Session, *Report of the Committee on the Elimination of Racial Discrimination*, Supp. No. 18, U.N. Doc. A/55/18, p. 112, Official Record, New York, 19 Jan. 1994. General Recommendation adopted by the Committee on the Elimination of Racial Discrimination (CERD). This Recommendation has been replaced by the General Recommendation XXX on discrimination against non citizens, 2000. See next page.

**CERD General Recommendation XXX on discrimination against non citizens, 2004<sup>228</sup>**

**Adoption: 1 October 2004**

*The Committee on the Elimination of Racial Discrimination,*

*Recalling* the Charter of the United Nations and the Universal Declaration of Human Rights, according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms enshrined therein without distinction of any kind, and the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination,

*Recalling* the Durban Declaration in which the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, recognized that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices,

*Noting* that, based on the International Convention on the Elimination of All Forms of Racial Discrimination and general recommendations XI and XX, it has become evident from the examination of the reports of States parties to the Convention that groups other than migrants, refugees and asylum-seekers are also of concern, including undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live, even where such persons have lived all their lives on the same territory,

*Having organized* a thematic discussion on the issue of discrimination against non-citizens and received the contributions of members of the Committee and States parties, as well as contributions from experts of other United Nations organs and specialized agencies and from non-governmental organizations,

*Recognizing* the need to clarify the responsibilities of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination with regard to non-citizens,

*Basing* its action on the provisions of the Convention, in particular article 5, which requires States parties to prohibit and eliminate discrimination based

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<sup>228</sup> See p. 105.

on race, colour, descent, and national or ethnic origin in the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms,

*Affirms that:*

### **I. Responsibilities of States parties to the Convention**

1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2 provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;
2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;
3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;
4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;
5. States parties are under an obligation to report fully upon legislation on non-citizens and its implementation. Furthermore, States parties should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin;

*Recommends,*

Based on these general principles, that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures:

**II. Measures of a general nature**

6. Review and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination;
7. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;
8. Pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them;
9. Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin;
10. Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping;

**III. Protection against hate speech and racial violence**

11. Take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens;
12. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large;

#### **IV. Access to citizenship**

13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;
14. Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality;
15. Take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles;
16. Reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children;
17. Regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party;

#### **V. Administration of justice**

18. Ensure that non-citizens enjoy equal protection and recognition before the law and in this context, to take action against racially motivated violence and to ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such violence;
19. Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards;
20. Ensure that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law;
21. Combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights;

22. Introduce in criminal law the provision that committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment;
23. Ensure that claims of racial discrimination brought by non-citizens are investigated thoroughly and that claims made against officials, notably those concerning discriminatory or racist behaviour, are subject to independent and effective scrutiny;
24. Regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a *prima facie* case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment;

## **VI. Expulsion and deportation of non-citizens**

25. Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;
26. Ensure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account;
27. Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment;
28. Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;

## **VII. Economic, social and cultural rights**

29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;
30. Ensure that public educational institutions are open to non-citizens

and children of undocumented immigrants residing in the territory of a State party;

31. Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;
32. Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices;
33. Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;
34. Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;
35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;
36. Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their access to preventive, curative and palliative health services;
37. Take the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture;
38. Ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks;
39. The present general recommendation replaces general recommendation XI (1993).



## **HRC General Comment No. 15: the position of aliens under the Covenant, 1986<sup>229</sup>**

### **Adoption: 11 April 1986**

1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.
2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee’s experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.
3. A few constitutions provide for equality of aliens with citizens. Some constitutions adopted more recently carefully distinguish fundamental rights that apply to all and those granted to citizens only, and deal with each in detail. In many States, however, the constitutions are drafted in terms of citizens only when granting relevant rights. Legislation and case law may also play an important part in providing for the rights of aliens. The Committee has been informed that in some States fundamental rights, though not guaranteed to aliens by the Constitution or other legislation, will also be extended to them as required by the Covenant. In certain cases, however, there has clearly been a failure to implement Covenant rights without discrimination in respect of aliens.
4. The Committee considers that in their reports States parties should give attention to the position of aliens, both under their law and in actual practice. The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate. The position of aliens would thus be considerably improved. States parties

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<sup>229</sup> Source: U.N. Doc. HRI/GEN/1/Rev.7, p. 140, twenty-seventh session, 1986.

should ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction.

5. The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.
6. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.
7. Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be

lawfully imposed under the Covenant.

8. Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3. Since such restrictions must, *inter alia*, be consistent with the other rights recognized in the Covenant, a State party cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country (art. 12, para. 4).
9. Many reports have given insufficient information on matters relevant to article 13. That article is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (arts. 9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national and international law may apply. Normally an alien who is expelled must be allowed to leave for any country that agrees to take him. The particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (art. 26).
10. Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy

against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when “compelling reasons of national security” so require. Discrimination may not be made between different categories of aliens in the application of article 13.

**HRC General Comment No. 31: the nature of the general legal obligation imposed on States parties to the Covenant, 2004<sup>230</sup>**

**Adoption: 29 March 2004**

(...)

10. States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. As indicated in general comment No. 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation.

(...)

12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

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<sup>230</sup> 26 May 2004, 80<sup>th</sup> Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.13.

## **6. Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live (excerpts), 1985<sup>231</sup>**

**Adoption: 13 December 1985**

(...)

### **Article 5**

(...)

2. Subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights:

- (a) The right to leave the country;
- (b) The right to freedom of expression;
- (c) The right to peaceful assembly;
- (d) The right to own property alone as well as in association with others, subject to domestic law.

(...)

### **Article 8**

1. Aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the following rights, subject to their obligations under article 4:
  - (a) The right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (b) The right to join trade unions and other organizations or associations of their choice and to participate in their activities. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary, in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others;

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<sup>231</sup> U.N.G.A. Res. 40/144, Annex, 40<sup>th</sup> Sess., Supp. No. 53, U.N. Doc. A/40/53 (13 Dec 1985).

(c) The right to health protection, medical care, social security, social services, education, rest and leisure, provided that they fulfil the requirements under the relevant regulations for participation and that undue strain is not placed on the resources of the State.

2. With a view to protecting the rights of aliens carrying on lawful paid activities in the country in which they are present, such rights may be specified by the Governments concerned in multilateral or bilateral conventions.

(...)

## **7. WHA61.17 Resolution ‘Health of migrants’, 2008<sup>232</sup>**

**Adoption: 24 May 2008**

The Executive Board,

Having considered the report on health of migrants,<sup>233</sup>

RECOMMENDS to the Sixty-first World Health Assembly the adoption of the following resolution:

The Sixty-first World Health Assembly,

Having considered the report on health of migrants;

Recalling the United Nations General Assembly resolution 58/208 underlining the need for a high-level dialogue on the multidimensional aspects of international migration and development (New York, 23 December 2003);

Recalling the first plenary session of the United Nations General Assembly on migration issues and the conclusions of the High-level Dialogue on Migration and Development (New York, 14–15 September 2006) with their focus on ways to maximize the development benefits of migration and to minimize its negative impacts;

Recognizing that the revised International Health Regulations (2005) include provisions relating to international passenger transport;

Recalling resolutions WHA57.19 and WHA58.17 on international migration of health personnel: a challenge for health systems in developing countries, calling for support to the strengthening of health systems, in particular human resources for health;

Recognizing the need for WHO to consider the health needs of migrants in the framework of the broader agenda on migration and development;

Recognizing that health outcomes can be influenced by the multiple dimensions of migration;

Noting that some groups of migrants experience increased health risks;

Recognizing the need for additional data on migrants’ health and their

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<sup>232</sup> EB122.R5.

<sup>233</sup> Document EB122/11. In the Report by the WHO Secretariat the term migrants is used for the heterogeneous group of individuals involved in the migration process who are referred to, in this publication, as migrating persons.



access to health care to substantiate evidence based policies;

Taking into account the determinants of migrants' health in developing intersectoral policies to protect their health;

Mindful of the role of health in promoting social inclusion;

Acknowledging that the health of migrants is an important public health matter both for Member States and for the work of the Secretariat;

Noting that Member States have need to formulate and implement strategies for improving the health of migrants;

Noting that policies addressing migrants' health should be sensitive to the specific health needs of women, men and children;

Recognizing that health policies can contribute to development and to achievement of the

Millennium Development Goals,

1. CALLS UPON Member States:

- (1) to promote migrant-sensitive health policies;
- (2) to promote equitable access to health promotion and care for migrants, subject to national laws and practice, and devise mechanisms for enhancing the health of migrants;
- (3) to assess and analyse trends in migrants' health, disaggregating health information by relevant categories;
- (4) to better identify the gaps in service delivery in order to improve the health of all populations, including migrants;
- (5) to gather, document and share information and best practices for meeting migrants' health needs in countries of origin or return, transit and destination;
- (6) to raise health service providers' and professionals' cultural and gender sensitivity to migrants' health issues;
- (7) to train health professionals to deal with the health issues associated with population movements;
- (8) to promote bilateral and multilateral cooperation on migrants' health among countries involved in the whole migratory process;

- (9) to promote strengthening of health systems in developing countries;
- (10) to contribute to the reduction of the global deficit of health professionals and its consequences on the sustainability of health systems and the attainment of the Millennium Development Goals;

2. REQUESTS the Director-General:

- (1) to promote migrants' health on the international health agenda in collaboration with other relevant international organizations;
- (2) to explore policy options and approaches for improving the health of migrants;
- (3) to analyse the major challenges to health associated with migration;
- (4) to support the development of regional and national assessments of migrants' health status and access to health care;
- (5) to promote the inclusion of migrants' health in the development of regional and national health strategies where appropriate;
- (6) to help collect and disseminate data on migrants' health;
- (7) to promote dialogue and cooperation on migrants' health among all Member States involved in the migratory process, within the framework of the implementation of their health strategies;
- (8) to promote interagency, interregional and international cooperation on migrants' health with an emphasis on developing partnerships with other organizations and considering the impact of other policies;
- (9) to encourage the exchange of information through a technical network of collaborating centres, academic institutions and other key partners in order to further research into migrants' health and to enhance capacity for technical cooperation;
- (10) to submit to the Sixty-third World Health Assembly, through the Executive Board, a report on the implementation of this resolution.



## **II.2.2 STATELESS PERSONS**



## **8. Convention relating to the Status of Stateless Persons, 1954<sup>234</sup>**

**Adopted: 8 September 1954**

**Entry into force: 6 June 1960**

(...)

### **WELFARE**

#### **Article 23. - Public relief**

The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

#### **Article 24. - Labour legislation and social security**

1. The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities; remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

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<sup>234</sup> 28 Sep 1954, 360 U.N.T.S. 117 (entered into force 6 Jun 1960).

2. The right to compensation for the death of a stateless person resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.
3. The Contracting States shall extend to stateless persons the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.
4. The Contracting States will give sympathetic consideration to extending to stateless persons so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

### **II.2.3 MIGRANT WORKERS**





**9. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (excerpts), 1990<sup>235</sup>**

**Adoption: 18 December 1990**

**Entry into force: 1 July 2003**

(...)

**Part I: Scope and definitions**

**Article 1**

1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.
2. The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

(...)

**Part II: Non-discrimination with respect to rights**

**Article 7**

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

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<sup>235</sup> Source: U.N.G.A. Res. 45/158, loc. cit. n. 109.

### **Part III: Human rights of all migrant workers and members of their families**

#### **Article 8**

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect 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 part of the Convention.
2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

(...)

#### **Article 13**

(...)

2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.
3. The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others;

(b) For the protection of the national security of the States concerned or of public order (ordre public) or of public health or morals;

(c) For the purpose of preventing any propaganda for war;

(d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

(...)

## **Article 25**

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;

(...)

3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

(...)

## **Article 27**

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.
2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

## **Article 28**

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency

medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

(...)

**Part IV: Other rights of migrant workers and members of their families who are documented or in a regular situation**

(...)

**Article 39**

1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.
2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect 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.

(...)

**Article 43**

1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:

(...)

(d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;

(e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;

(...)

2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.

3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

(...)

#### **Article 45**

1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to:

(...)

- (c) Access to social and health services, provided that requirements for participation in the respective schemes are met;

(...)

#### **Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families**

(...)

#### **Article 70**

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

(...)

## **Part VIII: General provisions**

(...)

### **Article 81**

1. Nothing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of:

( a ) The law or practice of a State Party; or

( b ) Any bilateral or multilateral treaty in force for the State Party concerned.

(...)

## CMW Concluding Observations

### Ecuador<sup>236</sup>

(...)

#### B. Positive aspects

5. The Committee welcomes the efforts by the State party to promote and protect the rights of Ecuadorian migrant workers abroad, including measures taken to facilitate their participation in national electoral processes. It also welcomes the adoption of bilateral agreements with both countries of employment of Ecuadorian migrant workers, such as Spain, and countries of origin of migrant workers travelling to Ecuador, such as Peru and Colombia.
6. The Committee further welcomes:
  - a) that the National Secretariat for Migrants (SENAMI), mandated to develop and implement Ecuador's migration policies, has been elevated to ministerial level in 2007;
  - b) the establishment, in September 2005, of the Round Table on Labour Migration, an inter-institutional framework which includes civil society organizations and specialized international organizations, with the aim of assisting in the formulation of public policies on migration, with a rights-based approach;
  - c) the implementation of migration regularization programmes by the State party with the aim of documenting irregular migrants, notwithstanding some shortcomings in their reach and results.
  - d) the information that civil society organizations were involved in the preparation of the State party's initial report;
  - e) the State party's participation at the international level in efforts to promote the ratification of the Convention;
  - f) the creation of an information system on migration.

(...)

<sup>236</sup> CMW, *UN Committee on the Protection of the Rights of All Migrant Workers and Their Families: Concluding Observations, Ecuador*, 5 December 2007CMW/C/ECU/CO/1.



### C. Main subjects of concern, suggestions and recommendations

(...)

#### 3. Human rights of all migrant workers and members of their families (arts. 8-35)

39. The Committee notes that under the State party's public health system, every person is entitled to health services, irrespective of migratory status. However, the Committee is concerned about information that in practice migrant workers in irregular situation and members of their families face difficulties in accessing the public health system.

**40. The Committee recommends that the State party strengthen its efforts to ensure, in accordance with article 28 of the Convention, that all migrant workers and members of their families – irrespective of their migratory status – enjoy in practice the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State party.**

#### Mexico<sup>237</sup>

(...)

<sup>237</sup> CMW, *UN Committee on the Protection of the Rights of All Migrant Workers and Their Families: Concluding Observations, Mexico*, 20 December 2006 CMW/C/MEX/CO/1. Regarding recommendation 10 of the Committee (paragraph 24 a), the Government of Mexico states as follows: 25. Como se indicó en el informe inicial, el artículo 1º de la Constitución Política prohíbe toda discriminación motivada por origen étnico o nacional, el género, la edad, las capacidades diferentes, la condición social, las condiciones de salud, la religión, las opiniones, las preferencias, el estado civil o cualquier otra que atente contra la dignidad humana y tenga por objeto anular o menoscabar los derechos y libertades de las personas. Concerning recommendation 24 (paragraph 38), the Government highlights that: 101. Entre los principales resultados alcanzados por los Grupos de Trabajo destacan: (...) c) El diagnóstico sobre infraestructura médica-hospitalaria orientada a trabajadores agrícolas en zonas de origen y destino, en el que se apoyarán las acciones de promoción de asegurados y campañas especiales de salud. (...) 104. En el sector salud, independientemente de que los trabajadores temporales puedan ser beneficiados por cualquier cobertura médica privada o pública, la Secretaría de Salud del estado de Chiapas brinda atención de manera ágil y gratuita a todos los trabajadores agrícolas y familiares que así lo soliciten. De igual forma, se emprenden campañas de vacunación en las unidades de producción agrícola chiapanecas. (...) Finally, regarding recommendation 25 (paragraph 40 a), the Government states that: 111. También se crea una Comisión Intersecretarial del Ejecutivo Federal para elaborar y poner en práctica el Programa Nacional para Prevenir y Sancionar la Trata de Personas que incluirá políticas en la materia. La Comisión estará integrada por los titulares de las Secretarías de Gobernación, Relaciones Exteriores, Seguridad Pública, Comunicaciones y Transportes, Trabajo y Previsión Social, Salud, Desarrollo Social, Turismo y la PGR. Asimismo, tendrán participación los titulares del DIF, el Inmujeres, el INM, el Instituto Nacional de Ciencias Penales y el Consejo Nacional de Población. *Información proporcionada por el Gobierno de México en relación con la aplicación de las observaciones finales del Comité de protección de los derechos de todos los trabajadores migratorios y de sus familiares*, 19 de junio de 2008 CMW/C/MEX/CO/1/Add.1.

## **B. Positive aspects**

5. The Committee appreciates the fact that the State party considers the question of migration as a priority of its domestic and foreign policy agenda.
6. The Committee acknowledges the State party's very active participation at the international level in efforts to promote the ratification of this Convention, as was mentioned in the report.
7. The Committee takes note with satisfaction of the existence of the Beta Migrant Protection Groups with responsibility for protecting and counselling migrants on the country's northern and southern borders.
8. The Committee notes with satisfaction the implementation of migration regularization programmes implemented by the Government with the aim of documenting thousands of illegal migrants.
9. The Committee welcomes the information that civil society organizations were involved in the preparation of the State party's initial report. It also notes with satisfaction that civil society organizations are also participating in the Subcommission for the Protection of the Human Rights of Migrants established within the Commission on Governmental Policy.
10. The Committee also recognizes the efforts made by the State party for voting rights to be extended to Mexican citizens resident abroad.

(...)

## **D. Principal subjects of concern, suggestions and recommendations**

(...)

### **2. General principles (arts. 7 and 83)**

#### **Non-discrimination**

23. The Committee welcomes the promulgation, in 2003, of the Federal Act to Prevent and Eliminate Discrimination, and also the establishment of the National Council for the Prevention of

Discrimination (CONAPRED) in 2004 and its National Programme for the Prevention and Elimination of Discrimination in 2006. The Committee is nevertheless concerned at the fact that migrant workers and members of their families suffer from various forms of discrimination in the area of employment and from social stigmatization. The Committee expresses its particular concern at the situation of indigenous migrants and women migrants who suffer from dual discrimination in the enjoyment of their rights, especially their economic, social and cultural rights, and are more vulnerable to violations and abuses.

**24. The Committee encourages the State party to:**

**(a) Intensify its efforts to ensure that all migrant workers and members of their families within its territory or subject to its jurisdiction enjoy the rights provided for in the Convention without any discrimination, in conformity with article 7;**

**(b) Intensify its efforts by promoting information campaigns for public officials working in the area of migration, especially at the local level, and for the general public on the elimination of discrimination against migrants, and combat their social marginalization and stigmatization, including the media in these activities.**

(...)

**3. Human rights of all migrant workers and members of their families (arts. 8-35)**

27. The Committee welcomes the programme for upgrading migrant holding centres in order to improve conditions there, and the opening of the new Siglo XXI holding centre in Tapachula. It also welcomes the launch of the Migrant Holding Centre Securing and Transfer System (SICATEM), which makes it possible to ascertain the number of foreigners secured in each centre and thereby prevent overcrowding in those centres. Nevertheless, the Committee remains concerned at the difficult detention conditions in certain centres, where cases of cruel and degrading treatment have been reported and overcrowding, lack of medical care and failure to notify consulates are commonplace. The Committee is also concerned at the fact that premises designed for pretrial detention are still being used as migrant holding centres.

(...)

**6. Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families (arts. 64-71)**

39. The Committee welcomes the measure taken by the National Institute for Migration to make it easier for foreigners who are victims of crime or of human rights violations, including trafficking in persons, to remain in Mexico. The Committee also takes note of the project “Combating the trafficking of women, adolescents and children in Mexico 2004-2005” and of the measures taken to combat migrant-smuggling. The Committee is nevertheless concerned at the following:

(a) The extent of the problems of trafficking in persons and migrant-smuggling in the State party;

(b) The fact that the offence of trafficking in persons is not adequately defined in the law;

(c) The involvement of State officials in criminal acts of this kind.

**40. The Committee urges the State party to:**

**(a) Finalize the amendment to the Criminal Code in order to define trafficking in persons as a criminal offence;**

**(b) Step up its efforts to counter migrant-smuggling and trafficking in persons, especially women and children, *inter alia* by taking appropriate steps to detect the illegal or clandestine movement of migrant workers and their families and punish the criminals and/or groups who orchestrate or assist such movement;**

**(c) Properly investigate complaints of involvement by State officials in such offences and duly prosecute and punish the culprits.**

41. The Committee welcomes the State party’s efforts to care for the large numbers of unaccompanied minors on the northern and southern borders, *inter alia* through the inter-agency programme for the care of border-area minors and the other programmes for safe and orderly repatriation. However, the Committee remains concerned - like the Committee on the Rights of the

Child - at the situation of extreme vulnerability of a great many unaccompanied minors (whether repatriated from Mexico to their countries of origin or repatriated to Mexico), which leaves them at very high risk of exploitation of various kinds, including trafficking for purposes of labour and sexual exploitation.

**42. The Committee recommends that the State party should pay particular attention to the vulnerable situation of migrant unaccompanied minors. In particular, the State party should:**

**(a) Strengthen its programmes for the safe and orderly repatriation of unaccompanied minors on the southern and northern borders;**

**(b) Provide specific training in children's rights for State officials working in border areas who come into contact with unaccompanied minors;**

**(c) Ensure that detention of migrant children and adolescents, accompanied or otherwise, is carried out in accordance with the law and used only as a last resort and for the shortest possible time;**

**(d) Strengthen its cooperation with civil society and international organizations, in order to address the growing problem of unaccompanied minors.**

### **Syrian Arab Republic<sup>238</sup>**

(...)

#### **B. Positive aspects**

(...)

7. The Committee takes note of the State party's recent efforts to regulate the employment and recruitment of non-Syrian female domestic workers, including through Prime Ministerial Decision No. 81 of 2006 and Presidential Decree No. 62 of 2007.

8. The Committee notes the State party's recent efforts to improve the situation of non-Arab migrant workers with regard to

<sup>238</sup> CMW, *UN Committee on the Protection of the Rights of All Migrant Workers and Their Families: Concluding Observations, Syrian Arab Republic*, 2 May 2008 CMW/C/SYR/CO/1.

the enjoyment of their rights in connection with the freedom of association, including through the inclusion of relevant provisions in Act No. 25 of 2000.

9. The Committee also takes note of the State party's intention to harmonize other areas of its legislation with the provisions of the Convention, including through the incorporation of relevant stipulations in its new draft Labour Code, such as stipulations on the regulation of private agencies recruiting Syrian nationals for employment outside their country.
10. The Committee appreciates the efforts undertaken by the State party to promote and protect the rights of the large number of Syrian migrant workers and their families abroad, including through the establishment of a Ministry of Expatriates by legislative decree No. 21 of 2002 and the planned establishment of a new department for migrant workers in the Ministry of Social Affairs and Labour.

(...)

### **C. Principal subjects of concern, suggestions and recommendations**

(...)

## **2. General principles (arts. 7 and 83)**

### **(a) Non-discrimination**

23. While noting that Syrian law does not generally discriminate between Syrian nationals and Arab migrant workers in the areas covered by the Convention, the Committee remains concerned that non-Arab migrant workers and their families, in some instances, may be discriminated against in practice, especially at the local level, in their enjoyment of rights and freedoms under the convention and in their ability to access employment, housing, health care and education.

### **24. The Committee encourages the State party to intensify its efforts:**

**(a) To ensure that all migrant workers and members of their families within its territory or subject to its jurisdiction enjoy the rights provided for in the Convention without any discrimination, in conformity with article 7;**

**(b) To promote information campaigns for public officials working in the area of migration, especially at the local level, and for the general public on the elimination of discrimination against migrants.**

### **II.2.3.1 ILO CONVENTIONS AND RECOMMENDATIONS**





**10. Convention No. 97 concerning Migration for Employment (Revised 1949) (excerpts), 1949<sup>239</sup>**

**Adoption: 1 July 1949**

**Entry into force: 22 January 1952**

(...)

**Article 5**

Each Member for which this Convention is in force undertakes to maintain, within its jurisdiction, appropriate medical services responsible for—

- (a) ascertaining, where necessary, both at the time of departure and on arrival, that migrants for employment and the members of their families authorised to accompany or join them are in reasonable health;
- (b) ensuring that migrants for employment and members of their families enjoy adequate medical attention and good hygienic conditions at the time of departure, during the journey and on arrival in the territory of destination.

**Article 6**

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities;

- (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;

- (ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

- (iii) accommodation;

(b) social security (that is to say, legal provision in respect of employment

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<sup>239</sup> Source: <http://www.ilo.org/ilolex/english/convdisp1.htm>, loc. cit. n. 162.

injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme),<sup>240</sup> subject to the following limitations:

- (i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
  - (ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;
- (c) employment taxes, dues or contributions payable in respect of the person employed; and
- (d) legal proceedings relating to the matters referred to in this Convention.
2. In the case of a federal State the provisions of this Article shall apply in so far as the matters dealt with are regulated by federal law or regulations or are subject to the control of federal administrative authorities. The extent to which and manner in which these provisions shall be applied in respect of matters regulated by the law or regulations of the constituent States, provinces or cantons, or subject to the control of the administrative authorities thereof, shall be determined by each Member. The Member shall indicate in its annual report upon the application of the Convention the extent to which the matters dealt with in this Article are regulated by federal law or regulations or are subject to the control of federal administrative authorities. In respect of matters which are regulated by the law or regulations of the

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<sup>240</sup> See also ILO Convention No. 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security. Article 2 of the Convention lists the branches of social security, starting with medical care, followed by sickness benefit, maternity benefit, invalidity benefit, old-age benefit, survivors' benefit, employment injury benefit, unemployment benefit and family benefit. For each of the branches that it accepts, a State party to the Convention undertakes to grant within its territory to nationals of any other State which has ratified the Convention equality of treatment in social security with its own nationals (Article 3, paragraph 1). An exception to this allows for the exertion of pressure on any other State that does not respect this rule (Article 3, paragraph 3). Furthermore, equality of treatment must be granted to refugees and stateless persons (Article 10). In addition, where, under the national legislation, entitlement to a benefit is subject to a residence requirement, such a condition cannot in principle, be imposed only on non-nationals. Concerning ILO standards addressing the issue of the social security of migrant workers in a global manner, see also ILO Convention No. 157 concerning the Establishment of an International System for the Maintenance of Rights in Social Security (1982). See M. Humblet and R. Silva, *Standards for the XXIst Century, Social Security*, Geneva, ILO, 2002. In particular, see Section II, Protection afforded in the different branches of social security, Paragraph 1, Medical Care, p. 17; and Section III, Social security of migrant workers, p. 41.

constituent States, provinces or cantons, or are subject to the control of the administrative authorities thereof, the Member shall take the steps provided for in paragraph 7 (b) of Article 19 of the Constitution of the International Labour Organisation.

(...)

### **Article 8**

1. A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.

(...)

## **11. Recommendation No. 86 concerning Migration for Employment (Revised 1949) (excerpts), 1949<sup>241</sup>**

**Adoption: 1 July 1949**

(...)

### **III**

(...)

#### **10.**

Migration should be facilitated by such measures as may be appropriate--

(a) to ensure that migrants for employment are provided in case of necessity with adequate accommodation, food and clothing on arrival in the country of immigration;

(...)

#### **12.**

In the case of migrants under Government-sponsored arrangements for group transfer, medical assistance should be extended to such migrants in the same manner as provided for nationals.

(...)

### **ANNEX**

Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons (Note: The phrases and passages in italics refer primarily to permanent migration; those enclosed within square brackets refer solely to migration of refugees and displaced persons.)

#### **Article 1. Exchange of Information**

1. The competent authority of the territory of immigration shall periodically furnish appropriate information to the competent authority of the territory of emigration or in the case of refugees and displaced persons, to any body established in accordance with the terms of an international instrument which may be responsible for the protection of refugees and displaced persons who do not benefit from the protection of any Government concerning:

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<sup>241</sup> Source: International Labour Organization, <http://www.ilo.org/ilolex/english/recdisp1.htm>, loc. cit. n. 163. .

(...)

(c) the conditions of life and work for the migrants and, in particular, cost of living and minimum wages according to occupational categories and regions of employment, supplementary allowances, if any, nature of employments available, bonus on engagement, if any, social security systems and medical assistance, provisions concerning transport of migrants and of their tools and belongings, housing conditions and provisions for the supply of food and clothing, measures relating to the transfer of the migrants' savings and other sums due in virtue of this Agreement;

(...)

3. The competent authority of the territory of emigration or in the case of refugees and displaced persons, any body established in accordance with the terms of an international instrument which may be responsible for the protection of refugees and displaced persons who do not benefit from the protection of any Government shall periodically furnish appropriate information to the competent authority of the territory of immigration concerning:

(...)

(c) the social security system;

(...)

(e) the environment and living conditions to which migrants are accustomed;

(...)

#### **Article 4. Validity of Documents**

1. The parties shall determine the conditions to be met for purposes of recognition in the territory of immigration of any document issued by the competent authority of the territory of emigration in respect of migrants and members of their families or in the case of refugees and displaced persons, by any body established in accordance with the terms of an international instrument which may be responsible for the protection of refugees and displaced persons who do not benefit from the protection of any Government concerning :

(...)

(e) participation in social security systems.

(...)

### **Article 5. Conditions and Criteria of Migration**

1. The parties shall jointly determine:

(a) the requirements for migrants and members of their families, as to age, physical aptitude and health, as well as the occupational qualifications for the various branches of economic activity and for the various occupational categories;

(...)

4. In drawing up these criteria, the two parties shall take into consideration:

(a) with respect to medical selection:

(i) the nature of the medical examination which migrants shall undergo (general medical examination, X-ray examination, laboratory examination, etc.) ;

(ii) the drawing up of lists of diseases and physical defects which clearly constitute a disability for employment in certain occupations;

(iii) minimum health provisions prescribed by international health conventions and relating to movement of population from one country to another;

(...)

### **Article 8. Information and Assistance of Migrants**

1. The migrant accepted after medical and occupational examination in the assembly or selection centre shall receive, in a language that he understands, all information he may still require as to the nature of the work for which he has been engaged, the region of employment, the undertaking to which he is assigned, travel arrangements and the conditions of life and work including health and related matters in the country and region to which he is going.

2. On arrival in the country of destination, and at a reception centre if such exists, or at the place of residence, migrants and the members of their families shall receive all the documents which they need for their work, their residence and their settlement in the country, as well as information, instruction and advice regarding conditions of life and

work, and any other assistance that they may need to adapt themselves to the conditions in the country of immigration.

(...)

### **Article 11. Conditions of Transport**

1. During the journey from their place of residence to the assembly or selection centre, as well as during their stay in the said centre, migrants and the members of their families shall receive from the competent authority of the territory of immigration or in the case of refugees and displaced persons, from any body established in accordance with the terms of an international instrument which may be responsible for the protection of refugees and displaced persons who do not benefit from the protection of any Government any assistance which they may require.
2. The competent authorities of the territories of emigration and immigration shall, each within its own jurisdiction, safeguard the health and welfare of, and render assistance to, migrants and the members of their families during the journey from the assembly or selection centre to the place of their employment, as well as during their stay in a reception centre if such exists.

(...)

### **Article 12. Travel and Maintenance Expenses**

The parties shall agree upon the methods for meeting the cost of travel of the migrants and the members of their families from the place of their residence to the place of their destination, and the cost of their maintenance while travelling, sick or hospitalised, as well as the cost of transport of their personal belongings.

(...)

### **Article 15. Supervision of Living and Working Conditions**

1. Provision shall be made for the supervision by the competent authority or duly authorised bodies of the territory of immigration of the living and working conditions, including hygienic conditions, to which the migrants are subject.

(...)



### **Article 17. Equality of Treatment**

1. The competent authority of the territory of immigration shall grant to migrants and to members of their families with respect to employment in which they are eligible to engage treatment no less favourable than that applicable to its won nationals in virtue of legal or administrative provisions or collective labour agreements.
2. Such equality of treatment shall apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within the territory of immigration in respect of the following matters:
  - (a) in so far as such matters are regulated by laws or regulations or are subject to the control of administrative authorities,
  - (i) remuneration, including family allowances where these form part of remuneration, hours of work, weekly rest days, overtime arrangements, holidays with pay and other regulations concerning employment, including limitations on home work, minimum age provisions, women's work, and the work of young persons;
  - (...)
  - (iv) recreation and welfare measures;
  - (...)
  - (c) hygiene, safety and medical assistance;
  - (...)

### **Article 20. Housing Conditions**

The competent authority of the territory of immigration shall ensure that migrants and the members of their families have hygienic and suitable housing, in so far as the necessary housing is available.

### **Article 21. Social Security**

1. The two parties shall determine in a separate agreement the methods of applying a system of social security to migrants and their dependants.
2. Such agreement shall provide that the competent authority of the territory of immigration shall take measures to ensure to the migrants and their dependants treatment not less favourable than that afforded by it to its nationals, except where particular residence qualifications apply to nationals.

3. The agreement shall embody appropriate arrangements for the maintenance of migrants' acquired rights and rights in course of acquisition framed with due regard to the principles of the Maintenance of Migrants' Pension Rights Convention, 1935, or of any revision of that Convention.
4. The agreement shall provide that the competent authority of the territory of immigration shall take measures to grant to temporary migrants and their dependants treatment not less favourable than that afforded by it to its nationals, subject in the case of compulsory pension schemes to appropriate arrangements being made for the maintenance of migrants' acquired rights and rights in course of acquisition.

### **Article 22. Contracts of Employment**

3. The individual contract of employment shall contain necessary information, such as:

(...)

(g) conditions regarding food if food is to be provided by the employer;

(...)

### **Article 25. Provisions Concerning Compulsory Return**

1. The competent authority of the territory of immigration undertakes that a migrant and the members of his family who have been authorised to accompany or join him will not be returned to the territory from which he emigrated unless he so desires if, because of illness or injury, he is unable to follow his occupation.

(...)

### **Article 26. Return Journey**

(...)

2. In accordance with the methods of co-operation and consultation agreed upon under Article 28 of this Agreement, the two parties shall determine the measures necessary to organise the return home of the said persons and to assure to them in the course of the journey the conditions of health and welfare and the assistance which they enjoyed during the outward journey.

**12. Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (excerpts), 1975<sup>242</sup>**

**Adoption: 24 June 1975**

**Entry into force: 9 December 1978**

(...)

**PART I: MIGRATION IN ABUSIVE CONDITIONS**

**Article 9**

1. Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.
2. In case of dispute about the rights referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative.
3. In case of expulsion of the worker or his family, the cost shall not be borne by them.
4. Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment.

**PART II. EQUALITY OF OPPORTUNITY AND TREATMENT**

**Article 10**

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms

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<sup>242</sup> Source: International Labour Organization, <http://www.ilo.org/ilolex/english/convdisp1.htm>, loc. cit. n. 164.

for persons who as migrant workers or as members of their families are lawfully within its territory.

(...)

## **Article 12**

Each Member shall, by methods appropriate to national conditions and practice

(g) guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

(...)

**13. Recommendation No. 151 concerning Migrant Workers (excerpts), 1975<sup>243</sup>**

**Adoption: 24 June 1975**

(...)

I. Equality of Opportunity and Treatment

2. Migrant workers and members of their families lawfully within the territory of a Member should enjoy effective equality of opportunity and treatment with nationals of the Member concerned in respect of--

(...)

(f) conditions of work, including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures,<sup>244</sup> as well as social security measures and welfare facilities and benefits provided in connection with employment;

(...)

(i) conditions of life, including housing and the benefits of social services and educational and health facilities.

3. Each Member should ensure the application of the principles set forth in Paragraph 2 of this Recommendation in all activities under the control of a public authority and promote its observance in all other activities by methods appropriate to national conditions and practice.

(...)

7.

(1) In order to enable migrant workers and their families to take full advantage of their rights and opportunities in employment and occupation, such measures as may be necessary should be taken, in consultation with the representative organisations of employers and workers--

(a) to inform them, as far as possible in their mother tongue or, if that is not

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<sup>243</sup> Source: International Labour Organization, <http://www.ilo.org/ilolex/english/recdispl.htm> , loc. cit. n.165.

<sup>244</sup> The ILO claims that its Unit called SAFEWORK has jurisdiction for over seventy Conventions and Recommendations pertaining to occupational safety and health. These topics range from subjects as diverse as maternity protection (1919) to maritime, workers' compensation, asbestos, benzene, and C 155 the Convention whereby member governments undertake to create regulatory frameworks to protect safety and health in the workplace. Additional Conventions and Recommendations concern safety and health or hygiene in specific branches of activity such as construction, mines, agriculture, commerce and offices.

possible, in a language with which they are familiar, of their rights under national law and practice as regards the matters dealt with in Paragraph 2 of this Recommendation;

(...)

8.

(...)

(2) Migrant workers whose position has been regularised should benefit from all rights which, in accordance with Paragraph 2 of this Recommendation, are provided for migrant workers lawfully within the territory of a Member.

(3) Migrant workers whose position has not been or could not be regularised should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights.

(...)

## II. Social Policy

(...)

### B. Protection of the Health of Migrant Workers

20. All appropriate measures should be taken to prevent any special health risks to which migrant workers may be exposed.<sup>245</sup>

21.

(1) Every effort should be made to ensure that migrant workers receive training and instruction in occupational safety and occupational hygiene in connection with their practical training or other work preparation, and, as far as possible, as part thereof.

(2) In addition, a migrant worker should, during paid working hours and immediately after beginning his employment, be provided with sufficient information in his mother tongue or, if that is not possible, in a language with which he is familiar, on the essential elements of laws and regulations

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<sup>245</sup> Three types of special health risks were identified by the preparatory work of the ILO on the 1975 instruments: conditions already contracted by migrants in their countries of origin; disorders contracted in host countries where migrants may have inadequate immunity to certain diseases; and physical and psychological disorders peculiar to the process of adaptation to a new environment.

and on provisions of collective agreements concerning the protection of workers and the prevention of accidents as well as on safety regulations and procedures particular to the nature of the work.

22.

(1) Employers should take all possible measures so that migrant workers may fully understand instructions, warnings, symbols and other signs relating to safety and health hazards at work.

(2) Where, on account of the migrant workers' lack of familiarity with processes, language difficulties or other reasons, the training or instruction given to other workers is inadequate for them, special measures which ensure their full understanding should be taken.

(...)

### C. Social Services

23. In accordance with the provisions of Paragraph 2 of this Recommendation, migrant workers and their families should benefit from the activities of social services and have access thereto under the same conditions as nationals of the country of employment.

24. In addition, social services should be provided which perform, in particular, the following functions in relation to migrant workers and their families--

(a) giving migrant workers and their families every assistance in adapting to the economic, social and cultural environment of the country of employment;

(b) helping migrant workers and their families to obtain information and advice from appropriate bodies, for instance by providing interpretation and translation services; to comply with administrative and other formalities; and to make full use of services and facilities provided in such fields as education, vocational training and language training, health services and social security, housing, transport and recreation: Provided that migrant workers and their families should as far as possible have the right to communicate with public authorities in the country of employment in their own language or in a language with which they are familiar, particularly in the context of legal assistance and court proceedings; (...)

## **II.2.4 VICTIMS OF TRAFFICKING IN PERSONS**





**14. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (excerpts), 2000<sup>246</sup>**

**Adoption: 15 November 2000 (not in force)**

(...)

**II. Protection of victims of trafficking in persons**

**Article 6**

**(Assistance to and protection of victims of trafficking in persons)**

(...)

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
  - (a) Appropriate housing;
  - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
  - (c) Medical, psychological and material assistance; and
  - (d) Employment, educational and training opportunities.
4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.
5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.
6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

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<sup>246</sup> Source: U.N.G.A. Res. 55/25, loc. cit. n. 8.



## **15. OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (excerpts), 2002<sup>247</sup>**

### **The primacy of human rights**

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.
2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.
3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

(...)

### **Protection and assistance**

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.
8. States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.

(...)

### **Guideline 1: Promotion and protection of human rights**

**Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.**

<sup>247</sup> Source: E/2002/68/Add.1, substantive session 2002, New York, 1-26 July 2002, loc. cit. n. 121.

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.

(...)

#### **Guideline 5: Ensuring an adequate law enforcement response**

**Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand.**

**An adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms. These problems are compounded when law enforcement officials are involved or complicit in trafficking. Strong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished. Law enforcement officials must also be sensitized to the paramount requirement of ensuring the safety of trafficked persons. This responsibility lies with the investigator and cannot be abrogated.**

**States and, where applicable, intergovernmental and non-governmental organizations should consider:**

(...)

5. Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.

(...)

#### **Guideline 6: Protection and support for trafficked persons**

**The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.
2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.

(...)

4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.

(...)

8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

**Guideline 7: Preventing trafficking**

**Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information.**

**States, in partnership with intergovernmental and non-governmental organizations and where appropriate, using development cooperation policies and programmes, should consider:**

(...)

4. Ensuring that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage and health and security issues, including exposure to HIV/AIDS) as well as avenues available for legal, non-exploitative migration.

(...)

**Guideline 8: Special measures for the protection and support of child victims of trafficking**

**The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6:**

(...)

7. Adopting specialized policies and programmes to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance.

(...)

10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.

(...)

**Guideline 11: Cooperation and coordination between States and regions**

**Trafficking is a regional and global phenomenon that cannot always be dealt with effectively at the national level: a strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation**

**can play an important role in combating trafficking activities. Such cooperation is particularly critical between countries involved in different stages of the trafficking cycle.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Adopting bilateral agreements aimed at preventing trafficking, protecting the rights and dignity of trafficked persons and promoting their welfare.





## **II.2.5 CIVILIAN PERSONS IN TIME OF ARMED CONFLICTS**



## **16. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949<sup>248</sup>**

**Adoption: 12 August 1949**

**Entry into force: 21 October 1950**

(...)

### **Part I: General provisions**

(...)

#### **Art. 2 - Application of the Convention<sup>249</sup>**

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

(...)

#### **Art. 3 - Conflicts not of an international character<sup>250</sup>**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors

<sup>248</sup> Source: 75 U.N.T.S. 287, Geneva Convention IV, loc. cit. n. 102.

<sup>249</sup> Article 2, common to the four Geneva Conventions, defines the situations to which the Conventions apply, namely situations of armed conflict or situations legally reputed to be equivalent (occupation of a territory). The notion of armed conflict between States is large: any armed confrontation, any use of weaponry – even, for instance, a minor border incident – is considered as a situation of armed conflict and therefore results in the application of the relevant Convention provisions.

<sup>250</sup> Article 3, common to the four Geneva Conventions, imposes minimal rules in situations of non-international armed conflict, i.e. conflicts arising within the territory of a single State, whether between governmental authorities and organized armed groups or amongst such armed groups. The threshold of applicability of common Article 3 demands an intensity of hostilities such as the government use of its armed forces instead of police forces against the insurgents and a minimum of organization of the insurgents – responsible command and capacity to observe minimal humanitarian requirements. The threshold of non-international armed conflict is lower under common Article 3 than under Protocol Additional (II) relating to the Protection of Victims of Non-International Armed Conflicts (see *infra*, p. 217).

de combat ‘ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

(...)

(2) The wounded and sick shall be collected and cared for.

(...)

#### **Art. 4 - Definition of protected persons<sup>251</sup>**

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

(...)

#### **Art. 8 - Non-renunciation of rights**

Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

(...)

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<sup>251</sup> The core of Geneva Convention IV is the rights granted to “protected persons” (Part III of the Convention). It is noticeable here that the logic of international humanitarian law is considerably different from that which governs human rights law. Whereas human rights law protects human beings in general without concern for their nationality, the main focus of international humanitarian law is the condition of civilians in contact with an enemy country rather than the provision of general protection to all. Two situations are therefore addressed: firstly, “enemy nationals”, i.e. civilians of enemy nationality living on the territory of a belligerent State; and secondly, the whole population of occupied territories (excluding nationals of the occupying power). From a migration perspective, the first situation is of primary importance.

## **Part II: General protection of populations against certain consequences of war**

### **Art. 13 - Field of application of Part II**

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

### **Art. 14 - Hospital and safety zones and localities<sup>252</sup>**

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

(...)

### **Art. 15 - Neutralized zones**

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;
- (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

(...)

### **Art. 16 - Wounded and sick I. General protection<sup>253</sup>**

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

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<sup>252</sup> Articles 14 and 15 concern places of refuge, i.e. pieces of territory meant to offer shelter to combatant and non-combatant wounded and sick as well as civilians (either all members of the civilian population, or certain categories of persons requiring special protection, such as children, the elderly, etc.). Whereas hospital and safety zones are established outside of combat zones, neutralized zones are located within combat areas. As a consequence, these zones are established on a temporary basis while hospital and safety zones are of a more permanent character.

<sup>253</sup> The protection of the wounded and the sick is furthered by several provisions protecting hospitals, hospital staff and medical transportation. See Articles 18-22 of Geneva Convention IV.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

(...)

**Art. 23 - Consignment of medical supplies, food and clothing<sup>254</sup>**

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

(...)

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<sup>254</sup> The purpose of Article 23 is to protect the most vulnerable categories of the population against the consequences of a blockade.

### **Part III: Status and treatment of protected persons**

#### **Section I: Provisions common to the territories of the parties to the conflict and to occupied territories**

##### **Art. 27 - Treatment I. General observations**

Protected persons are entitled, in all circumstances, to respect for their persons,<sup>255</sup> their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

(...)

##### **Article 32 - Prohibition of corporal punishment, torture, etc.**

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents.

(...)

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<sup>255</sup> The right of respect for the person shall be understood in a wide sense. It covers the right to physical integrity which involves the prohibition of acts impairing individual life or health.



## **Section II: Aliens in the territory of a party to the conflict<sup>256</sup>**

### **Art. 35 - Right to leave the territory**

All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.

(...)

### **Art. 36 - Method of repatriation**

Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned.

(...)

### **Art. 38 - Non-repatriated persons I. General observations**

With the exception of special measures authorized by the present Convention, in particular by Articles 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:

- (1) They shall be enabled to receive the individual or collective relief that may be sent to them.
- (2) They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.

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<sup>256</sup> The situation of enemy civilians is obviously problematic. Deprived of consular and diplomatic protection, considered as potential soldiers by the State of residence, enemy civilians have regularly been mistreated in the course of history. They often appear as the first victims of armed conflicts. One of the main objectives of Geneva Convention IV is therefore to offer protection to these persons.

(...)

(5) Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.

(...)

### **Section III: Occupied territories**

(...)

#### **Art. 49 - Deportations, transfers, evacuations**

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

(...)

### **Section IV: Regulations for the treatment of internees<sup>257</sup>**

#### **Chapter I: General provisions**

(...)

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<sup>257</sup> Geneva Convention IV authorizes internment of protected persons under certain circumstances. Concerning aliens in the territory of a party to the conflict, Article 42 reads as follows: "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary". Section IV of the Convention contains detailed rules of protection of internees inspired by the regulations relating to prisoners of war.

### **Art. 81 - Maintenance**

Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health.

No deduction from the allowances, salaries or credits due to the internees shall be made for the repayment of these costs.

The Detaining Power shall provide for the support of those dependent on the internees, if such dependents are without adequate means of support or are unable to earn a living.

(...)

## **Chapter II: Places of internment**

### **Art. 85 - Accommodation, hygiene**

The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts the climate of which is injurious to the internees. In all cases where the district, in which a protected person is temporarily interned, is in an unhealthy area or has a climate which is harmful to his health, he shall be removed to a more suitable place of internment as rapidly as circumstances permit.

The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.

Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

(...)

### **Chapter III: Food and clothing**

#### **Art. 89 - Food**

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.

#### **Art. 90 - Clothing**

When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and be unable to procure any, it shall be provided free of charge to them by the Detaining Power.

The clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes shall not be ignominious nor expose them to ridicule.

Workers shall receive suitable working outfits, including protective clothing, whenever the nature of their work so requires.

## **Chapter IV: Hygiene and medical attention**

### **Art. 91 - Medical attention**

Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require, as well as an appropriate diet. Isolation wards shall be set aside for cases of contagious or mental diseases.

Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.

Internees shall, for preference, have the attention of medical personnel of their own nationality.

Internees may not be prevented from presenting themselves to the medical authorities for examination. The medical authorities of the Detaining Power shall, upon request, issue to every internee who has undergone treatment an official certificate showing the nature of his illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate shall be forwarded to the Central Agency provided for in Article 140.

Treatment, including the provision of any apparatus necessary for the maintenance of internees in good health, particularly dentures and other artificial appliances and spectacles, shall be free of charge to the internee.

### **Art. 92 - Medical inspections**

Medical inspections of internees shall be made at least once a month. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections shall include, in particular, the checking of weight of each internee and, at least once a year, radioscopic examination.

(...)

## **Chapter VIII: Relations with the exterior**

(...)

### **Art. 108 - Relief shipments I. General principles**

Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character which may meet their needs. Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.

The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels.

(...)

## **Chapter IX: Penal and disciplinary sanctions**

(...)

### **Art. 124 - Premises for disciplinary punishments**

Internees shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

The premises in which disciplinary punishments are undergone shall conform to sanitary requirements; they shall in particular be provided with adequate bedding. Internees undergoing punishment shall be enabled to keep themselves in a state of cleanliness.

Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.

### **Art. 125 - Essential safeguards**

Internees awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, if they so request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the infirmary of the place of internment or to a hospital.

(...)

## **Chapter X: Transfers of internees**

### **Art. 127 - Conditions**

The transfer of internees shall always be effected humanely. As a general rule, it shall be carried out by rail or other means of transport, and under conditions at least equal to those obtaining for the forces of the Detaining Power in their changes of station. If, as an exceptional measure, such removals have to be effected on foot, they may not take place unless the internees are in a fit state of health, and may not in any case expose them to excessive fatigue.

The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during transfer, and shall establish before their departure a complete list of all internees transferred.

Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands.

(...)

## **Chapter XII: Release, repatriation and accommodation in neutral countries**

### **Art. 132 - During hostilities or occupation**

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.



**17. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977<sup>258</sup>**

**Adoption: 8 June 1977**

**Entry into force: 7 December 1978**

(...)

**Part I: General provisions**

**Art. 1 - General principles and scope of application**

(...)

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.<sup>259</sup>
4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

(...)

**Part II: Wounded, sick and shipwrecked**

**Section I - General protection**

**Art. 8 -Terminology**

For the purposes of this Protocol:

a) “wounded” and “sick” mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;

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<sup>258</sup> 8 Jun 1977, 1125 U.N.T.S. 3, (entry into force 7 Dec 1978).

<sup>259</sup> See p. 199.

(...)

### **Art. 9 - Field of application**

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

(...)

### **Art. 10 - Protection and care<sup>260</sup>**

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

### **Article 11- Protection of persons<sup>261</sup>**

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
2. It is, in particular, prohibited to carry out on such persons, even with their consent:

(a) physical mutilations;

(b) medical or scientific experiments;

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<sup>260</sup> The protection of the wounded and the sick is furthered by several provisions protecting hospitals, hospital staff and medical transportation. See Additional Protocol I, Articles 12-18; 21-31.

<sup>261</sup> The purpose of Article 11 is mainly to develop the protection of persons against unlawful medical experiments foreseen in Article 32 of Geneva Convention IV (see p. 203).

(c) removal of tissue or organs for transplantation,

except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.
4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.
5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.
6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

(...)

#### **Part IV: Civilian population**

(...)

#### **Section II -Relief in favour of the civilian population**

(...)

#### **Art. 70 - Relief actions**

1. If the civilian population of any territory under the control of a Party to

the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69,<sup>262</sup> relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
  - (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
  - (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
  - (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.
4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.
5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

(...)

<sup>262</sup> Article 69 refers to food, medical supplies, clothing, means of shelter and other supplies essential to the survival of the civilian population.

### **Section III - Treatment of persons in the power of a party to the conflict**

#### **Chapter I - Field of application and protection of persons and objects**

##### **Art. 73 - Refugees and stateless persons<sup>263</sup>**

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

(...)

#### **Chapter II - Measures in favour of women and children**

(...)

##### **Art. 78 - Evacuation of children**

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

(...)

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<sup>263</sup> The aim of Article 73 is to offer to stateless persons and refugees the protection of all Geneva Convention IV provisions, as Part II already applies to the civilian population as a whole, without any distinction of nationality. Although stateless persons were not explicitly protected by Geneva Convention IV, they were actually implicitly covered by Article 4 (see p. 200) and therefore already enjoyed the protection of the entire Convention. Present Article 73 explicitly grants them such status. Refugees, who benefit from a specific protection under Geneva Convention IV (Article 44), were not covered by Article 4. Consequently to Article 73, they are protected by all provisions of the Convention.

**18. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977<sup>264</sup>**

**Adoption: 8 June 1977**

**Entry into force: 7 December 1978**

(...)

**Part I: Scope of this protocol**

**Art. 1 - Material field of application<sup>265</sup>**

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

**Art. 2 - Personal field of application**

1. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as “adverse distinction”) to all persons affected by an armed conflict as defined in Article 1.
2. At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose

<sup>264</sup> Source: 1125 U.N.T.S. 609, loc. cit. n. 172.

<sup>265</sup> Although the objective of Additional Protocol II is to further the protection in non international armed conflicts provided by Article 3 common to the Geneva Conventions (see p. 199), its threshold of applicability is higher. A third criteria, i.e. control of a part of the national territory by the insurgents is added to the need of a certain intensity of hostilities and the minimum requirement of organization of the insurgents. Moreover, Additional Protocol II only covers conflicts between a government and insurgents, excluding conflicts arising amongst the insurgents themselves.

liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

(...)

## **Part II: Humane treatment**

### **Art. 4 - Fundamental guarantees**

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person,<sup>266</sup> honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(...)

### **Art. 5 - Persons whose liberty has been restricted**

1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained:
    - (a) the wounded and the sick shall be treated in accordance with Article 7;
    - (b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;
    - (c) they shall be allowed to receive individual or collective relief;
- (...)

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<sup>266</sup> Article 4 recognizes that the right of respect for the person is strongly inspired by Article 27 of Geneva Convention IV. It must be understood in the same wide sense (loc. cit. n. 203).

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

(...)

(d) they shall have the benefit of medical examinations;

(e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (a), (c) and (d), and 2 (b) of this Article.

(...)

### **Part III: Wounded, sick and shipwrecked**

#### **Art. 7 - Protection and care<sup>267</sup>**

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

(...)

### **Part IV: Civilian population**

(...)

#### **Article 17 - Prohibition of forced movement of civilians**

1. The displacement of the civilian population shall not be ordered for

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<sup>267</sup> The protection of the wounded and the sick is furthered by several provisions protecting hospitals, hospital staff and medical transportation. See Additional Protocol II, loc. cit. n. 172 Articles 9-11.



reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

### **Article 18 - Relief societies and relief actions**

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

(...)

## **II.2.6 REFUGEES**



## **19. Convention relating to the Status of Refugees (excerpts), 1951<sup>268</sup>**

**Adoption: 28 July 1951**

**Entry into force: 22 April 1954**

(...)

### **Chapter I**

#### **GENERAL PROVISIONS**

(...)

#### **Article 3. - Non-discrimination**

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

(...)

### **Chapter IV**

#### **WELFARE**

#### **Article 20. - Rationing**

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

#### **Article 21. - Housing**

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

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<sup>268</sup> Source: 189 U.N.T.S. 150, loc. cit. n. 37. In contrast with international human rights conventions, the Refugee Convention has no mechanism for scrutinizing States' compliance with the stipulated rights. The supervisory mechanisms of the European Social Charter, however, could be a potential avenue for the enforcement of the Refugee Convention rights within a European context. The European Social Charter (Revised), in its Appendix, explicitly binds contracting States "to grant to refugees as defined in the Refugee Convention, who are lawfully staying in their territory, treatment not less favorable than that required by the Refugee Convention". See K. Janssens, M. Bosmans and Prof. Dr. M. Temmerman, "Sexual and reproductive health rights of refugee women in Europe. Rights, policies, status and needs", *Literature Review*, June 2005, p. 36.

(...)

### **Article 23. - Public relief<sup>269</sup>**

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

### **Article 24. - Labour legislation and social security**

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(...)

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

(...)

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<sup>269</sup> The Convention includes health care with respect to the treatment which is accorded to refugees lawfully staying in their host country. This is in spite of the fact that the Convention does not specifically mention the right to health care as such. The provisions have been given a wide interpretation, covering areas such as medical assistance and hospital treatment, emergency relief, and relief for the blind and unemployed.

## **II.2.7 INTERNALLY DISPLACED PERSONS (IDPs)**



## **20. Guiding Principles on Internal Displacement (excerpts), 1998<sup>270</sup>**

**Adoption: 11 February 1998**

(...)

### **SECTION I - GENERAL PRINCIPLES**

#### **Principle 1**

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.
2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.

(...)

#### **Principle 4**

1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.
2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

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<sup>270</sup> Source: E/CN.4/1998/53/Add.2, loc. cit. n. 90.



## **SECTION II - PRINCIPLES RELATING TO PROTECTION FROM DISPLACEMENT**

(...)

### **Principle 6**

(...)

2. The prohibition of arbitrary displacement includes displacement:

(...)

(d) In cases of disasters, unless the safety and health of those affected requires their evacuation;

(...)

### **Principle 7**

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.
2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

(...)

## **SECTION III – PRINCIPLES RELATING TO PROTECTION DURING DISPLACEMENT**

### **Principle 10**

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

(...)

(b) Starvation as a method of combat;

(...)

### **Principle 18**

1. **All internally displaced persons** have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
  - (a) Essential food and potable water;
  - (b) Basic shelter and housing;
  - (c) Appropriate clothing; and
  - (d) Essential medical services and sanitation.
3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

### **Principle 19**

1. All wounded and sick internally displaced persons<sup>271</sup> as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.
3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

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<sup>271</sup> See the Geneva Convention IV, loc. cit. n. 102.



## **II.2.8 DETAINEES**



## **21. Standard Minimum Rules for the Treatment of Prisoners (excerpts), 1955**

**Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977<sup>272</sup>**

(...)

### **Part I**

#### **RULES OF GENERAL APPLICATION**

##### **Basic principle**

6. (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

(...)

##### **Medical services**

22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

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<sup>272</sup> Adopted 30 August 1955, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), loc. cit. n. 123.

23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

26. (1) The medical officer shall regularly inspect and advise the director upon:

( a ) The quantity, quality, preparation and service of food;

( b ) The hygiene and cleanliness of the institution and the prisoners;

( c ) The sanitation, heating, lighting and ventilation of the institution;

( d ) The suitability and cleanliness of the prisoners' clothing and bedding;

( e ) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.

(2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to

give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

(...)

**Notification of death, illness, transfer, etc.**

44. (1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner.

(...)

**Part II**

**RULES APPLICABLE TO SPECIAL CATEGORIES**

**A. Prisoners under sentence**

(...)

62. The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.

**Treatment**

(...)

66. (1) (...)

(2) For every prisoner with a sentence of suitable length, the director shall receive, as soon as possible after his admission, full reports on all the matters referred to in the foregoing paragraph. Such reports shall always include a report by a medical officer, wherever possible qualified in psychiatry, on the physical and mental condition of the prisoner.

(...)

**Work**

(...)

74. (1) The precautions laid down to protect the safety and health of free



workmen shall be equally observed in institutions.

(2) Provision shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to free workmen.

(...)

### **B. Insane and mentally abnormal prisoners**

82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.

(2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.

(3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.

(4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.

83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.

(...)

## **22. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (excerpts), 1988<sup>273</sup>**

**Adoption: 9 December 1988**

### **Scope of the Body of Principles**

These principles apply for the protection of all persons under any form of detention or imprisonment.

(...)

### **Principle 5**

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.(...)

### **Principle 22**

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

(...)

### **Principle 24**

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

### **Principle 25**

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of

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<sup>273</sup> Source: A/RES/43/173, loc. cit. n. 124.

detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

### **Principle 26**

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

(...)

**23. Basic Principles for the Treatment of Prisoners (excerpts), 1990<sup>274</sup>**

**Adoption: 14 December 1990**

(...)

2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(...)

9. Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

(...)

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<sup>274</sup> Source: A/RES/45/111, loc. cit. n. 125.

## **24. United Nations Rules for the Protection of Juveniles Deprived of their Liberty (excerpts), 1990<sup>275</sup>**

**Adoption: 14 December 1990**

### **I. Fundamental perspectives**

(...)

3. The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.
4. The Rules should be applied impartially, without discrimination of any kind as to race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. The religious and cultural beliefs, practices and moral concepts of the juvenile should be respected.

(...)

### **II. Scope and application of the rules**

(...)

12. The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

(...)

### **IV. The management of juvenile facilities**

#### **A. Records**

19. All reports, including legal records, medical records and records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment, should be placed in a confidential

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<sup>275</sup> Source: A/RES/45/113, loc. cit. n. 126.

individual file, which should be kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood. Where possible, every juvenile should have the right to contest any fact or opinion contained in his or her file so as to permit rectification of inaccurate, unfounded or unfair statements. In order to exercise this right, there should be procedures that allow an appropriate third party to have access to and to consult the file on request. Upon release, the records of juveniles shall be sealed, and, at an appropriate time, expunged.

(...)

## **B. Admission, registration, movement and transfer**

21. In every place where juveniles are detained, a complete and secure record of the following information should be kept concerning each juvenile received:

(...)

( e ) Details of known physical and mental health problems, including drug and alcohol abuse.

(...)

## **C. Classification and placement**

27. As soon as possible after the moment of admission, each juvenile should be interviewed, and a psychological and social report identifying any factors relevant to the specific type and level of care and programme required by the juvenile should be prepared. This report, together with the report prepared by a medical officer who has examined the juvenile upon admission, should be forwarded to the director for purposes of determining the most appropriate placement for the juvenile within the facility and the specific type and level of care and programme required and to be pursued. When special rehabilitative treatment is required, and the length of stay in the facility permits, trained personnel of the facility should prepare a written, individualized treatment plan specifying treatment objectives and time-frame and the means, stages and delays with which the objectives should be approached.
28. The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal

criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.

(...)

#### **D. Physical environment and accommodation**

31. Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.
32. The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities. The design and structure of juvenile detention facilities should be such as to minimize the risk of fire and to ensure safe evacuation from the premises. There should be an effective alarm system in case of fire, as well as formal and drilled procedures to ensure the safety of the juveniles. Detention facilities should not be located in areas where there are known health or other hazards or risks.
33. Sleeping accommodation should normally consist of small group dormitories or individual bedrooms, while bearing in mind local standards. During sleeping hours there should be regular, unobtrusive supervision of all sleeping areas, including individual rooms and group dormitories, in order to ensure the protection of each juvenile. Every juvenile should, in accordance with local or national standards, be provided with separate and sufficient bedding, which should be clean when issued, kept in good order and changed often enough to ensure cleanliness.
34. Sanitary installations should be so located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner.

(...)

37. Every detention facility shall ensure that every juvenile receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements. Clean drinking water should be available to every juvenile at any time.

(...)

## **F. Recreation**

47. Every juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided. Adequate space, installations and equipment should be provided for these activities. Every juvenile should have additional time for daily leisure activities, part of which should be devoted, if the juvenile so wishes, to arts and crafts skill development. The detention facility should ensure that each juvenile is physically able to participate in the available programmes of physical education. Remedial physical education and therapy should be offered, under medical supervision, to juveniles needing it.

(...)

## **H. Medical care**

49. Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated. All such medical care should, where possible, be provided to detained juveniles through the appropriate health facilities and services of the community in which the detention facility is located, in order to prevent stigmatization of the juvenile and promote self-respect and integration into the community.
50. Every juvenile has a right to be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention.
51. The medical services provided to juveniles should seek to detect and should treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society. Every detention facility for juveniles should have immediate access to adequate medical facilities and equipment appropriate to the number and requirements of its residents and staff trained in preventive health care and the handling of medical emergencies. Every juvenile who is ill, who complains of illness or who demonstrates symptoms of physical or mental difficulties, should be examined promptly by a medical officer.



52. Any medical officer who has reason to believe that the physical or mental health of a juvenile has been or will be injuriously affected by continued detention, a hunger strike or any condition of detention should report this fact immediately to the director of the detention facility in question and to the independent authority responsible for safeguarding the well-being of the juvenile.
53. A juvenile who is suffering from mental illness should be treated in a specialized institution under independent medical management. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release.
54. Juvenile detention facilities should adopt specialized drug abuse prevention and rehabilitation programmes administered by qualified personnel. These programmes should be adapted to the age, sex and other requirements of the juveniles concerned, and detoxification facilities and services staffed by trained personnel should be available to drug- or alcohol-dependent juveniles.
55. Medicines should be administered only for necessary treatment on medical grounds and, when possible, after having obtained the informed consent of the juvenile concerned. In particular, they must not be administered with a view to eliciting information or a confession, as a punishment or as a means of restraint. Juveniles shall never be testees in the experimental use of drugs and treatment.

The administration of any drug should always be authorized and carried out by qualified medical personnel.

## **I. Notification of illness, injury and death**

56. The family or guardian of a juvenile and any other person designated by the juvenile have the right to be informed of the state of health of the juvenile on request and in the event of any important changes in the health of the juvenile. The director of the detention facility should notify immediately the family or guardian of the juvenile concerned, or other designated person, in case of death, illness requiring transfer of the juvenile to an outside medical facility, or a condition requiring clinical care within the detention facility for more than 48 hours. Notification should also be given to the consular authorities of the State of which a foreign juvenile is a citizen.

(...)

## **M. Inspection and complaints**

72. Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities.
73. Qualified medical officers attached to the inspecting authority or the public health service should participate in the inspections, evaluating compliance with the rules concerning the physical environment, hygiene, accommodation, food, exercise and medical services, as well as any other aspect or conditions of institutional life that affect the physical and mental health of juveniles. Every juvenile should have the right to talk in confidence to any inspecting officer.

(...)

## **V. Personnel**

(...)

87. In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows:

( d ) All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required;

(...)

## **25. UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (excerpts), 1999<sup>276</sup>**

**(February 1999)**

### **Introduction**

1. The detention of asylum-seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.

(...)

### **Guideline 7: Detention of Vulnerable Persons.**

Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories: (13)

#### **Unaccompanied elderly persons.**

Torture or trauma victims.

Persons with a mental or physical disability.

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication counselling etc. should it become necessary.

### **Guideline 8: Detention of Women.**

Women asylum-seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided.

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<sup>276</sup> UN High Commissioner for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

Where women asylum-seekers are detained they should be accommodated separately from male asylum-seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres, the use of female staff is recommended.

Women asylum-seekers should be granted access to legal and other services without discrimination as to their gender (14), and specific services in response to their special needs (15). In particular they should have access to gynaecological and obstetrical services.

(...)

### **Guideline 10: Conditions of Detention (18)**

Conditions of detention for asylum-seekers should be humane with respect shown for the inherent dignity of the person. They should be prescribed by law.

Reference is made to the applicable norms and principles of international law and standards on the treatment of such persons. Of particular relevance are the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

The following points in particular should be emphasised:

(i) the initial screening of all asylum seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.

(...)

(iv) the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;

(v) the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate;

(vi) the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;

(...)

## Notes

1. These Guidelines address exclusively the detention of asylum seekers. The detention of refugees is generally covered by national law and subject to the principles, norms and standards contained in the 1951 Convention, and the applicable human rights instruments.
13. Although it must be recognised that most individuals will be able to articulate their claims, this may not be the case in those who are victims of trauma. Care must be taken when dealing with these individuals as their particular problems may not be apparent, and it will require care and skill to assess the situation of a person with mental disability or a disoriented older refugee who is alone.
14. See UNHCR Guidelines on The Protection of Refugee Women.
15. Women particularly those who have travelled alone may have been exposed to violence and exploitation prior to and during their flight and will require counseling.

(...)

18. Article 10(1) ICCPR

1988 UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.

1955 UN Standard Minimum Rules for the Treatment of Prisoners.

1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

## **II.2.9 INDIGENOUS PEOPLES**



**26. Convention No.169 concerning indigenous and tribal peoples in independent countries (excerpts), 1989<sup>277</sup>**

**Adoption: 27 June 1989**

**Entry into force: 05 September 1991**

(...)

**PART I. GENERAL POLICY**

(...)

**Article 7**

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

(...)

**PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT**

**Article 20**

(...)

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

(...)

(c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;

(...)

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<sup>277</sup> <http://www.ilo.org/ilolex/english/convdisp1.htm>, loc cit. n. 131.



## **PART V. SOCIAL SECURITY AND HEALTH**

### **Article 24**

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

### **Article 25**

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.
2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.
3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.
4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

(...)

## **PART VI. EDUCATION AND MEANS OF COMMUNICATION**

(...)

### **Article 30**

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.
2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

## **27. United Nations Declaration on the Rights of Indigenous Peoples (excerpts), 2007<sup>278</sup>**

**Adoption: 13 September 2007**

(...)

### **Article 2**

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have

the right to be free from any kind of discrimination, in the exercise of their rights, in particular that

based on their indigenous origin or identity.

(...)

### **Article 21**

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, *inter alia*, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

### **Article 22**

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

### **Article 23**

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous

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<sup>278</sup> G.A. Res. 61/295, 61st Sess. U.N. Doc. A/RES/61/295 (2 Oct 2007).

peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

#### **Article 24**

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

## **II.2.10 WOMEN**



**28. Convention on the Elimination of All Forms of Discrimination against Women (excerpts), 1979<sup>279</sup>**

**Adoption: 18 December 1979**

**Entry into force: 3 September 1981**

(...)

**PART III**

**Article 10**

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(...)

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

**Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(...)

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

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<sup>279</sup> Source: A/RES/34/180.

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

- 3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

#### Article 12<sup>280</sup>

- 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

(...)

#### Article 14

- 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in

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<sup>280</sup> Article 12 of the Convention on the Elimination of All the Forms of Discrimination against Women addresses some of the inadequacies of Article 12 of the International Covenant on Economic, Social and Cultural Rights in relation to women's health rights. The UN Centre for Human Rights clarifies the obligations of States under Paragraph 1: it "requires the removal of any legal and social barriers which may operate to prevent or discourage women from making full use of available health care services. Steps should be taken to ensure access to health care services for all women, including those whose access may be impeded through poverty, illiteracy, or physical isolation." UN Centre for Human Rights, *Discrimination against Women*, cited by A. J. Dent, *Research Paper on the Social and Economic Rights of Non-nationals in Europe*, Commissioned by the European Council on Refugees and Exiles (ECRE), York University, Toronto, ECRE, November 1998, p. 85.

the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(...)

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(...)

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

### **Article 16**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(...)

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(...)



**CEDAW General Recommendation No. 14: female circumcision, 1990<sup>281</sup>**

**Adoption: 2 February 1990**

The Committee on the Elimination of Discrimination against Women,

Concerned about the continuation of the practice of female circumcision and other traditional practices harmful to the health of women,

Noting with satisfaction that Governments, where such practices exist, national women's organizations, non-governmental organizations, and bodies of the United Nations system, such as the World Health Organization and the United Nations Children's Fund, as well as the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities, remain seized of the issue having particularly recognized that such traditional practices as female circumcision have serious health and other consequences for women and children,

Taking note with interest the study of the Special Rapporteur on Traditional Practices Affecting the Health of Women and Children, (1) and of the study of the Special Working Group on Traditional Practices, (2)

Recognizing that women are taking important action themselves to identify and to combat practices that are prejudicial to the health and well-being of women and children,

Convinced that the important action that is being taken by women and by all interested groups needs to be supported and encouraged by Governments,

Noting with grave concern that there are continuing cultural, traditional and economic pressures which help to perpetuate harmful practices, such as female circumcision,

Recommends that States parties:

(a) Take appropriate and effective measures with a view to eradicating the practice of female circumcision. Such measures could include:

(i) The collection and dissemination by universities, medical or nursing associations, national women's organizations or other bodies of basic data about such traditional practices;

(ii) The support of women's organizations at the national and local levels

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<sup>281</sup> Source: A/45/38 and Corrigendum, ninth session, 1990. General Recommendation of the Committee on the Elimination of Discrimination against Women (CEDAW), loc. cit. n. 137.

working for the elimination of female circumcision and other practices harmful to women;

(iii) The encouragement of politicians, professionals, religious and community leaders at all levels, including the media and the arts, to co-operate in influencing attitudes towards the eradication of female circumcision;

(iv) The introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision;

(b) Include in their national health policies appropriate strategies aimed at eradicating female circumcision in public health care. Such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the harmful effects of female circumcision;

(c) Invite assistance, information and advice from the appropriate organizations of the United Nations system to support and assist efforts being deployed to eliminate harmful traditional practices;

(d) Include in their reports to the Committee under articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women information about measures taken to eliminate female circumcision.

### **Notes**

1 E/CN.4/Sub.2/1989/42 of 21 August 1989.

2 E/CN.4/1986/42.

**CEDAW General Recommendation No. 15: avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS), 1990<sup>282</sup>**

**Adoption: 3 February 1990**

Avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS)

The Committee on the Elimination of Discrimination against Women,

Having considered information brought to its attention on the potential effects of both the global pandemic of acquired immunodeficiency syndrome (AIDS) and strategies to control it on the exercise of the rights of women,

Having regard to the reports and materials prepared by the World Health Organization and other United Nations organizations, organs and bodies in relation to human immunodeficiency virus (HIV), and, in particular, the note by the Secretary-General to the Commission on the Status of Women on the effects of AIDS on the advancement of women (1) and the Final Document of the International Consultation on AIDS and Human Rights, held at Geneva from 26 to 28 July 1989, (2)

Noting World Health Assembly resolution WHA 41.24 on the avoidance of discrimination in relation to HIV-infected people and people with AIDS of 13 May 1988, resolution 1989/11 of the Commission on Human Rights on non-discrimination in the field of health, of 2 March 1989, and in particular the Paris Declaration on Women, Children and AIDS, of 30 November 1989,

Noting that the World Health Organization has announced that the theme of World Aids Day, 1 December 1990, will be “Women and Aids”,

Recommends:

(a) That States parties intensify efforts in disseminating information to increase public awareness of the risk of HIV infection and AIDS, especially in women and children, and of its effects on them;

(b) That programmes to combat AIDS should give special attention to the rights and needs of women and children, and to the factors relating to the reproductive role of women and their subordinate position in some societies which make them especially vulnerable to HIV infection;

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<sup>282</sup> Source: A/45/38, ninth session, 1990, loc. cit. n. 138.

(c) That States parties ensure the active participation of women in primary health care and take measures to enhance their role as care providers, health workers and educators in the prevention of infection with HIV;

(d) That all States parties include in their reports under article 12 of the Convention information on the effects of AIDS on the situation of women and on the action taken to cater to the needs of those women who are infected and to prevent specific discrimination against women in response to AIDS.

### **Notes**

1 E/CN.6/1989/6/Add.1.

2 HR/AIDS/1989/3.

**CEDAW General Recommendation No. 18: disabled women, 1991**<sup>283</sup>

**Adoption: 4 January 1991**

*The Committee on the Elimination of Discrimination against Women,*

*Taking into consideration* particularly article 3 of the Convention on the Elimination of All Forms of Discrimination against Women,

*Having considered* more than 60 periodic reports of States parties, and having recognized that they provide scarce information on disabled women,

*Concerned* about the situation of disabled women, who suffer from a double discrimination linked to their special living conditions,

*Recalling* paragraph 296 of the Nairobi Forward-looking Strategies for the Advancement of Women, in which disabled women are considered as a vulnerable group under the heading “areas of special concern”,

*Affirming its support* for the World Programme of Action concerning Disabled Persons (1982),

*Recommends* that States parties provide information on disabled women in their periodic reports, and on measures taken to deal with their particular situation, including special measures to ensure that they have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life.

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<sup>283</sup> Source: A/46/38, tenth session, 1991, loc. cit. n. 139.

**CEDAW General Recommendation No. 21: equality in marriage and family relations, 1994<sup>284</sup>**

**Adoption: 4 February 1994**

(...)

**Article 16 (1) (e)**

21. The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children.
22. Some reports disclose coercive practices which have serious consequences for women, such as forced pregnancies, abortions or sterilization. Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government. In order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in article 10 (h) of the Convention.
23. There is general agreement that where there are freely available appropriate measures for the voluntary regulation of fertility, the health, development and well-being of all members of the family improves. Moreover, such services improve the general quality of life and health of the population, and the voluntary regulation of population growth helps preserve the environment and achieve sustainable economic and social development.

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<sup>284</sup> Source: A/47/38, thirteenth session, 1994, loc. cit. n. 141.

**CEDAW General Recommendation No. 24: women and health (Article 12), 1999<sup>285</sup>**

**Adoption: 5 February 1999**

1. The Committee on the Elimination of Discrimination against Women, affirming that access to health care, including reproductive health, is a basic right under the Convention on the Elimination of All Forms of Discrimination against Women, decided at its twentieth session, pursuant to article 21, to elaborate a general recommendation on article 12 of the Convention.

Background

2. States parties' compliance with article 12 of the Convention is central to the health and well-being of women. It requires States to eliminate discrimination against women in their access to health-care services throughout the life cycle, particularly in the areas of family planning, pregnancy and confinement and during the post-natal period. The examination of reports submitted by States parties pursuant to article 18 of the Convention demonstrates that women's health is an issue that is recognized as a central concern in promoting the health and well-being of women. For the benefit of States parties and those who have a particular interest in and concern with the issues surrounding women's health, the present general recommendation seeks to elaborate the Committee's understanding of article 12 and to address measures to eliminate discrimination in order to realize the right of women to the highest attainable standard of health.
3. Recent United Nations world conferences have also considered these objectives. In preparing this general recommendation, the Committee has taken into account relevant programmes of action adopted at United Nations world conferences and, in particular, those of the 1993 World Conference on Human Rights, the 1994 International Conference on Population and Development and the 1995 Fourth World Conference on Women. The Committee has also noted the work of the World Health Organization (WHO), the United Nations Population Fund (UNFPA) and other United Nations bodies. It has collaborated with a large number of non-governmental organizations with a special expertise in women's health in preparing this general recommendation.
4. The Committee notes the emphasis that other United Nations instruments place on the right to health and to the conditions that

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<sup>285</sup> Source: A/54/38/Rev.1, chapter I, twentieth session, 1999, loc. cit. n. 136.

enable good health to be achieved. Among such instruments are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination.

5. The Committee refers also to its earlier general recommendations on female circumcision, human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS), disabled women, violence against women and equality in family relations, all of which refer to issues that are integral to full compliance with article 12 of the Convention.
6. While biological differences between women and men may lead to differences in health status, there are societal factors that are determinative of the health status of women and men and can vary among women themselves. For that reason, special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities.
7. The Committee notes that the full realization of women's right to health can be achieved only when States parties fulfil their obligation to respect, protect and promote women's fundamental human right to nutritional well-being throughout their lifespan by means of a food supply that is safe, nutritious and adapted to local conditions. To this end, States parties should take steps to facilitate physical and economic access to productive resources, especially for rural women, and to otherwise ensure that the special nutritional needs of all women within their jurisdiction are met.

#### Article 12.

8. Article 12 reads as follows:

“1. States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning.”

“2. Notwithstanding the provisions of paragraph 1 of this article, States parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services



where necessary, as well as adequate nutrition during pregnancy and lactation.”

States parties are encouraged to address the issue of women’s health throughout the woman’s lifespan. For the purposes of the present general recommendation, therefore, “women” includes girls and adolescents. The general recommendation will set out the Committee’s analysis of the key elements of article 12.

### Key elements

#### Article 12 (1)

9. States parties are in the best position to report on the most critical health issues affecting women in that country. Therefore, in order to enable the Committee to evaluate whether measures to eliminate discrimination against women in the field of health care are appropriate, States parties must report on their health legislation, plans and policies for women with reliable data disaggregated by sex on the incidence and severity of diseases and conditions hazardous to women’s health and nutrition and on the availability and cost-effectiveness of preventive and curative measures. Reports to the Committee must demonstrate that health legislation, plans and policies are based on scientific and ethical research and assessment of the health status and needs of women in that country and take into account any ethnic, regional or community variations or practices based on religion, tradition or culture.
10. States parties are encouraged to include in their reports information on diseases, health conditions and conditions hazardous to health that affect women or certain groups of women differently from men, as well as information on possible intervention in this regard.
11. Measures to eliminate discrimination against women are considered to be inappropriate if a health-care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.
12. States parties should report on their understanding of how policies and measures on health care address the health rights of women from the perspective of women’s needs and interests and how it addresses distinctive features and factors that differ for women in comparison to men, such as:

(a) Biological factors that differ for women in comparison with men, such as their menstrual cycle, their reproductive function and menopause. Another example is the higher risk of exposure to sexually transmitted diseases that women face;

(b) Socio-economic factors that vary for women in general and some groups of women in particular. For example, unequal power relationships between women and men in the home and workplace may negatively affect women's nutrition and health. They may also be exposed to different forms of violence which can affect their health. Girl children and adolescent girls are often vulnerable to sexual abuse by older men and family members, placing them at risk of physical and psychological harm and unwanted and early pregnancy. Some cultural or traditional practices such as female genital mutilation also carry a high risk of death and disability;

(c) Psychosocial factors that vary between women and men include depression in general and post-partum depression in particular as well as other psychological conditions, such as those that lead to eating disorders such as anorexia and bulimia;

(d) While lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment and thereby adversely affect their health and well-being. Women will be less willing, for that reason, to seek medical care for diseases of the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence.

13. The duty of States parties to ensure, on a basis of equality of men and women, access to health-care services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system that ensures effective judicial action. Failure to do so will constitute a violation of article 12.

14. The obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals. States parties should report on how public and private health-care providers meet their duties to respect women's rights to have access to health care. For example, States parties should not restrict women's access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health authorities, because they are unmarried (1) or because they are women. Other barriers to women's access

to appropriate health care include laws that criminalize medical procedures only needed by women punish women who undergo those procedures.

15. The obligation to protect rights relating to women's health requires States parties, their agents and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations. Since gender-based violence is a critical health issue for women, States parties should ensure:
  - (a) The enactment and effective enforcement of laws and the formulation of policies, including health-care protocols and hospital procedures to address violence against women and sexual abuse of girl children and the provision of appropriate health services;
  - (b) Gender-sensitive training to enable health-care workers to detect and manage the health consequences of gender-based violence;
  - (c) Fair and protective procedures for hearing complaints and imposing appropriate sanctions on health-care professionals guilty of sexual abuse of women patients;
  - (d) The enactment and effective enforcement of laws that prohibit female genital mutilation and marriage of girl children.
16. States parties should ensure that adequate protection and health services, including trauma treatment and counselling, are provided for women in especially difficult circumstances, such as those trapped in situations of armed conflict and women refugees.
17. The duty to fulfil rights places an obligation on States parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care. Studies such as those that emphasize the high maternal mortality and morbidity rates worldwide and the large numbers of couples who would like to limit their family size but lack access to or do not use any form of contraception provide an important indication for States parties of possible breaches of their duties to ensure women's access to health care. The Committee asks States parties to report on what they have done to address the magnitude of women's ill-health, in particular when it arises from preventable conditions, such as tuberculosis and HIV/AIDS. The Committee is concerned about the evidence that States are relinquishing these obligations as they transfer State health functions to private agencies. States and parties cannot absolve themselves of

responsibility in these areas by delegating or transferring these powers to private sector agencies. States parties should therefore report on what they have done to organize governmental processes and all structures through which public power is exercised to promote and protect women's health. They should include information on positive measures taken to curb violations of women's rights by third parties and to protect their health and the measures they have taken to ensure the provision of such services.

18. The issues of HIV/AIDS and other sexually transmitted diseases are central to the rights of women and adolescent girls to sexual health. Adolescent girls and women in many countries lack adequate access to information and services necessary to ensure sexual health. As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as female genital mutilation, polygamy, as well as marital rape, may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases. Women in prostitution are also particularly vulnerable to these diseases. States parties should ensure, without prejudice or discrimination, the right to sexual health information, education and services for all women and girls, including those who have been trafficked, even if they are not legally resident in the country. In particular, States parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed programmes that respect their right to privacy and confidentiality.
19. In their reports, States parties should identify the test by which they assess whether women have access to health care on a basis of equality of men and women in order to demonstrate compliance with article 12. In applying these tests, States parties should bear in mind the provisions of article 1 of the Convention. Reports should therefore include comments on the impact that health policies, procedures, laws and protocols have on women when compared with men.
20. Women have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives.
21. States parties should report on measures taken to eliminate barriers that women face in access to health-care services and what measures they have taken to ensure women timely and affordable access to such services. Barriers include requirements or conditions that

prejudice women's access, such as high fees for health-care services, the requirement for preliminary authorization by spouse, parent or hospital authorities, distance from health facilities and the absence of convenient and affordable public transport.

22. States parties should also report on measures taken to ensure access to quality health-care services, for example, by making them acceptable to women. Acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity.
23. In their reports, States parties should state what measures they have taken to ensure timely access to the range of services that are related to family planning, in particular, and to sexual and reproductive health in general. Particular attention should be paid to the health education of adolescents, including information and counselling on all methods of family planning (2).
24. The Committee is concerned about the conditions of health-care services for older women, not only because women often live longer than men and are more likely than men to suffer from disabling and degenerative chronic diseases, such as osteoporosis and dementia, but because they often have the responsibility for their ageing spouses. Therefore, States parties should take appropriate measures to ensure the access of older women to health services that address the handicaps and disabilities associated with ageing.
25. Women with disabilities, of all ages, often have difficulty with physical access to health services. Women with mental disabilities are particularly vulnerable, while there is limited understanding, in general, of the broad range of risks to mental health to which women are disproportionately susceptible as a result of gender discrimination, violence, poverty, armed conflict, dislocation and other forms of social deprivation. States parties should take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities and are respectful of their human rights and dignity.

#### Article 12 (2)

26. Reports should also include what measures States parties have taken to ensure women appropriate services in connection with pregnancy,

confinement and the post-natal period. Information on the rates at which these measures have reduced maternal mortality and morbidity in their countries, in general, and in vulnerable groups, regions and communities, in particular, should also be included.

27. States parties should include in their reports how they supply free services where necessary to ensure safe pregnancies, childbirth and post-partum periods for women. Many women are at risk of death or disability from pregnancy-related causes because they lack the funds to obtain or access the necessary services, which include antenatal, maternity and post-natal services. The Committee notes that it is the duty of States parties to ensure women's right to safe motherhood and emergency obstetric services and they should allocate to these services the maximum extent of available resources.

#### Other relevant articles in the Convention

28. When reporting on measures taken to comply with article 12, States parties are urged to recognize its interconnection with other articles in the Convention that have a bearing on women's health. Those articles include article 5 (b), which requires States parties to ensure that family education includes a proper understanding of maternity as a social function; article 10, which requires States parties to ensure equal access to education, thus enabling women to access health care more readily and reducing female student drop-out rates, which are often a result of premature pregnancy; article 10 (h), which requires that States parties provide to women and girls access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning; article 11, which is concerned, in part, with the protection of women's health and safety in working conditions, including the safeguarding of the reproductive function, special protection from harmful types of work during pregnancy and with the provision of paid maternity leave; article 14, paragraph 2 (b), which requires States parties to ensure access for rural women to adequate health-care facilities, including information, counselling and services in family planning, and (h), which obliges States parties to take all appropriate measures to ensure adequate living conditions, particularly housing, sanitation, electricity and water supply, transport and communications, all of which are critical for the prevention of disease and the promotion of good health care; and article 16, paragraph 1 (e), which requires States parties to ensure that women have the same rights as men to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise those rights. Article 16, paragraph 2, proscribes the betrothal and marriage of children, an important factor in preventing

the physical and emotional harm which arise from early childbirth.

### Recommendations for government action

29. States parties should implement a comprehensive national strategy to promote women's health throughout their lifespan. This will include interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women, and will ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services.
30. States parties should allocate adequate budgetary, human and administrative resources to ensure that women's health receives a share of the overall health budget comparable with that for men's health, taking into account their different health needs.
31. States parties should also, in particular:
  - (a) Place a gender perspective at the centre of all policies and programmes affecting women's health and should involve women in the planning, implementation and monitoring of such policies and programmes and in the provision of health services to women;
  - (b) Ensure the removal of all barriers to women's access to health services, education and information, including in the area of sexual and reproductive health, and, in particular, allocate resources for programmes directed at adolescents for the prevention and treatment of sexually transmitted diseases, including HIV/AIDS;
  - (c) Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion;
  - (d) Monitor the provision of health services to women by public, non-governmental and private organizations, to ensure equal access and quality of care;
  - (e) Require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice;
  - (f) Ensure that the training curricula of health workers include

comprehensive, mandatory, gender-sensitive courses on women's health and human rights, in particular gender-based violence.

### Notes

1. See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 38 (A/49/38), chapter I, section A, General recommendation 21, para. 29.
2. Health education for adolescents should further address, *inter alia*, gender equality, violence, prevention of sexually transmitted diseases and reproductive and sexual health rights.



**CEDAW General Recommendation No. 26: women migrant workers (excerpts), 2008<sup>286</sup>**

**Adoption: 7 November 2008**

**Sex and gender-based human rights concerns related to migrant women**

13. In countries of destination

(...)

17. Women migrant workers often suffer from inequalities that threaten their health. They may be unable to access health services, including reproductive health services, because insurance or national health schemes are not available to them or they may have to pay unaffordable fees. As women have health needs different from those of men, this aspect requires special attention. They may also suffer from a lack of arrangements for their safety at work, or provisions for safe travel between the worksite and their place of accommodation. Where accommodation is provided, especially in female-dominated occupations such as factory, farm or domestic work, living conditions may be poor and overcrowded without running water or adequate sanitary facilities, or lack privacy and hygiene. Women migrant workers are sometimes subjected to sex-discriminatory mandatory HIV/AIDS testing or testing for other infections without their consent, followed by provision of test results to agents and employers rather than to the worker herself. This may result in loss of job or deportation if she tests positive.
18. Discrimination may be especially acute in relation to pregnancy. Women migrant workers may face mandatory pregnancy tests, followed by deportation if the test is positive; coercive abortion or lack of access to safe reproductive health and abortion services, when the health of the mother is at risk or even following sexual assault; absence of or inadequate maternity leave and of benefits and absence of affordable obstetric care, resulting in serious health risks. They may also face dismissal from employment upon detection of pregnancy, sometimes resulting in irregular immigration status and deportation.
- (...)

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<sup>286</sup> CEDAW/C/2009/WP.1/R, loc. cit. n. 142.

## **Recommendations to States parties**

(...)

### **24. Responsibilities specific to countries of origin**

Countries of origin must respect, protect and fulfil the human rights of their female nationals who migrate for purposes of work. Measures that may be required include, but are not limited to the following:

(...)

#### *b. Education, awareness-raising and training with standardized content*

States Parties should develop an appropriate education and awareness raising programme in close consultation with concerned NGOs, gender and migration specialists, women workers with migration experience and reliable recruiting agencies. In this regard, States parties should: (articles, 3, 5, 10 and 14)

(i) Deliver or facilitate free or affordable gender and rights-based predeparture information and training programmes that raise prospective women migrant workers' awareness of potential exploitation, including: recommended contents of labour contracts, legal rights and entitlements in countries of employment, procedures for invoking formal and informal redress mechanisms, processes by which to obtain information about employers, cultural conditions in countries of destination, stress management, first aid and emergency measures including emergency telephone numbers of home embassy, and services; information about safety in transit including airport and airline orientations and information on general and reproductive health, including HIV/AIDS prevention. These training programmes should be targeted to prospective women migrant workers through an effective outreach programme and held in decentralized training venues so that they are accessible to women

(...)

#### *d. Health services*

States Parties should ensure the provision of standardized and authentic health certificates if required by countries of destination and require prospective employers to purchase medical insurance for women migrant workers. All required pre departure HIV/AIDS testing or pre-departure health examinations must be respectful of the human rights of women migrants. Special attention should be paid to voluntariness, the provision

of free or affordable services and to the problems of stigmatization. (article 2 f, and 12)

(...)

## 26. Responsibilities specific to countries of destination

States Parties in countries where migrant women work, should take all appropriate measures to ensure non-discrimination and the equal rights of women migrant workers, including in their own communities. Measures that may be required include, but are not limited to, the following:

(...)

### *b. Legal protection for the rights of women migrant workers*

States Parties should ensure that constitutional and civil law, as well as labour codes provide to women migrant workers, the same rights and protection that is extended to all workers in the country including the right to organize and freely associate. They should ensure that contracts for women migrant workers are legally valid. In particular, they should ensure that occupations dominated by women migrants workers such as domestic work and some forms of entertainment, are protected by labour laws including wage and hour regulations, health and safety codes, holiday and vacation leave regulations. These laws should include mechanisms by which to monitor work place conditions of migrant women especially in the kinds of jobs they dominate. (articles 2a, f and 11)

(...)

### *g. Training and awareness-raising*

States Parties should provide mandatory awareness-raising programmes concerning the rights of migrant women workers and gender sensitivity training for relevant public and private recruitment agencies and employers and relevant state employees, such as criminal justice officers, border police, immigration authorities, border polices, social service and health care providers. (articles 3)

(...)

### *i. Access to services*

States Parties should ensure that linguistically and culturally appropriate gender sensitive services for women migrant workers are available, including language and skills training programmes, emergency shelters,

health care services, police services, recreational programmes, and programmes designed especially for isolated women migrant workers such as domestic workers and others secluded in the home, in addition to victims of domestic violence. Victims of abuse must be provided with relevant emergency and social services regardless of their immigration status. (articles 3, 5, and 12)

*j. The rights of women migrant workers in detention whether they are documented or undocumented*

States Parties should ensure that women migrant workers who are in detention do not suffer discrimination or gender-based violence, and that pregnant and breastfeeding mothers as well as women of ill-health have access to appropriate services. They should review, eliminate or reform laws, regulations, or policies that result in a disproportionate number of women migrant workers being detained for migration-related reasons. (article 2d and 5)

(...)

*l. Protection of undocumented women migrant workers:*

The situation of undocumented women needs specific attention. Regardless of the lack of immigration status of undocumented women migrant workers, States Parties have an obligation to protect their basic human rights. Undocumented women migrant workers must have access to legal remedies and justice in cases of risk to life or to cruel and degrading treatment or if they are compelled into forced labor, face deprivation of fulfillment of basic needs including in times of health emergencies or pregnancy and maternity, or if they are abused physically and sexually by employers or others. If they are arrested or detained, the States Parties must ensure that undocumented women migrant workers receive humane treatment and have access to due process of the law including through free legal aid. In this regard, States Parties should repeal or amend laws and practices that prevent undocumented women migrant workers from using the courts and other systems of redress. If deportation cannot be avoided, States Parties need to treat each case individually with due consideration to the gender related circumstances and risks of human rights violations in the country of origin. (article 2c,f and e)

## CEDAW Concluding Observations

### Australia<sup>287</sup>

(...)

#### Positive aspects

6. The Committee notes with satisfaction the wide range of legislative and other measures taken and the existence of strong monitoring institutions to advance the status of women since the submission of the last report and appreciates the priority accorded to women's human rights in the State party.
7. The Committee notes with satisfaction the introduction of the maternity payment in 2004 and the legislative and policy measures to combat violence against women. The Committee welcomes the increased participation of women in political and public life.
8. The Committee congratulates the State party for its high ranking in international surveys assessing gender-related progress and achievements at the national level, and notes in particular that the *2005 Human Development Report* ranked Australia second in the world in its Gender Related Index.

#### Principal areas of concern and recommendations

(...)

28. The Committee expresses concern that immigrant, refugee and minority women and girls, based on their ethnic background, may be subject to multiple forms of discrimination with respect to education, health, employment and political participation. It is also concerned that women belonging to these groups seem to be particularly vulnerable to violence.
- 29. The Committee urges the State party to take more effective measures to eliminate discrimination against refugee, migrant and minority women and girls and to strengthen its efforts to combat and eliminate xenophobia and racism in Australia, particularly its impact on women and girls. It**

<sup>287</sup> CEDAW, *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Australia*, 3 February 2006 CEDAW/C/AUL/CO/5.

**also encourages the State party to be more proactive in its measures to prevent and eliminate discrimination against these women and girls within their communities and in society at large and to report on the steps taken in this regard in its next report.**

**Austria**<sup>288</sup>

(...)

### **Positive aspects**

7. The Committee commends the State party on a number of new laws and amendments aimed at reinforcing the equal treatment of women and men, including in the public service and universities, as well as amendments regarding criminal law, maternity protection, paternity leave and working time aimed at achieving compliance with the State party's obligations under the Convention.
8. The Committee welcomes the appointment of a Minister for Women's Affairs in the Federal Chancellery and the development of gender-mainstreaming structures and mechanisms at the federal level and within several ministries, including the Federal Ministries of Finance and of Education, Science and Culture, as well as in the health sector.
9. The Committee commends the State party for the adoption of a motion by the Council of Ministers in 2001 on the use of gender-sensitive language in all ministries and departments.

### **Principal areas of concern and recommendations**

(...)

29. While welcoming the positive changes in immigration law, including the amendment to the Aliens' Act of 2002 and the amendment to the Asylum Act of 2004, as well as the establishment of a service unit for migrant women at the federal level, and the intention expressed to adopt an action plan for migrants, the Committee expresses concern that some groups of women and girls, including migrants, asylum-seekers and refugees, may be subject to multiple forms of discrimination

<sup>288</sup> CEDAW, *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Austria*, 2 February 2007 CEDAW/C/AUT/CO/6.

with respect to education, health, employment and social and political participation. It is also concerned that some women belonging to those groups may be particularly vulnerable to poverty and violence, including domestic violence, and encounter difficulties in obtaining residency permits, accessing social services and obtaining employment in jobs that are commensurate with their level of education, experience and qualifications.

- 30. The Committee calls upon the State party to keep under review and carefully monitor the impact of its laws and policies on women migrants, refugees and asylum-seekers with a view to taking remedial measures that effectively respond to the needs of those women, including the clear adoption of a gender perspective in the action plan for migrants. It calls upon the State party to pay specific attention to the vulnerability of women asylum-seekers while their claims are under examination. The Committee further recommends the adoption of measures for the integration of women of all minority groups in vulnerable circumstances into society and the labour market in order to advance de facto equality for all women.**

**Denmark<sup>289</sup>**

(...)

### **Positive aspects**

5. The Committee commends the State party for its two-pronged approach to gender equality work that has included sustained and prioritized efforts at gender mainstreaming, including through the development of tools to assess bills, budgets, campaigns and statistics from a gender perspective, supplemented by special initiatives in key areas of concern to women requiring Government attention.
6. The Committee commends the State party for being among the first countries in the world to elaborate an action plan in 2005 on the implementation of Security Council resolution 1325 (2000) on women and peace and security, with direct relevance to article 3, article 4, paragraph 1, and article 7 of the Convention.

<sup>289</sup> CEDAW, *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Denmark*, 25 August 2006 CEDAW/C/DEN/CO/6.

7. The Committee welcomes the code of conduct elaborated in 2004 by the Ministry of Defence, which guides personnel who participate in international operations as to how they should relate to and observe the special rules and customs that apply in the countries concerned.
8. The Committee commends the State party for integrating a gender dimension into its development cooperation programmes and using the Committee's concluding comments in its decision-making processes in this area.

### **Principal areas of concern and recommendations**

(...)

- 27. The Committee urges the State party to intensify its efforts to eliminate discrimination against minority women. It encourages the State party to be proactive in its measures to prevent discrimination against those women, both within their communities and in society at large, to combat violence against them, and to increase their awareness of the availability of social services and legal remedies as well as to familiarize them with their rights to gender equality and non-discrimination. The Committee recommends that foreign women's health needs, in particular as regards information on preventing and addressing HIV infection, be fully addressed. The Committee also urges the State party to conduct regular and comprehensive studies on discrimination against minority women and to collect statistics on their situation in employment, education and health and on all forms of violence that they may experience and submit such information in its next periodic report.**
28. The Committee continues to be concerned by the situation of foreign married women with temporary residence permits issued on the grounds of marriage and who risk expulsion if they leave the marital home because of spousal violence. The Committee is concerned at the difficulties that such women face in meeting the criteria for obtaining residency in their own right, and that their fear of expulsion is a deterrent to their seeking assistance or taking steps to seek separation or divorce.
- 29. The Committee recommends that the State party review its administrative practice without delay and reconsider the**



**residency requirements for foreign married women who have been exposed to spousal violence.**

30. While noting the State party's action plan to counter forced marriages and arranged marriages launched in 2003 with initiatives that include dialogue and cooperation, counselling and research, the Committee is concerned by the consequences the legislation that increased the minimum age requirement from 18 to 24 years of age for spousal reunification may have for women. The Committee notes the absence of statistics on the incidence of forced marriage.
- 31. The Committee recommends that the State party undertake an assessment of the consequences on women of the increase in the age limit for family reunification with spouses, and to continue to explore other ways of combating forced marriages.**

**Greece<sup>290</sup>**

(...)

**Positive aspects**

8. The Committee commends the State party on its recent legal reforms aimed at eliminating discrimination against women and promoting gender equality. In particular, it welcomes: the introduction, in 2001, of article 116, paragraph 2, of the Constitution, which establishes the State party's responsibility for taking special measures to ensure the elimination of discrimination against women; and the adoption, in 2002, of Law 3064/2002 on the Suppression of Trafficking in Human Beings; in 2003, of Presidential Decree 233/2003 regarding the provision of assistance to victims of trafficking; in 2004, of Law 3274/2004 related to issuing a temporary residence permit to victims of trafficking; in 2006, of the Law on Combating Domestic Violence; and, in 2006, the Law on Equal Treatment between Men and Women in the Field of Employment, Labour and Occupation.
9. The Committee commends the State party for its political will expressed during the constructive dialogue to implement fully the provisions of the Convention.

<sup>290</sup> CEDAW, *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Greece*, 2 February 2007 CEDAW/C/GRC/CO/6.

10. The Committee expresses its appreciation to the State party for the signing of a memorandum of cooperation between the General Secretariat for Gender Equality and the Office of the United Nations High Commissioner for Refugees (UNHCR) in order to promote and protect the rights of refugee women and girls, and for having elaborated an action plan to implement the memorandum.
11. The Committee congratulates the State party for the legal measures taken to increase women's employment, in particular the introduction of Law 3250/2004, which redefined the categories of people eligible for recruitment, through, *inter alia*, the enlargement of the category of mothers with underage children at a 10 per cent quota, and which provided that a quota of up to 60 per cent of the various categories of the unemployed who benefit from such employment positions be reserved for women.

### **Principal areas of concern and recommendations**

(...)

25. The Committee is concerned that, due to inadequate access to family planning and contraceptive methods, abortion is often used by women and adolescent girls as a method of birth control. It regrets the lack of data about the incidence of abortion disaggregated by age and ethnic group of the persons undergoing it. The Committee is also concerned about the high number of caesarean sections performed.
26. **The Committee recommends that the State party implement programmes and policies aimed at providing effective access for women, including minority women (Roma and Muslim women) and adolescent girls, to health-care information and contraceptives, and to family planning services, thus avoiding the need for women to resort to abortion as a method of birth control. The Committee urges the State party to implement programmes of sexual and reproductive health education for men, women and adolescents in order to foster responsible sexual behaviour. The Committee further calls on the State party to implement initiatives, in close**

**consultation with the medical profession, aimed at reducing the number of caesarean sections performed.**

**Ireland<sup>291</sup>**

(...)

**Positive aspects**

16. The Committee notes with appreciation that, since the consideration of its combined second and third periodic report (CEDAW/C/IRL/2-3) in 1999, the State party has enacted the Equal Status Act, 2000 and the Equality Act, 2004, the latter amending both the 2000 Act and the Employment Equality Act, 1998; the Carer's Leave Act, 2001; the Protection of Employees (Part-Time Work) Act, 2001; the Pensions (Amendment) Act, 2002; and the Maternity Protection (Amendment) Act, 2004; and that the State party has included the comprehensive Equality for Women Measure in the National Development Plan, 2000-2006.
17. The Committee welcomes the establishment of the Irish Human Rights Commission under the Human Rights Commission Act 2000, and its amendment of 2001, which provide for equal gender representation in that at least seven of 15 commissioners must be women and seven must be men. The Committee commends the Commission for having identified gender as one of its key areas of work in its strategic plan for 2003-2006 and for making a submission in respect of Ireland's combined fourth and fifth periodic report.
18. The Committee notes with appreciation the increase in the employment rate for women aged 15-64 from 40 per cent in 1994 to 56 per cent in 2004.
19. The Committee welcomes the incorporation of gender mainstreaming as part of Ireland's development aid.
20. The Committee commends the State party for its ratification of the Optional Protocol to the Convention and acceptance of the amendment to article 20, paragraph 1, of the Convention, relating to the Committee's meeting time.

<sup>291</sup> CEDAW, *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Ireland*, 22 July 2005 CEDAW/C/IRL/CO/4-5.

## Principal areas of concern and recommendations

(...)

30. The Committee is concerned about trafficking in women and girls into Ireland, the lack of information on the extent of the problem and on specific legislation in this area, and the lack of a comprehensive strategy to combat it.
31. **The Committee recommends the adoption and implementation of a comprehensive strategy to combat trafficking in women and girls, which should include preventive measures, the prosecution and punishment of offenders and the enactment of specific legislation in the area. The Committee also recommends that measures be put in place to provide for the physical, psychological and social recovery of women and girls who have been victims of trafficking, including the provision of shelter, counselling and medical care. It further recommends that border police and law enforcement officials be provided with the requisite skills to recognize and provide support for victims of trafficking. The Committee requests the State party to provide in its next report comprehensive information and data on trafficking in women and girls and on the measures taken to combat the phenomenon.**

Italy<sup>292</sup>

(...)

## Positive aspects

13. The Committee commends the State party for amending article 51 of the Constitution which, as was stated by the delegation, is the vehicle through which the Convention will become part of the law of the land and forms the constitutional basis for the use of temporary special measures, including the use of quotas for accelerating the increase in the participation of women in political and public life.
14. The Committee commends the State party for the legislative reforms taken in the past few years for the advancement of women, including law 66/1996 on sexual violence, law 53/2000

<sup>292</sup> CEDAW, *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Italy*, 15 February 2005 CEDAW/C/ITA/CC/4-5.

on parental leave and law 154 of 2001, on *inter alia*, protection measures in favour of trafficked women.

15. The Committee commends the State party for ratifying the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in September 2000, as well as for accepting the amendment to article 20, paragraph 1, of the Convention in May 1996.

### **Principal areas of concern and recommendations**

(...)

36. The Committee urges the State party to take effective measures to eliminate discrimination against vulnerable groups of women, including Roma and migrant women, and to enhance respect for their human rights through all available means, including temporary special measures in accordance with article 4, paragraph 1, of the Convention and the Committee's general recommendation 25. It calls on the State party to provide, in its next periodic report, a comprehensive picture of the de facto position of Roma and migrant women in the areas of education, employment, health and participation in political and public life. The Committee also encourages the State party to revisit the provisions of law 189/2002 with a view to removing the current restrictions on migrant women, and to adopt laws and policies which recognize gender-related forms of persecution in the determination of refugee status.

### **Nicaragua<sup>293</sup>**

(...)

### **Positive aspects**

4. The Committee commends the State party on its establishment of the National Coalition against Trafficking in Persons in 2004, as well as its accession to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, also in 2004.

<sup>293</sup> CEDAW, *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Nicaragua*, 2 February 2007 CEDAW/C/NIC/CO/6.

5. The Committee welcomes the Government's collaboration with civil society on women's issues.

### **Principal areas of concern and recommendations**

(...)

21. While recognizing the efforts made by the State party to address trafficking in and sexual exploitation of women and girls, the Committee is concerned about the continued vulnerability of women and girls to traffickers, and about the inadequate measures to combat this phenomenon.
22. **The Committee urges the State party to intensify its efforts to address trafficking in and sexual exploitation of women and girls, and to step up the prosecution and adequate punishment of offenders. It recommends the introduction of measures aimed at improving the economic situation of women so as to eliminate their vulnerability to traffickers and education initiatives for vulnerable groups, including girls, as well as social support, rehabilitation and reintegration measures for women and girls who have been victims of trafficking. It requests the State party to compile data and systematically monitor the extent of trafficking and the effectiveness of measures, and results achieved with its efforts to combat this phenomenon.**
23. The Committee is concerned about the high levels of unemployment among women, and of the displacement of women into informal-sector work, resulting in high levels of migration, and the lack of adequate and effective enforcement of labour laws. It notes with particular concern the continuing violations of the rights of women working in the free trade zones and maquiladoras, including their right to association and access to justice, their conditions of work and the lack of employers' compliance with safety and health standards. The Committee is also concerned about the lack of legal provisions on sexual harassment, and about the situation of domestic workers.
24. **The Committee calls upon the State party to increase women's opportunity to transition from informal- to formal-sector employment, including through the provision of training and capacity-building efforts. It calls on the State party to fully enforce existing labour legislation; put in**

**place effective measures to prevent and punish violations of the rights of women working in the maquiladora industries; address the lack of adherence to safety and health standards in those industries; and enhance women workers' access to justice and legal assistance. It also calls on the State party to undertake awareness-raising efforts so that women workers can claim their rights, and to inform women of the potential risks of migration. It requests the State party to establish a concrete timetable for the adoption of legislative and policy measures to protect the rights of domestic workers, as well as on sexual harassment. It requests the State party to include in its next periodic report information on the impact of steps and measures taken to enhance compliance with article 11 of the Convention.**

**Saudi Arabia<sup>294</sup>**

(...)

**Positive aspects**

5. The Committee commends Saudi Arabia for its modern infrastructure, and its high standard of basic social services, especially the provision of Government-funded health care and education services to many sectors of society.
6. The Committee congratulates the State party on the establishment of institutional mechanisms for the advancement and the protection of women from violence, in particular the higher national committee specialized in women's affairs and the 13 social protection committees established in 2004. The Committee also notes with satisfaction that Saudi Arabia is currently in the process of drafting new legislation on the implementation of women's rights and that the State party plans to compile, in writing, the provisions of Sharia on personal status.
7. The Committee also notes the establishment by royal decree in 2004 of a human rights commission, which is tasked with the implementation of the human rights commitments of the State party, and a national society for human rights.

<sup>294</sup> CEDAW, *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Saudi Arabia*, 8 April 2008 CEDAW/C/SAU/CO/2.

## Principal areas of concern and recommendations

(...)

23. The Committee notes with concern that the State party did not provide sufficient information and statistical data on the situation of non-Saudi Arabian women residing in the State party. It is especially concerned about the status and situation of female domestic migrant workers, in particular as they are not yet covered by the current labour code, often are not aware of their rights, and, in practice, cannot easily file complaints and gain redress in cases of abuse. The Committee also expresses concern with regard to the rights of the children of these women, in particular in relation to residency and access to health services and education. While appreciating the State party's efforts to combat the trafficking of women and girls, including its accession to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol), the national plan to combat trafficking, and the draft law on combating the trafficking of human beings, the Committee is concerned about the persistence of trafficking and the economic and sexual exploitation and ill-treatment of young migrant girls employed as domestic servants.
24. The Committee urges the State party to provide full details on the situation of non-Saudi women, in particular domestic workers, in its next report and on their enjoyment of the rights established by the Convention. It calls upon the State party to grant in law and practice female domestic migrant workers, including their children, the rights provided for in the Convention and to implement measures aimed at informing them about these rights. It also urges the State party to adopt a labour law concerning domestic workers as a priority. The Committee also urges the State party to fully implement article 6 of the Convention, including by speedily enacting specific and comprehensive national legislation on the phenomenon of trafficking that ensures that victims are adequately protected and assisted. It also recommends that the State party increase prevention efforts, by addressing the root causes of trafficking through bilateral and/or multilateral cooperation with the countries of origin so as to eliminate the vulnerability of women and girls to being trafficked into Saudi Arabia, as well as the provision of assistance and support to these trafficking victims, using the Office of the High Commissioner for Human Rights



Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1).

(...)

33. While commending the efforts made by the State party to improve the health-care infrastructure, the Committee expresses concern about the lack of information and data on health problems unrelated to maternity, as well as the access by women and girls from rural areas and non-Saudi nationalities to adequate health-care services. The Committee further expresses concern that women may require the permission of their male guardian to access health facilities.
34. The Committee calls upon the State party to take all necessary measures to improve women's access to health care and health related services and information within the framework of the Committee's general recommendation 24. The Committee further recommends that special attention is paid to the health needs of women from rural areas and non-Saudi nationalities. The Committee also recommends training for hospital staff on the rights of women regarding health care and the implementation of a system of supervision to ensure that staff respects these rights.

## **II.2.11 CHILDREN**



## **29. Convention on the Rights of the Child (excerpts), 1989<sup>295</sup>**

**Adoption: 20 November 1989**

**Entry into force: 2 September 1990**

(...)

### **PART I**

(...)

#### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

#### **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 to 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.

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<sup>295</sup> Source: 1577 U.N.T.S. 3, loc. cit. n. 37.

(...)

### **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

(...)

### **Article 14**

(...)

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

### **Article 15**

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

(...)

### **Article 19**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

(...)

## **Article 22**

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

## **Article 23**

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

## **Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
  - (a) To diminish infant and child mortality;
  - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - (c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
  - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
  - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
  - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

### **Article 25**

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

### **Article 26**

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

### **Article 27**

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.

(...)



### **Article 31**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### **Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
  - (a) Provide for a minimum age or minimum ages for admission to employment;
  - (b) Provide for appropriate regulation of the hours and conditions of employment;
  - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

### **Article 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

(...)

### **Article 37**

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.

### **Article 38**

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties

shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

### **Article 39**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

(...)

## **CRC General Comment No. 3: HIV/AIDS and the rights of the child, 2003<sup>296</sup>**

**Adoption: 17 March 2003**

### **I. INTRODUCTION (1)**

1. The HIV/AIDS epidemic has drastically changed the world in which children live. Millions of children have been infected and have died and many more are gravely affected as HIV spreads through their families and communities. The epidemic impacts on the daily life of younger children, and increases the victimization and marginalization of children, especially those living in particularly difficult circumstances. HIV/AIDS is not a problem of some countries but of the entire world. To truly bring its impact on children under control will require concerted and well-targeted efforts from all countries at all stages of development.
2. Initially children were considered to be only marginally affected by the epidemic.

However, the international community has discovered that, unfortunately, children are at the heart of the problem. According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), the most recent trends are alarming: in most parts of the world the majority of new infections are among young people between the ages of 15 and 24, sometimes younger. Women, including young girls, are also increasingly becoming infected. In most regions of the world, the vast majority of infected women do not know that they are infected and may unknowingly infect their children. Consequently, many States have recently registered an increase in their infant and child mortality rates. Adolescents are also vulnerable to HIV/AIDS because their first sexual experience may take place in an environment in which they have no access to proper information and guidance. Children who use drugs are at high risk.

3. Yet, all children can be rendered vulnerable by the particular circumstances of their lives, especially (a) children who are themselves HIV-infected; (b) children who are affected by the epidemic because of the loss of a parental caregiver or teacher and/or because their families or communities are severely strained by its consequences; and (c) children who are most prone to be infected or affected.

<sup>296</sup> Source: CRC/GC/2003/3, thirty-second session, 13-31 January 2003. General Comment of the Committee on the Rights of the Child (CRC), loc cit. n. 149.

## **II. THE OBJECTIVES OF THE PRESENT GENERAL COMMENT**

4. The objectives of the present General Comment are:

(a) To identify further and strengthen understanding of all the human rights of children in the context of HIV/AIDS;

(b) To promote the realization of the human rights of children in the context of HIV/AIDS, as guaranteed under the Convention on the Rights of the Child (hereafter “the Convention”);

(c) To identify measures and good practices to increase the level of implementation by States of the rights related to the prevention of HIV/AIDS and the support, care and protection of children infected with or affected by this pandemic;

(d) To contribute to the formulation and promotion of child-oriented plans of action, strategies, laws, policies and programmes to combat the spread and mitigate the impact of HIV/AIDS at the national and international levels.

## **III. THE CONVENTION’S PERSPECTIVES ON HIV/AIDS: THE HOLISTIC**

### **CHILD RIGHTS-BASED APPROACH**

5. The issue of children and HIV/AIDS is perceived as mainly a medical or health problem, although in reality it involves a much wider range of issues. In this regard, the right to health (article 24 of the Convention) is, however, central. But HIV/AIDS impacts so heavily on the lives of all children that it affects all their rights - civil, political, economic, social and cultural. The rights embodied in the general principles of the Convention - the right to non-discrimination (art. 2), the right of the child to have his/her interest as a primary consideration (art. 3), the right to life, survival and development (art. 6) and the right to have his/her views respected (art. 12) - should therefore be the guiding themes in the consideration of HIV/AIDS at all levels of prevention, treatment, care and support.

6. Adequate measures to address HIV/AIDS can be undertaken only if the rights of children and adolescents are fully respected. The most relevant rights in this regard, in addition to those enumerated in paragraph 5 above, are the following: the right to access information and material aimed at the promotion of their social, spiritual and moral well-being and physical and mental health (art. 17); the right to preventive health care, sex education and family planning education and services (art.

24 (f)); the right to an appropriate standard of living (art. 27); the right to privacy (art. 16); the right not to be separated from parents (art. 9); the right to be protected from violence (art. 19); the right to special protection and assistance by the State (art. 20); the rights of children with disabilities (art. 23); the right to health (art. 24); the right to social security, including social insurance (art. 26); the right to education and leisure (arts. 28 and 31); the right to be protected from economic and sexual exploitation and abuse, and from illicit use of narcotic drugs (arts. 32, 33, 34 and 36); the right to be protected from abduction, sale and trafficking as well as torture or other cruel, inhuman or degrading treatment or punishment (arts. 35 and 37); and the right to physical and psychological recovery and social reintegration (art. 39). Children are confronted with serious challenges to the above-mentioned rights as a result of the epidemic.

The Convention, and in particular the four general principles with their comprehensive approach, provide a powerful framework for efforts to reduce the negative impact of the pandemic on the lives of children. The holistic rights-based approach required to implement the Convention is the optimal tool for addressing the broader range of issues that relate to prevention, treatment and care efforts.

### **A. The right to non-discrimination (art. 2)**

7. Discrimination is responsible for heightening the vulnerability of children to HIV and AIDS, as well as seriously impacting the lives of children who are affected by HIV/AIDS, or are themselves HIV infected. Girls and boys of parents living with HIV/AIDS are often victims of stigma and discrimination as they too are often assumed to be infected. As a result of discrimination, children are denied access to information, education (see the Committee's General Comment No. 1 on the aims of education), health or social care services or community life. At its extreme, discrimination against HIV-infected children has resulted in their abandonment by their family, community and/or society. Discrimination also fuels the epidemic by making children in particular those belonging to certain groups like children living in remote or rural areas where services are less accessible, more vulnerable to infection. These children are thus doubly victimized.
8. Of particular concern is gender-based discrimination combined with taboos or negative or judgemental attitudes to sexual activity of girls, often limiting their access to preventive measures and other services. Of concern also is discrimination based on sexual orientation. In the design of HIV/AIDS-related strategies, and in keeping with their obligations under the Convention, States parties must give careful consideration to prescribed gender norms within their societies with a

view to eliminating gender-based discrimination as these norms impact on the vulnerability of both girls and boys to HIV/AIDS. States parties should, in particular, recognize that discrimination in the context of HIV/AIDS often impacts girls more severely than boys.

9. All the above-mentioned discriminatory practices are violations of children's rights under the Convention. Article 2 of the Convention obliges States parties to ensure all the rights set forth in the Convention without discrimination of any kind, "irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". The Committee interprets "other status" under article 2 of the Convention to include HIV/AIDS status of the child or his/her parent(s). Laws, policies, strategies and practices should address all forms of discrimination that contribute to increasing the impact of the epidemic. Strategies should also promote education and training programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS.

### **B. Best interests of the child (art. 3)**

10. Policies and programmes for the prevention, care and treatment of HIV/AIDS have generally been designed for adults with scarce attention to the principle of the best interests of the child as a primary consideration. Article 3, paragraph 1, of the Convention states "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". The obligations attached to this right are fundamental to guiding the action of States in relation to HIV/AIDS. The child should be placed at the centre of the response to the pandemic, and strategies should be adapted to children's rights and needs.

### **C. The right to life, survival and development (art. 6)**

11. Children have the right not to have their lives arbitrarily taken, as well as to benefit from economic and social policies that will allow them to survive into adulthood and develop in the broadest sense of the word. State obligation to realize the right to life, survival and development also highlights the need to give careful attention to sexuality as well as to the behaviours and lifestyles of children, even if they do not conform with what society determines to be acceptable under prevailing cultural norms for a particular age group. In this regard, the female child is often subject to harmful traditional practices, such as early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection, including because such practices often

interrupt access to education and information. Effective prevention programmes are only those that acknowledge the realities of the lives of adolescents, while addressing sexuality by ensuring equal access to appropriate information, life skills, and to preventive measures.

#### **D. The right to express views and have them taken into account (art. 12)**

12. Children are rights holders and have a right to participate, in accordance with their evolving capacities, in raising awareness by speaking out about the impact of HIV/AIDS on their lives and in the development of HIV/AIDS policies and programmes. Interventions have been found to benefit children most when they are actively involved in assessing needs, devising solutions, shaping strategies and carrying them out rather than being seen as objects for whom decisions are made. In this regard, the participation of children as peer educators, both within and outside schools, should be actively promoted. States, international agencies and non-governmental organizations must provide children with a supportive and enabling environment to carry out their own initiatives, and to fully participate at both community and national levels in HIV policy and programme conceptualization, design, implementation, coordination, monitoring and review. A variety of approaches are likely to be necessary to ensure the participation of children from all sectors of society, including mechanisms which encourage children, consistent with their evolving capacities, to express their views, have them heard, and given due weight in accordance with their age and maturity (art. 12, para. 1). Where appropriate, the involvement of children living with HIV/AIDS in raising awareness, by sharing their experiences with their peers and others, is critical both to effective prevention and to reducing stigmatization and discrimination. States parties must ensure that children who participate in these awareness-raising efforts do so voluntarily, after being counselled, and that they receive both the social support and legal protection to allow them to lead normal lives during and after their involvement.

#### **E. Obstacles**

13. Experience has shown that many obstacles hinder effective prevention, delivery of care services and support for community initiatives on HIV/AIDS. These are mainly cultural, structural and financial. Denying that a problem exists, cultural practices and attitudes, including taboos and stigmatization, poverty and patronizing attitudes towards children are just some of the obstacles that may block the political and individual commitment needed for effective programmes.
14. With regard to financial, technical and human resources, the



Committee is aware that such resources may not be immediately available. However, concerning this obstacle, the Committee wishes to remind States parties of their obligations under article 4. It further notes that resource constraints should not be used by States parties to justify their failure to take any or enough of the technical or financial measures required. Finally, the Committee wishes to emphasize in this regard the essential role of international cooperation.

#### **IV. PREVENTION, CARE, TREATMENT AND SUPPORT**

15. The Committee wishes to stress that prevention, care, treatment and support are mutually reinforcing elements and provide a continuum within an effective response to HIV/AIDS.

##### **A. Information on HIV prevention and awareness-raising**

16. Consistent with the obligations of States parties in relation to the rights to health and information (arts. 24, 13 and 17), children should have the right to access adequate information related to HIV/AIDS prevention and care, through formal channels (e.g. through educational opportunities and child-targeted media) as well as informal channels (e.g. those targeting street children, institutionalized children or children living in difficult circumstances). States parties are reminded that children require relevant, appropriate and timely information which recognizes the differences in levels of understanding among them, is tailored appropriately to age level and capacity and enables them to deal positively and responsibly with their sexuality in order to protect themselves from HIV infection. The Committee wishes to emphasize that effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, and that, consistent with their obligations to ensure the right to life, survival and development of the child (art. 6), States parties must ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality.
17. Dialogue with community, family and peer counsellors, and the provision of “life skills” education within schools, including skills in communicating on sexuality and healthy living, have been found to be useful approaches to delivering HIV prevention messages to both girls and boys, but different approaches may be necessary to reach different groups of children.

States parties must make efforts to address gender differences as they may impact on the access children have to prevention messages, and ensure that children are reached with appropriate prevention messages

even if they face constraints due to language, religion, disability or other factors of discrimination. Particular attention must be paid to raising awareness among hard-to-reach populations. In this respect, the role of the mass media and/or oral tradition in ensuring that children have access to information and material, as recognized in article 17 of the Convention, is crucial both to providing appropriate information and to reducing stigmatization and discrimination. States parties should support the regular monitoring and evaluation of HIV/AIDS awareness campaigns to ascertain their effectiveness in providing information, reducing ignorance, stigmatization and discrimination, as well as addressing fear and misperceptions concerning HIV and its transmission among children, including adolescents.

### **B. The role of education**

18. Education plays a critical role in providing children with relevant and appropriate information on HIV/AIDS, which can contribute to increased awareness and better understanding of this pandemic and prevent negative attitudes towards victims of HIV/AIDS (see also the Committee's General Comment No. 1 on the aims of education). Furthermore, education can and should empower children to protect themselves from the risk of HIV infection.

In this regard, the Committee wishes to remind States parties of their obligation to ensure that primary education is available to all children, whether infected, orphaned or otherwise affected by HIV/AIDS. In many communities where HIV has spread widely, children from affected families, in particular girls, are facing serious difficulties staying in school and the number of teachers and other school employees lost to AIDS is limiting and threatening to destroy the ability of children to access education. States parties must make adequate provision to ensure that children affected by HIV/AIDS can stay in school and ensure the qualified replacement of sick teachers so that children's regular attendance at schools is not affected, and that the right to education (art. 28) of all children living within these communities is fully protected.

19. States parties must make every effort to ensure that schools are safe places for children, which offer them security and do not contribute to their vulnerability to HIV infection. In accordance with article 34 of the Convention, States parties are under obligation to take all appropriate measures to prevent, *inter alia*, the inducement or coercion of a child to engage in any unlawful sexual activity.

### **C. Child and adolescent sensitive health services**

20. The Committee is concerned that health services are generally still insufficiently responsive to the needs of children under 18 years of age, in particular adolescents. As the Committee has noted on numerous occasions, children are more likely to use services that are friendly and supportive, provide a wide range of services and information, are geared to their needs, give them the opportunity to participate in decisions affecting their health, are accessible, affordable, confidential and non-judgemental, do not require parental consent and are not discriminatory. In the context of HIV/AIDS and taking into account the evolving capacities of the child, States parties are encouraged to ensure that health services employ trained personnel who fully respect the rights of children to privacy (art. 16) and non-discrimination in offering them access to HIV-related information, voluntary counselling and testing, knowledge of their HIV status, confidential sexual and reproductive health services, and free or low-cost contraceptive methods and services, as well as HIV-related care and treatment if and when needed, including for the prevention and treatment of health problems related to HIV/AIDS, e.g. tuberculosis and opportunistic infections.
21. In some countries, even when child- and adolescent-friendly HIV-related services are available, they are not sufficiently accessible to children with disabilities, indigenous children, children belonging to minorities, children living in rural areas, children living in extreme poverty or children who are otherwise marginalized within the society. In others, where the health system's overall capacity is already strained, children with HIV have been routinely denied access to basic health care. States parties must ensure that services are provided to the maximum extent possible to all children living within their borders, without discrimination, and that they sufficiently take into account differences in gender, age and the social, economic, cultural and political context in which children live.

### **D. HIV counselling and testing**

22. The accessibility of voluntary, confidential HIV counselling and testing services, with due attention to the evolving capacities of the child, is fundamental to the rights and health of children. Such services are critical to children's ability to reduce the risk of contracting or transmitting HIV, to access HIV-specific care, treatment and support, and to better plan for their futures. Consistent with their obligation under article 24 of the Convention to ensure that no child is deprived of his or her right of access to necessary health services, States parties should ensure access to voluntary, confidential HIV counselling and

testing for all children.

23. The Committee wishes to stress that, as the duty of States parties is first and foremost to ensure that the rights of the child are protected, States parties must refrain from imposing mandatory HIV/AIDS testing of children in all circumstances and ensure protection against it.

While the evolving capacities of the child will determine whether consent is required from him or her directly or from his or her parent or guardian, in all cases, consistent with the child's right to receive information under articles 13 and 17 of the Convention, States parties must ensure that, prior to any HIV testing, whether by health-care providers in relation to children who are accessing health services for another medical condition or otherwise, the risks and benefits of such testing are sufficiently conveyed so that an informed decision can be made.

24. States parties must protect the confidentiality of HIV test results, consistent with the obligation to protect the right to privacy of children (art. 16), including within health and social welfare settings, and information on the HIV status of children may not be disclosed to third parties, including parents, without the child's consent.

### **E. Mother-to-child transmission**

25. Mother-to-child transmission (MTCT) is responsible for the majority of HIV infections in infants and young children. Infants and young children can be infected with HIV during pregnancy, labour and delivery, and through breastfeeding. States parties are requested to ensure implementation of the strategies recommended by the United Nations agencies to prevent HIV infection in infants and young children. These include: (a) the primary prevention of HIV infection among parents-to-be; (b) the prevention of unintended pregnancies in HIV-infected women, (c) the prevention of HIV transmission from HIV-infected women to their infants; and (d) the provision of care, treatment and support to HIV-infected women, their infants and families.
26. To prevent MTCT of HIV, States parties must take steps, including the provision of essential drugs, e.g. anti-retroviral drugs, appropriate antenatal, delivery and post-partum care, and making HIV voluntary counselling and testing services available to pregnant women and their partners. The Committee recognizes that anti-retroviral drugs administered to a woman during pregnancy and/or labour and, in some regimens, to her infant, have been shown to significantly reduce the risk of transmission from mother to child. However, in addition, States

parties should provide support for mothers and children, including counselling on infant feeding options. States parties are reminded that counselling of HIV-positive mothers should include information about the risks and benefits of different infant feeding options, and guidance on selecting the option most likely to be suitable for their situation. Follow-up support is also required in order for women to be able to implement their selected option as safely as possible.

27. Even in populations with high HIV prevalence, the majority of infants are born to women who are not HIV-infected. For the infants of HIV-negative women and women who do not know their HIV status, the Committee wishes to emphasize, consistent with articles 6 and 24 of the Convention, that breastfeeding remains the best feeding choice. For the infants of HIV-positive mothers, available evidence indicates that breastfeeding can add to the risk of HIV transmission by 10-20 per cent, but that lack of breastfeeding can expose children to an increased risk of malnutrition or infectious diseases other than HIV. United Nations agencies have recommended that, where replacement feeding is affordable, feasible, acceptable, sustainable and safe, avoidance of all breastfeeding by HIV-infected mothers is recommended; otherwise, exclusive breastfeeding is recommended during the first months of life and should then be discontinued as soon as it is feasible.

#### **F. Treatment and care**

28. The obligations of States parties under the Convention extend to ensuring that children have sustained and equal access to comprehensive treatment and care, including necessary HIV-related drugs, goods and services on a basis of non-discrimination. It is now widely recognized that comprehensive treatment and care includes anti-retroviral and other drugs, diagnostics and related technologies for the care of HIV/AIDS, related opportunistic infections and other conditions, good nutrition, and social, spiritual and psychological support, as well as family, community and home-based care. In this regard, States parties should negotiate with the pharmaceutical industry in order to make the necessary medicines locally available at the lowest costs possible. Furthermore, States parties are requested to affirm, support and facilitate the involvement of communities in the provision of comprehensive HIV/AIDS treatment, care and support, while at the same time complying with their own obligations under the Convention.

States parties are called upon to pay special attention to addressing those factors within their societies that hinder equal access to treatment, care and support for all children.

### **G. Involvement of children in research**

29. Consistent with article 24 of the Convention, States parties must ensure that HIV/AIDS research programmes include specific studies that contribute to effective prevention, care, treatment and impact reduction for children. States parties must, nonetheless, ensure that children do not serve as research subjects until an intervention has already been thoroughly tested on adults. Rights and ethical concerns have arisen in relation to HIV/AIDS biomedical research, HIV/ADS operations, and social, cultural and behavioural research. Children have been subjected to unnecessary or inappropriately designed research with little or no voice to either refuse or consent to participation. In line with the child's evolving capacities, consent of the child should be sought and consent may be sought from parents or guardians if necessary, but in all cases consent must be based on full disclosure of the risks and benefits of research to the child. States parties are further reminded to ensure that the privacy rights of children, in line with their obligations under article 16 of the Convention, are not inadvertently violated through the research process and that personal information about children, which is accessed through research, is, under no circumstances, used for purposes other than that for which consent was given. States parties must make every effort to ensure that children and, according to their evolving capacities, their parents and/or their guardians participate in decisions on research priorities and that a supportive environment is created for children who participate in such research.

### **V. VULNERABILITY AND CHILDREN NEEDING SPECIAL PROTECTION**

30. The vulnerability of children to HIV/AIDS resulting from political, economic, social, cultural and other factors determines the likelihood of their being left with insufficient support to cope with the impact of HIV/AIDS on their families and communities, exposed to the risk of infection, subjected to inappropriate research, or deprived of access to treatment, care and support if and when HIV infection sets in. Vulnerability to HIV/AIDS is most acute for children living in refugee and internally displaced persons camps, children in detention, children living in institutions, as well as children living in extreme poverty, children living in situations of armed conflict, child soldiers, economically and sexually exploited children, and disabled, migrant, minority, indigenous, and street children. However, all children can be rendered vulnerable by the particular circumstances of their lives. Even in times of severe resource constraints, the Committee wishes to note that the rights of vulnerable members of society must be

protected and that many measures can be pursued with minimum resource implications. Reducing vulnerability to HIV/AIDS requires first and foremost that children, their families and communities be empowered to make informed choices about decisions, practices or policies affecting them in relation to HIV/AIDS.

#### **A. Children affected and orphaned by HIV/AIDS**

31. Special attention must be given to children orphaned by AIDS and to children from affected families, including child-headed households, as these impact on vulnerability to HIV infection. For children from families affected by HIV/AIDS, the stigmatization and social isolation they experience may be accentuated by the neglect or violation of their rights, in particular discrimination resulting in a decrease or loss of access to education, health and social services. The Committee wishes to underline the necessity of providing legal, economic and social protection to affected children to ensure their access to education, inheritance, shelter and health and social services, as well as to make them feel secure in disclosing their HIV status and that of their family members when the children deem it appropriate. In this respect, States parties are reminded that these measures are critical to the realization of the rights of children and to giving them the skills and support necessary to reduce their vulnerability and risk of becoming infected.
32. The Committee wishes to emphasize the critical implications of proof of identity for children affected by HIV/AIDS, as it relates to securing recognition as a person before the law, safeguarding the protection of rights, in particular to inheritance, education, health and other social services, as well as to making children less vulnerable to abuse and exploitation, particularly if separated from their families due to illness or death. In this respect, birth registration is critical to ensuring the rights of the child and is also necessary to minimize the impact of HIV/AIDS on the lives of affected children. States parties are, therefore, reminded of their obligation under article 7 of the Convention to ensure that systems are in place for the registration of every child at or immediately after birth.
33. The trauma HIV/AIDS brings to the lives of orphans often begins with the illness and death of one of their parents, and is frequently compounded by the effects of stigmatization and discrimination. In this respect, States parties are particularly reminded to ensure that both law and practice support the inheritance and property rights of orphans, with particular attention to the underlying gender-based discrimination which may interfere with the fulfilment of these rights. Consistent with their obligations under article 27 of the Convention, States parties must also support and strengthen the capacity of families



and communities of children orphaned by AIDS to provide them with a standard of living adequate for their physical, mental, spiritual, moral, economic and social development, including access to psychosocial care, as needed.

34. Orphans are best protected and cared for when efforts are made to enable siblings to remain together, and in the care of relatives or family members. The extended family, with the support of the surrounding community, may be the least traumatic and therefore the best way to care for orphans when there are no other feasible alternatives. Assistance must be provided so that, to the maximum extent possible, children can remain within existing family structures. This option may not be available due to the impact HIV/AIDS has on the extended family. In that case, States parties should provide, as far as possible, for family-type alternative care (e.g. foster care). States parties are encouraged to provide support, financial and otherwise, when necessary, to child-headed households. States parties must ensure that their strategies recognize that communities are at the front line of the response to HIV/AIDS and that these strategies are designed to assist communities in determining how best to provide support to the orphans living there.
35. Although institutionalized care may have detrimental effects on child development, States parties may, nonetheless, determine that it has an interim role to play in caring for children orphaned by HIV/AIDS when family-based care within their own communities is not a possibility. It is the opinion of the Committee that any form of institutionalized care for children should only serve as a measure of last resort, and that measures must be fully in place to protect the rights of the child and guard against all forms of abuse and exploitation. In keeping with the right of children to special protection and assistance when within these environments, and consistent with articles 3, 20 and 25 of the Convention, strict measures are needed to ensure that such institutions meet specific standards of care and comply with legal protection safeguards.

States parties are reminded that limits must be placed on the length of time children spend in these institutions, and programmes must be developed to support any children who stay in these institutions, whether infected or affected by HIV/AIDS, to successfully reintegrate them into their communities.

### **B. Victims of sexual and economic exploitation**

36. Girls and boys who are deprived of the means of survival and development, particularly children orphaned by AIDS, may be subjected to sexual and economic exploitation in a variety of ways,



including the exchange of sexual services or hazardous work for money to survive, support their sick or dying parents and younger siblings, or to pay for school fees. Children who are infected or directly affected by HIV/AIDS may find themselves at a double disadvantage - experiencing discrimination on the basis of both their social and economic marginalization and their, or their parents', HIV status. Consistent with the right of children under articles 32, 34, 35 and 36 of the Convention, and in order to reduce children's vulnerability to HIV/AIDS, States parties are under obligation to protect children from all forms of economic and sexual exploitation, including ensuring they do not fall prey to prostitution networks, and that they are protected from performing any work likely to be prejudicial to, or to interfere with, their education, health, or physical, mental, spiritual, moral or social development. States parties must take bold action to protect children from sexual and economic exploitation, trafficking and sale and, consistent with the rights under article 39, create opportunities for those who have been subjected to such treatment to benefit from the support and caring services of the State and non-governmental entities engaged in these issues.

### **C. Victims of violence and abuse**

37. Children may be exposed to various forms of violence and abuse which may increase the risk of their becoming HIV-infected, and may also be subjected to violence as a result of their being infected or affected by HIV/AIDS. Violence, including rape and other forms of sexual abuse, can occur in the family or foster setting or may be perpetrated by those with specific responsibilities towards children, including teachers and employees of institutions working with children, such as prisons and institutions concerned with mental health and other disabilities. In keeping with the rights of the child set forth in article 19 of the Convention, States parties have the obligation to protect children from all forms of violence and abuse, whether at home, in school or other institutions, or in the community.
38. Programmes must be specifically adapted to the environment in which children live, to their ability to recognize and report abuses and to their individual capacity and autonomy. The Committee considers that the relationship between HIV/AIDS and the violence or abuse suffered by children in the context of war and armed conflict requires specific attention. Measures to prevent violence and abuse in these situations are critical, and States parties must ensure the incorporation of HIV/AIDS and child rights issues in addressing and supporting children – girls and boys - who were used by military or other uniformed personnel to provide domestic help or sexual services, or

who are internally displaced or living in refugee camps. In keeping with States parties' obligations, including under articles 38 and 39 of the Convention, active information campaigns, combined with the counselling of children and mechanisms for the prevention and early detection of violence and abuse, must be put in place within conflict- and disaster-affected regions, and must form part of national and community responses to HIV/AIDS.

### **Substance abuse**

39. The use of substances, including alcohol and drugs, may reduce the ability of children to exert control over their sexual conduct and, as a result, may increase their vulnerability to HIV infection. Injecting practices using unsterilized instruments further increase the risk of HIV transmission. The Committee notes that greater understanding of substance use behaviours among children is needed, including the impact that neglect and violation of the rights of the child has on these behaviours. In most countries, children have not benefited from pragmatic HIV prevention programmes related to substance use, which even when they do exist have largely targeted adults. The Committee wishes to emphasize that policies and programmes aimed at reducing substance use and HIV transmission must recognize the particular sensitivities and lifestyles of children, including adolescents, in the context of HIV/AIDS prevention.

Consistent with the rights of children under articles 33 and 24 of the Convention, States parties are obligated to ensure the implementation of programmes which aim to reduce the factors that expose children to the use of substances, as well as those that provide treatment and support to children who are abusing substances.

## **VI. RECOMMENDATIONS**

40. The Committee hereby reaffirms the recommendations, which emerged at the day of general discussion on children living in a world with HIV/AIDS (CRC/C/80), and calls upon States parties:
  - (a) To adopt and implement national and local HIV/AIDS-related policies, including effective plans of action, strategies, and programmes that are child-centred, rights-based and incorporate the rights of the child under the Convention, including by taking into account the recommendations made in the previous paragraphs of the present General Comment and those adopted at the United Nations General Assembly special session on children (2002);
  - (b) To allocate financial, technical and human resources, to the maximum

extent possible, to supporting national and community-based action (art. 4), and, where appropriate, within the context of international cooperation (see paragraph 41 below).

(c) To review existing laws or enact new legislation with a view to implementing fully article 2 of the Convention, and in particular to expressly prohibiting discrimination based on real or perceived HIV/AIDS status so as to guarantee equal access for of all children to all relevant services, with particular attention to the child's right to privacy and confidentiality and to other recommendations made by the Committee in the previous paragraphs relevant to legislation;

(d) To include HIV/AIDS plans of action, strategies, policies and programmes in the work of national mechanisms responsible for monitoring and coordinating children's rights and to consider the establishment of a review procedure, which responds specifically to complaints of neglect or violation of the rights of the child in relation to HIV/AIDS, whether this entails the creation of a new legislative or administrative body or is entrusted to an existing national institution;

(e) To reassess their HIV-related data collection and evaluation to ensure that they adequately cover children as defined under the Convention, are disaggregated by age and gender ideally in five-year age groups, and include, as far as possible, children belonging to vulnerable groups and those in need of special protection;

(f) To include, in their reporting process under article 44 of the Convention, information on national HIV/AIDS policies and programmes and, to the extent possible, budgeting and resource allocations at the national, regional and local levels, as well as within these breakdowns the proportions allocated to prevention, care, research and impact reduction.

Specific attention must be given to the extent to which these programmes and policies explicitly recognize children (in the light of their evolving capacities) and their rights, and the extent to which HIV-related rights of children are dealt with in laws, policies and practices, with specific attention to discrimination against children on the basis of their HIV status, as well as because they are orphans or the children of parents living with HIV/AIDS. The Committee requests States parties to provide a detailed indication in their reports of what they consider to be the most important priorities within their jurisdiction in relation to children and HIV/AIDS, and to outline the programme of activities they intend to pursue over the coming five years in order to address the problems identified. This would allow activities to be progressively assessed over time.

41. In order to promote international cooperation, the Committee calls

upon UNICEF, World Health Organization, United Nations Population Fund, UNAIDS and other relevant international bodies, organizations and agencies to contribute systematically, at the national level, to efforts to ensure the rights of children in the context of HIV/AIDS, and also to continue to work with the Committee to improve the rights of the child in the context of HIV/AIDS. Further, the Committee urges States providing development cooperation to ensure that HIV/AIDS strategies are so designed as to take fully into account the rights of the child.

42. Non-governmental organizations, as well as community-based groups and other civil society actors, such as youth groups, faith-based organizations, women's organizations and traditional leaders, including religious and cultural leaders, all have a vital role to play in the response to the HIV/AIDS pandemic. States parties are called upon to ensure an enabling environment for participation by civil society groups, which includes facilitating collaboration and coordination among the various players, and that these groups are given the support needed to enable them to operate effectively without impediment (in this regard, States parties are specifically encouraged to support the full involvement of people living with HIV/AIDS, with particular attention to the inclusion of children, in the provision of HIV/AIDS prevention, care, treatment and support services).

### Notes

1. At its seventeenth session (1998), the Committee on the Rights of the Child held a day of general discussion on the theme of HIV/AIDS and children's rights, during which it recommended that a number of actions be taken, including facilitating the engagement of States parties on HIV/AIDS issues in relation to the rights of the child. Human rights in relation to HIV/AIDS has also been discussed at the Eighth Meeting of Persons Chairing the Human Rights Treaty Bodies in 1997 and has been taken up by the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women. Similarly, HIV/AIDS has been discussed annually by the Commission on Human Rights for over a decade.

UNAIDS and the United Nations Children's Fund (UNICEF) have emphasized the rights of the child in relation to HIV/AIDS in all aspects of their work, and the World AIDS Campaign for 1997 focused on "Children Living in a World with AIDS" and for 1998 on "Force for Change: World AIDS Campaign with Young People". UNAIDS and the Office of the United Nations High Commissioner for Human Rights have also produced *The International Guidelines on HIV/AIDS and Human Rights* (1998) and its *Revised Guideline 6* (2002) to

promote and protect human rights in the context of HIV/AIDS. At the international level, HIV/AIDS-related rights have been recognized in the *Declaration of Commitment on HIV/AIDS*, adopted at the United Nations General Assembly special session, *A World Fit for Children*, adopted at the United Nations General Assembly special session on children, and in other international and regional documents.

## **CRC General Comment No. 4: adolescent health and development in the context of the Convention on the Rights of the Child, 2003<sup>297</sup>**

**Adoption: 1 July 2003**

### **Introduction**

1. The Convention on the Rights of the Child defines a child as “every human being below the age of 18 years unless, under the law applicable, majority is attained earlier” (art. 1). Consequently, adolescents up to 18 years old are holders of all the rights enshrined in the Convention; they are entitled to special protection measures and, according to their evolving capacities, they can progressively exercise their rights (art. 5).
2. Adolescence is a period characterized by rapid physical, cognitive and social changes, including sexual and reproductive maturation; the gradual building up of the capacity to assume adult behaviours and roles involving new responsibilities requiring new knowledge and skills. While adolescents are in general a healthy population group, adolescence also poses new challenges to health and development owing to their relative vulnerability and pressure from society, including peers, to adopt risky health behaviour. These challenges include developing an individual identity and dealing with one’s sexuality. The dynamic transition period to adulthood is also generally a period of positive changes, prompted by the significant capacity of adolescents to learn rapidly, to experience new and diverse situations, to develop and use critical thinking, to familiarize themselves with freedom, to be creative and to socialize.
3. The Committee on the Rights of the Child notes with concern that in implementing their obligations under the Convention, States parties have not given sufficient attention to the specific concerns of adolescents as rights holders and to promoting their health and development. This has motivated the Committee to adopt the present general comment in order to raise awareness and provide States parties with guidance and support in their efforts to guarantee the respect for, protection and fulfilment of the rights of adolescents, including through the formulation of specific strategies and policies.
4. The Committee understands the concepts of “health and development” more broadly than being strictly limited to the provisions defined in articles 6 (right to life, survival and development) and 24 (right to health) of the Convention. One of the aims of this general comment is precisely to identify the main human rights that need to be promoted

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<sup>297</sup> CRC, U.N. Doc. CRC/GC/2003/4 (1 July 2003).

and protected in order to ensure that adolescents do enjoy the highest attainable standard of health, develop in a well-balanced manner, and are adequately prepared to enter adulthood and assume a constructive role in their communities and in society at large. This general comment should be read in conjunction with the Convention and its two Optional Protocols on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict, as well as other relevant international human rights norms and standards<sup>(1)</sup>

## **I. Fundamental principles and other obligations of States parties**

5. As recognized by the World Conference on Human Rights (1993) and repeatedly stated by the Committee, children's rights too are indivisible and interrelated. In addition to articles 6 and 24, other provisions and principles of the Convention are crucial in guaranteeing that adolescents fully enjoy their right to health and development.

### **The right to non-discrimination**

6. States parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2), including with regard to "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". These grounds also cover adolescents' sexual orientation and health status (including HIV/AIDS and mental health). Adolescents who are subject to discrimination are more vulnerable to abuse, other types of violence and exploitation, and their health and development are put at greater risk. They are therefore entitled to special attention and protection from all segments of society.

### **Appropriate guidance in the exercise of rights**

7. The Convention acknowledges the responsibilities, rights and duties of parents (or other persons legally responsible for the child) "to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention" (art. 5). The Committee believes that parents or other persons legally responsible for the child need to fulfil with care their right and responsibility to provide direction and guidance to their adolescent children in the exercise by the latter of their rights. They have an obligation to take into account the adolescents' views, in accordance with their age and maturity, and to provide a safe and supportive environment in which the adolescent can develop. Adolescents need to be recognized by the members of

their family environment as active rights holders who have the capacity to become full and responsible citizens, given the proper guidance and direction.

### **Respect for the views of the child**

8. The right to express views freely and have them duly taken into account (art. 12) is also fundamental in realizing adolescents' right to health and development. States parties need to ensure that adolescents are given a genuine chance to express their views freely on all matters affecting them, especially within the family, in school, and in their communities. In order for adolescents to be able safely and properly to exercise this right, public authorities, parents and other adults working with or for children need to create an environment based on trust, information-sharing, the capacity to listen and sound guidance that is conducive for adolescents' participating equally including in decision-making processes.

### **Legal and judicial measures and processes**

9. Under article 4 of the Convention, "States parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized" therein. In the context of the rights of adolescents to health and development, States parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent, marriage and the possibility of medical treatment without parental consent. These minimum ages should be the same for boys and girls (article 2 of the Convention) and closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity (arts. 5 and 12 to 17). Further, adolescents need to have easy access to individual complaint systems as well as judicial and appropriate non-judicial redress mechanisms that guarantee fair and due process, with special attention to the right to privacy (art. 16).

### **Civil rights and freedoms**

10. The Convention defines the civil rights and freedoms of children and adolescents in its articles 13 to 17. These are fundamental in guaranteeing the right to health and development of adolescents. Article 17 states that the child has the right to "access information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health". The right of adolescents to access appropriate information is crucial if States



parties are to promote cost-effective measures, including through laws, policies and programmes, with regard to numerous health-related situations, including those covered in articles 24 and 33 such as family planning, prevention of accidents, protection from harmful traditional practices, including early marriages and female genital mutilation, and the abuse of alcohol, tobacco and other harmful substances.

11. In order to promote the health and development of adolescents, States parties are also encouraged to respect strictly their right to privacy and confidentiality, including with respect to advice and counselling on health matters (art. 16). Health-care providers have an obligation to keep confidential medical information concerning adolescents, bearing in mind the basic principles of the Convention. Such information may only be disclosed with the consent of the adolescent, or in the same situations applying to the violation of an adult's confidentiality. Adolescents deemed mature enough to receive counselling without the presence of a parent or other person are entitled to privacy and may request confidential services, including treatment.

### **Protection from all forms of abuse, neglect, violence and exploitation (2)**

12. States parties must take effective measures to ensure that adolescents are protected from all forms of violence, abuse, neglect and exploitation (arts. 19, 32-36 and 38), paying increased attention to the specific forms of abuse, neglect, violence and exploitation that affects this age group. In particular, they should adopt special measures to ensure the physical, sexual and mental integrity of adolescents with disabilities, who are particularly vulnerable to abuse and neglect. States parties should also ensure that adolescents affected by poverty who are socially marginalized are not criminalized. In this regard, financial and human resources need to be allocated to promote research that would inform the adoption of effective local and national laws, policies and programmes. Policies and strategies should be reviewed regularly and revised accordingly. In taking these measures, States parties have to take into account the evolving capacities of adolescents and involve them in an appropriate manner in developing measures, including programmes, designed to protect them. In this context, the Committee emphasizes the positive impact that peer education can have, and the positive influence of proper role models, especially those in the worlds of arts, entertainment and sports.

### **Data collection**

13. Systematic data collection is necessary for States parties to be able to monitor the health and development of adolescents. States parties

should adopt data-collection mechanisms that allow desegregation by sex, age, origin and socio-economic status so that the situation of different groups can be followed. Data should also be collected to study the situation of specific groups such as ethnic and/or indigenous minorities, migrant or refugee adolescents, adolescents with disabilities, working adolescents, etc. Where appropriate, adolescents should participate in the analysis to ensure that the information is understood and utilized in an adolescent-sensitive way.

## **II. Creating a safe and supportive environment**

14. The health and development of adolescents are strongly determined by the environments in which they live. Creating a safe and supportive environment entails addressing attitudes and actions of both the immediate environment of the adolescent - family, peers, schools and services - as well as the wider environment created by, *inter alia*, community and religious leaders, the media, national and local policies and legislation. The promotion and enforcement of the provisions and principles of the Convention, especially articles 2-6, 12-17, 24, 28, 29 and 31, are key to guaranteeing adolescents' right to health and development. States parties should take measures to raise awareness and stimulate and/or regulate action through the formulation of policy or the adoption of legislation and the implementation of programmes specifically for adolescents.
15. The Committee stresses the importance of the family environment, including the members of the extended family and community or other persons legally responsible for the child or adolescent (arts. 5 and 18). While most adolescents grow up in well-functioning family environments, for some the family does not constitute a safe and supportive milieu.
16. The Committee calls upon States parties to develop and implement, in a manner consistent with adolescents' evolving capacities, legislation, policies and programmes to promote the health and development of adolescents by (a) providing parents (or legal guardians) with appropriate assistance through the development of institutions, facilities and services that adequately support the well-being of adolescents, including, when needed, the provision of material assistance and support with regard to nutrition, clothing and housing (art. 27 (3)); (b) providing adequate information and parental support to facilitate the development of a relationship of trust and confidence in which issues regarding, for example, sexuality and sexual behaviour and risky lifestyles can be openly discussed and acceptable solutions found that respect the adolescent's rights (art. 27 (3)); (c) providing adolescent mothers and fathers with support and guidance for both their

own and their children's well-being (art. 24 (f), 27 (2-3)); (d) giving, while respecting the values and norms of ethnic and other minorities, special attention, guidance and support to adolescents and parents (or legal guardians), whose traditions and norms may differ from those in the society where they live; and (e) ensuring that interventions in the family to protect the adolescent and, when necessary, separate her/him from the family, e.g. in case of abuse or neglect, are in accordance with applicable laws and procedures. Such laws and procedures should be reviewed to ensure that they conform to the principles of the Convention.

17. The school plays an important role in the life of many adolescents, as the venue for learning, development and socialization. Article 29 (1) states that education must be directed to "the development of the child's personality, talents and mental and physical abilities to their fullest potential". In addition, general comment No. 1 on the aims of education states that "Education must also be aimed at ensuring that ... no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills should include ... the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle [and] good social relationships ...". Considering the importance of appropriate education for the current and future health and development of adolescents, as well as for their children, the Committee urges States parties, in line with articles 28 and 29 of the Convention to (a) ensure that quality primary education is compulsory and available, accessible and free to all and that secondary and higher education are available and accessible to all adolescents; (b) provide well-functioning school and recreational facilities which do not pose health risks to students, including water and sanitation and safe journeys to school; (c) take the necessary actions to prevent and prohibit all forms of violence and abuse, including sexual abuse, corporal punishment and other inhuman, degrading or humiliating treatment or punishment in school, by school personnel as well as among students; (d) initiate and support measures, attitudes and activities that promote healthy behaviour by including relevant topics in school curricula.
18. During adolescence, an increasing number of young people are leaving school to start working to help support their families or for wages in the formal or informal sector. Participation in work activities in accordance with international standards, as long as it does not jeopardize the enjoyment of any of the other rights of adolescents, including health and education, may be beneficial for the development of the adolescent. The Committee urges States parties to take all necessary measures to abolish all forms of child labour, starting

with the worst forms, to continuously review national regulations on minimum ages for employment with a view to making them compatible with international standards, and to regulate the working environment and conditions for adolescents who are working (in accordance with article 32 of the Convention, as well as ILO Conventions Nos. 138 and 182), so as to ensure that they are fully protected and have access to legal redress mechanisms.

19. The Committee also stresses that in accordance with article 23 (3) of the Convention, the special rights of adolescents with disabilities should be taken into account and assistance provided to ensure that the disabled child/adolescent has effective access to and receives good quality education. States should recognize the principle of equal primary, secondary and tertiary educational opportunities for disabled children/adolescents, where possible in regular schools.
20. The Committee is concerned that early marriage and pregnancy are significant factors in health problems related to sexual and reproductive health, including HIV/AIDS. Both the legal minimum age and actual age of marriage, particularly for girls, are still very low in several States parties. There are also non-health-related concerns: children who marry, especially girls, are often obliged to leave the education system and are marginalized from social activities. Further, in some States parties married children are legally considered adults, even if they are under 18, depriving them of all the special protection measures they are entitled under the Convention. The Committee strongly recommends that States parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys. The Committee on the Elimination of Discrimination against Women has made a similar recommendation (general comment No. 21 of 1994).
21. In most countries accidental injuries or injuries due to violence are a leading cause of death or permanent disability among adolescents. In that respect, the Committee is concerned about the injuries and death resulting from road traffic accidents, which affect adolescents disproportionately. States parties should adopt and enforce legislation and programmes to improve road safety, including driving education for and examination of adolescents and the adoption or strengthening of legislation known to be highly effective such as the obligations to have a valid driver's licence, wear seat belts and crash helmets, and the designation of pedestrian areas.
22. The Committee is also very concerned about the high rate of suicide among this age group. Mental disorders and psychosocial illness are

relatively common among adolescents. In many countries symptoms such as depression, eating disorders and self-destructive behaviours, sometimes leading to self-inflicted injuries and suicide, are increasing. They may be related to, *inter alia*, violence, ill-treatment, abuse and neglect, including sexual abuse, unrealistically high expectations, and/or bullying or hazing in and outside school. States parties should provide these adolescents with all the necessary services.

23. Violence results from a complex interplay of individual, family, community and societal factors. Vulnerable adolescents such as those who are homeless or who are living in institutions, who belong to gangs or who have been recruited as child soldiers are especially exposed to both institutional and interpersonal violence. Under article 19 of the Convention, States parties must take all appropriate measures<sup>(3)</sup> to prevent and eliminate: (a) institutional violence against adolescents, including through legislation and administrative measures in relation to public and private institutions for adolescents (schools, institutions for disabled adolescents, juvenile reformatories, etc.), and training and monitoring of personnel in charge of institutionalized children or who otherwise have contact with children through their work, including the police; and (b) interpersonal violence among adolescents, including by supporting adequate parenting and opportunities for social and educational development in early childhood, fostering non-violent cultural norms and values (as foreseen in article 29 of the Convention), strictly controlling firearms and restricting access to alcohol and drugs.
24. In light of articles 3, 6, 12, 19 and 24 (3) of the Convention, States parties should take all effective measures to eliminate all acts and activities which threaten the right to life of adolescents, including honour killings. The Committee strongly urges States parties to develop and implement awareness-raising campaigns, education programmes and legislation aimed at changing prevailing attitudes, and address gender roles and stereotypes that contribute to harmful traditional practices. Further, States parties should facilitate the establishment of multidisciplinary information and advice centres regarding the harmful aspects of some traditional practices, including early marriage and female genital mutilation.
25. The Committee is concerned about the influence exerted on adolescent health behaviours by the marketing of unhealthy products and lifestyles. In line with article 17 of the Convention, States parties are urged to protect adolescents from information that is harmful to their health and development, while underscoring their right to information and material from diverse national and international sources. States parties are therefore urged to regulate or prohibit information on and

marketing of substances such as alcohol and tobacco, particularly when it targets children and adolescents.<sup>(4)</sup>

### III. Information, skills development, counselling, and health services

26. Adolescents have the right to access adequate information essential for their health and development and for their ability to participate meaningfully in society. It is the obligation of States parties to ensure that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practise healthy behaviours. This should include information on the use and abuse, of tobacco, alcohol and other substances, safe and respectful social and sexual behaviours, diet and physical activity.
27. In order to act adequately on the information, adolescents need to develop the skills necessary, including self-care skills, such as how to plan and prepare nutritionally balanced meals and proper personal hygiene habits, and skills for dealing with particular social situations such as interpersonal communication, decision-making, and coping with stress and conflict. States parties should stimulate and support opportunities to build such skills through, *inter alia*, formal and informal education and training programmes, youth organizations and the media.
28. In light of articles 3, 17 and 24 of the Convention, States parties should provide adolescents with access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs). In addition, States parties should ensure that they have access to appropriate information, regardless of their marital status and whether their parents or guardians consent. It is essential to find proper means and methods of providing information that is adequate and sensitive to the particularities and specific rights of adolescent girls and boys. To this end, States parties are encouraged to ensure that adolescents are actively involved in the design and dissemination of information through a variety of channels beyond the school, including youth organizations, religious, community and other groups and the media.
29. Under article 24 of the Convention, States parties are urged to provide adequate treatment and rehabilitation for adolescents with mental disorders, to make the community aware of the early signs and symptoms and the seriousness of these conditions, and to protect adolescents from undue pressures, including psychosocial stress. States parties are also urged to combat discrimination and stigma surrounding mental disorders, in line with their obligations under

article 2. Every adolescent with a mental disorder has the right to be treated and cared for, as far as possible, in the community in which he or she lives. Where hospitalization or placement in a psychiatric institution is necessary, this decision should be made in accordance with the principle of the best interests of the child. In the event of hospitalization or institutionalization, the patient should be given the maximum possible opportunity to enjoy all his or her rights as recognized under the Convention, including the rights to education and to have access to recreational activities(5). Where appropriate, adolescents should be separated from adults. States parties must ensure that adolescents have access to a personal representative other than a family member to represent their interests, when necessary and appropriate(6). In accordance with article 25 of the Convention, States parties should undertake periodic review of the placement of adolescents in hospitals or psychiatric institutions.

30. Adolescents, both girls and boys, are at risk of being infected with and affected by STDs, including HIV/AIDS (7). States should ensure that appropriate goods, services and information for the prevention and treatment of STDs, including HIV/AIDS, are available and accessible. To this end, States parties are urged (a) to develop effective prevention programmes, including measures aimed at changing cultural views about adolescents' need for contraception and STD prevention and addressing cultural and other taboos surrounding adolescent sexuality; (b) to adopt legislation to combat practices that either increase adolescents' risk of infection or contribute to the marginalization of adolescents who are already infected with STDs, including HIV; (c) to take measures to remove all barriers hindering the access of adolescents to information, preventive measures such as condoms, and care.
31. Adolescent girls should have access to information on the harm that early marriage and early pregnancy can cause, and those who become pregnant should have access to health services that are sensitive to their rights and particular needs. States parties should take measures to reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices, and to support adolescent parents. Young mothers, especially where support is lacking, may be prone to depression and anxiety, compromising their ability to care for their child. The Committee urges States parties (a) to develop and implement programmes that provide access to sexual and reproductive health services, including family planning, contraception and safe abortion services where abortion is not against the law, adequate and comprehensive obstetric care and counselling; (b) to foster positive and supportive attitudes towards adolescent



parenthood for their mothers and fathers; and (c) to develop policies that will allow adolescent mothers to continue their education.

32. Before parents give their consent, adolescents need to have a chance to express their views freely and their views should be given due weight, in accordance with article 12 of the Convention. However, if the adolescent is of sufficient maturity, informed consent shall be obtained from the adolescent her/himself, while informing the parents if that is in the “best interest of the child” (art. 3).
33. With regard to privacy and confidentiality, and the related issue of informed consent to treatment, States parties should (a) enact laws or regulations to ensure that confidential advice concerning treatment is provided to adolescents so that they can give their informed consent. Such laws or regulations should stipulate an age for this process, or refer to the evolving capacity of the child; and (b) provide training for health personnel on the rights of adolescents to privacy and confidentiality, to be informed about planned treatment and to give their informed consent to treatment.

#### **IV. Vulnerability and risk**

34. In ensuring respect for the right of adolescents to health and development, both individual behaviours and environmental factors which increase their vulnerability and risk should be taken into consideration. Environmental factors, such as armed conflict or social exclusion, increase the vulnerability of adolescents to abuse, other forms of violence and exploitation, thereby severely limiting adolescents’ abilities to make individual, healthy behaviour choices. For example, the decision to engage in unsafe sex increases adolescents’ risk of ill-health.
35. In accordance with article 23 of the Convention, adolescents with mental and/or physical disabilities have an equal right to the highest attainable standard of physical and mental health. States parties have an obligation to provide adolescents with disabilities with the means necessary to realize their rights (8). States parties should (a) ensure that health facilities, goods and services are available and accessible to all adolescents with disabilities and that these facilities and services promote their self-reliance and their active participation in the community; (b) ensure that the necessary equipment and personal support are available to enable them to move around, participate and communicate; (c) pay specific attention to the special needs relating to the sexuality of adolescents with disabilities; and (d) remove barriers that hinder adolescents with disabilities in realizing their rights.



36. States parties have to provide special protection to homeless adolescents, including those working in the informal sector. Homeless adolescents are particularly vulnerable to violence, abuse and sexual exploitation from others, self-destructive behaviour, substance abuse and mental disorders. In this regard, States parties are required to (a) develop policies and enact and enforce legislation that protect such adolescents from violence, e.g. by law enforcement officials; (b) develop strategies for the provision of appropriate education and access to health care, and of opportunities for the development of livelihood skills.
37. Adolescents who are sexually exploited, including in prostitution and pornography, are exposed to significant health risks, including STDs, HIV/AIDS, unwanted pregnancies, unsafe abortions, violence and psychological distress. They have the right to physical and psychological recovery and social reintegration in an environment that fosters health, self-respect and dignity (art. 39). It is the obligation of States parties to enact and enforce laws to prohibit all forms of sexual exploitation and related trafficking; to collaborate with other States parties to eliminate intercountry trafficking; and to provide appropriate health and counselling services to adolescents who have been sexually exploited, making sure that they are treated as victims and not as offenders.
38. Additionally, adolescents experiencing poverty, armed conflicts, all forms of injustice, family breakdown, political, social and economic instability and all types of migration may be particularly vulnerable. These situations might seriously hamper their health and development. By investing heavily in preventive policies and measures States parties can drastically reduce levels of vulnerability and risk factors; they will also provide cost-effective ways for society to help adolescents develop harmoniously in a free society.

## **V. Nature of States' obligations**

39. In exercising their obligations in relation to the health and development of adolescents, States parties shall always take fully into account the four general principles of the Convention. It is the view of the Committee that States parties must take all appropriate legislative, administrative and other measures for the realization and monitoring of the rights of adolescents to health and development as recognized in the Convention. To this end, States parties must notably fulfil the following obligations:
  - (a) To create a safe and supportive environment for adolescents, including within their family, in schools, in all types of institutions in which they

may live, within their workplace and/or in the society at large;

(b) To ensure that adolescents have access to the information that is essential for their health and development and that they have opportunities to participate in decisions affecting their health (notably through informed consent and the right of confidentiality), to acquire life skills, to obtain adequate and age-appropriate information, and to make appropriate health behaviour choices;

(c) To ensure that health facilities, goods and services, including counselling and health services for mental and sexual and reproductive health, of appropriate quality and sensitive to adolescents' concerns are available to all adolescents;

(d) To ensure that adolescent girls and boys have the opportunity to participate actively in planning and programming for their own health and development;

(e) To protect adolescents from all forms of labour which may jeopardize the enjoyment of their rights, notably by abolishing all forms of child labour and by regulating the working environment and conditions in accordance with international standards;

(f) To protect adolescents from all forms of intentional and unintentional injuries, including those resulting from violence and road traffic accidents;

(g) To protect adolescents from all harmful traditional practices, such as early marriages, honour killings and female genital mutilation;

(h) To ensure that adolescents belonging to especially vulnerable groups are fully taken into account in the fulfilment of all aforementioned obligations;

(i) To implement measures for the prevention of mental disorders and the promotion of mental health of adolescents.

40. The Committee draws the attention of States parties to the general comment No. 14 on the right to the highest attainable standard of health of the Committee on Economic, Social and Cultural Rights which states that, "States parties should provide a safe and supportive environment for adolescents that ensures the opportunity to participate in decisions affecting their health, to build life skills, to acquire appropriate information, to receive counselling and to negotiate the

health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-sensitive health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services”.

41. In accordance with articles 24, 39 and other related provisions of the Convention, States parties should provide health services that are sensitive to the particular needs and human rights of all adolescents, paying attention to the following characteristics:
  - (a) *Availability*. Primary health care should include services sensitive to the needs of adolescents, with special attention given to sexual and reproductive health and mental health;
  - (b) *Accessibility*. Health facilities, goods and services should be known and easily accessible (economically, physically and socially) to all adolescents, without discrimination. Confidentiality should be guaranteed, when necessary;
  - (c) *Acceptability*. While fully respecting the provisions and principles of the Convention, all health facilities, goods and services should respect cultural values, be gender sensitive, be respectful of medical ethics and be acceptable to both adolescents and the communities in which they live;
  - (d) *Quality*. Health services and goods should be scientifically and medically appropriate, which requires personnel trained to care for adolescents, adequate facilities and scientifically accepted methods.
42. States parties should, where feasible, adopt a multisectoral approach to the promotion and protection of adolescent health and development by facilitating effective and sustainable linkages and partnerships among all relevant actors. At the national level, such an approach calls for close and systematic collaboration and coordination within Government, so as to ensure the necessary involvement of all relevant government entities. Public health and other services utilized by adolescents should also be encouraged and assisted in seeking collaboration with, *inter alia*, private and/or traditional practitioners, professional associations, pharmacies and organizations that provide services to vulnerable groups of adolescents.
43. A multisectoral approach to the promotion and protection of adolescent health and development will not be effective without international cooperation. Therefore, States parties should, when appropriate, seek such cooperation with United Nations specialized agencies, programmes and bodies, international NGOs and bilateral aid agencies, international professional associations and other non-State actors.

## Notes

1. These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Elimination of All Forms of Discrimination against Women.
2. See also the reports of the Committee's days of general discussion on "Violence against children" held in 2000 and 2001 and the Recommendations adopted in this regard (see CRC/C/100, chapter V and CRC/C/111, chapter V).
3. Ibid.
4. As proposed in the Framework Convention on Tobacco Control (2003) of the World Health Organization.
5. For further guidance on this subject, refer to the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, (General Assembly resolution 46/119 of 17 December 1991, annex).
6. Ibid., in particular principles 2, 3 and 7.
7. For further guidance on this issue, see General Comment No. 3, *HIV/AIDS and the rights of children*, 2003.
8. United Nations Standard Rules on Equal Opportunities for Persons with Disabilities.

**CRC General Comment No. 6: treatment of unaccompanied and separated children outside their country of origin, 2005<sup>298</sup>**

**Adoption: 1 September 2005**

(...)

**I. OBJECTIVES OF THE GENERAL COMMENT**

(...)

3. The issuing of the general comment is further motivated by the Committee's identification of a number of protection gaps in the treatment of such children, including the following: unaccompanied and separated children face greater risks of, *inter alia*, sexual exploitation and abuse, military recruitment, child labour (including for their foster families) and detention. They are often discriminated against and denied access to food, shelter, housing, health services and education. Unaccompanied and separated girls are at particular risk of gender-based violence, including domestic violence. In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, guardianship systems or legal advice. In many countries, unaccompanied and separated children are routinely denied entry to or detained by border or immigration officials. In other cases they are admitted but are denied access to asylum procedures or their asylum claims are not handled in an age and gender-sensitive manner. Some countries prohibit separated children who are recognized as refugees from applying for family reunification; others permit reunification but impose conditions so restrictive as to make it virtually impossible to achieve. Many such children are granted only temporary status, which ends when they turn 18, and there are few effective return programmes.

(....)

**IV. APPLICABLE PRINCIPLES**

(...)

**(b) Non-discrimination (art. 2)**

18. The principle of non-discrimination, in all its facets, applies in

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<sup>298</sup> Source: CRC/GC/2005/6, thirty-ninth session, 2005, loc. cit. n. 75.

respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender. Measures should also be taken to address possible misperceptions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.

**(c) Best interests of the child as a primary consideration in the search for short and**

**long-term solutions (art. 3)**

(...)

22. Respect for best interests also requires that, where competent authorities have placed an unaccompanied or separated child “for the purposes of care, protection or treatment of his or her physical or mental health”, the State recognizes the right of that child to a “periodic review” of their treatment and “all other circumstances relevant to his or her placement” (article 25 of the Convention).

(...)

**(e) Right of the child to express his or her views freely (art. 12)**

25. Pursuant to article 12 of the Convention, in determining the measures to be adopted with regard to unaccompanied or separated children, the child’s views and wishes should be elicited and taken into account (art. 12 (1)). To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (arts. 13, 17 and 22 (2)). In guardianship, care and accommodation arrangements, and legal representation, children’s views should also be taken into account. Such information must be provided in a manner

that is appropriate to the maturity and level of understanding of each child. As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure.

**(f) Respect for the principle of non-refoulement**

26. In affording proper treatment of unaccompanied or separated children, States must fully respect non-refoulement obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention and in article 3 of CAT.
27. Furthermore, in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.
28. As underage recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life, State obligations deriving from article 38 of the Convention, in conjunction with articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, entail extraterritorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.

**(g) Confidentiality**

29. States parties must protect the confidentiality of information received in relation to an unaccompanied or separated child, consistent with the obligation to protect the child's rights, including the right to privacy

(art. 16). This obligation applies in all settings, including health and social welfare. Care must be taken that information sought and legitimately shared for one purpose is not inappropriately used for that of another.

30. Confidentiality concerns also involve respect for the rights of others. For example, in obtaining, sharing and preserving the information collected in respect of unaccompanied and separated children, particular care must be taken in order not to endanger the well-being of persons still within the child's country of origin, especially the child's family members. Furthermore, information relating to the whereabouts of the child shall only be withheld vis-à-vis the parents where required for the safety of the child or to otherwise secure the "best interests" of the child.

(...)

## **V. RESPONSE TO GENERAL AND SPECIFIC PROTECTION NEEDS**

### **(a) Initial assessment and measures**

31. The best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children. This necessary initial assessment process, in particular, entails the following:

(...)

(iii) In continuation of the registration process, the recording of further information in order to meet the specific needs of the child. This information should include:

(...)

– Assessment of particular vulnerabilities, including health, physical, psychosocial, material and other protection needs, including those deriving from domestic violence, trafficking or trauma;

(...)

### **(b) Appointment of a guardian or adviser and legal representative (arts. 18 (2) and 20 (1))**

33. States are required to create the underlying legal framework and



to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, *inter alia*, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.

(...)

### **(c) Care and accommodation arrangements (arts. 20 and 22)**

(...)

40. Mechanisms established under national law in order to ensure alternative care for such children in accordance with article 22 of the Convention, shall also cover unaccompanied or separated children outside their country of origin. A wide range of options for care and accommodation arrangements exist and are explicitly acknowledged in article 20 (3) as follows: "... *inter alia*, foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children". When selecting from these options, the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process. Such care and accommodation arrangements should comply with the following parameters:

(...)

– Irrespective of the care arrangements made for unaccompanied or separated children, regular supervision and assessment ought to be maintained by qualified persons in order to ensure the child's physical and psychosocial health, protection against domestic violence or exploitation, and access to educational and vocational skills and opportunities;

(...)

**(e) Right to an adequate standard of living (art. 27)**

44. States should ensure that separated and unaccompanied children have a standard of living adequate for their physical, mental, spiritual and moral development. As provided in article 27 (2) of the Convention, States shall provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

45. States shall, in particular where government capacity is limited, accept and facilitate the assistance offered by UNICEF, UNESCO, UNHCR and other United Nations agencies within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations (art. 22 (2)) in order to secure an adequate standard of living for unaccompanied and separated children.

**(f) Right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health (arts. 23, 24 and 39)**

46. When implementing the right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health under article 24 of the Convention, States are obligated to ensure that unaccompanied and separated children have the same access to health care as national children.

47. In ensuring their access, States must assess and address the particular plight and vulnerabilities of such children. They should, in particular, take into account the fact that unaccompanied children have undergone separation from family members and have also, to varying degrees, experienced loss, trauma, disruption and violence. Many of such children, in particular, those who are refugees, have further experienced pervasive violence and the stress associated with a country afflicted by war. This may have created deep-rooted feelings of helplessness and undermined a child's trust in others. Moreover, girls are particularly susceptible to marginalization, poverty and suffering during armed

conflict, and many may have experienced gender based violence in the context of armed conflict. The profound trauma experienced by many affected children calls for special sensitivity and attention in their care and rehabilitation.

48. The obligation under article 39 of the Convention sets out the duty of States to provide rehabilitation services to children who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or armed conflicts. In order to facilitate such recovery and reintegration, culturally-appropriate and gender sensitive mental health care should be developed and qualified psycho-social counselling provided.
49. States shall, in particular where government capacity is limited, accept and facilitate assistance offered by UNICEF, WHO, UNAIDS, UNHCR and other agencies (art. 22(2)) within their respective mandates, as well as, where appropriate, other competent inter-governmental organizations or nongovernmental organizations in order to meet the health and health care needs of unaccompanied and separated children

(...)

## **VII. FAMILY REUNIFICATION, RETURN AND OTHER FORMS OF DURABLE SOLUTIONS**

(...)

### **(d) Local integration**

89. Local integration is the primary option if return to the country of origin is impossible on either legal or factual grounds. Local integration must be based on a secure legal status (including residence status) and be governed by the Convention rights that are fully applicable to all children who remain in the country, irrespective of whether this is due to their recognition as a refugee, other legal obstacles to return, or whether the best-interests-based balancing test has decided against return.
90. Once it has been determined that a separated or unaccompanied child will remain in the community, the relevant authorities should conduct an assessment of the child's situation and then, in consultation with the child and his or her guardian, determine the appropriate long-term arrangements within the local community and other necessary measures to facilitate such integration. The long-term placement

should be decided in the best interests of the child and, at this stage, institutional care should, wherever possible, serve only as a last resort. The separated or unaccompanied child should have the same access to rights (including to education, training, employment and health care) as enjoyed by national children. In ensuring that these rights are fully enjoyed by the unaccompanied or separated child, the host country may need to pay special attention to the extra measures required to address the child's vulnerable status, including, for example, through extra language training.

## **CRC Concluding Observations**

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(...)

#### **B. Follow-up measures undertaken and progress achieved by the State Party**

(...)

(b) The establishment and coverage of the Plan for Universal Access and Explicit Guarantees (the AUGÉ health plan);

(...)

#### **C. Main subjects of concern and recommendations**

(...)

### **3. General Principles (arts. 2, 3, 6 and 12 of the Convention)**

#### **Non-discrimination**

29. The Committee recognises the policy measures undertaken to advance the implementation of the principle of non-discrimination, in particular in the area of health services, however remains concerned that certain vulnerable groups, including indigenous, migrant and refugee children, children with disabilities, as well as children from disadvantaged socio-economic backgrounds and those living in rural areas, continue to be victims of discrimination, particularly in their reduced access to education. The Committee further notes the prevalence of gender based discrimination and that pregnancy continues to result in the exclusion of girls from educational establishments, despite an explicit prohibition of discrimination on this ground. Furthermore, the Committee is concerned that homosexual relations, including those of persons under 18 years old, continue to be criminalised, indicating discrimination on the basis of sexual orientation.

<sup>299</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, Chile*, 23 April 2007 CRC/C/CHL/CO/3.

- 30. The Committee recommends that the State party increase its efforts to review, monitor and ensure implementation of legislation guaranteeing the principle of nondiscrimination and full compliance with article 2 of the Convention, and adopt a proactive and comprehensive strategy to eliminate discrimination on gender, ethnic, religious or any other grounds and against all vulnerable groups throughout the country.**
- 31. The Committee also request that specific information be included in the next periodic report on the measures and programmes relevant to the Convention on the Rights of the Child undertaken by the State party, to provide special protection to vulnerable groups and to follow up on the Declaration and Programme of Action adopted at the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, also taking into account General Comment No. 1 on article 29, paragraph 1 of the Convention (aims of education).**

(...)

#### **6. Basic Health and Welfare (arts. 6, 18 (para. 3), 23, 24, 26, 27 (paras. 1-3) of the Convention)**

(...)

#### **HIV/AIDS**

- 57. The Committee welcomes the legal guarantee to freely access antiretroviral treatment introduced in 2004, and the reduction in the incidence of HIV/AIDS, however it recommends that the State party undertake further awareness raising campaigns in order to counteract discrimination against children living with HIV/AIDS.**

#### **58. The Committee recommends that the State party:**

- (a) Conduct awareness raising campaigns among adolescents, in particular among those belonging to vulnerable groups, such as street children;**
- (b) Provide adequate financial and human resources for prevention measures and information campaigns to combat**

**discrimination against infected children, while taking into account the Committee's general comment No. 3 on HIV/AIDS and the rights of the child and the Guidelines on HIV/AIDS and Human Rights (E/CN.4/1997/37, annex I);**

**(c) Seek technical assistance from, *inter alia*, the United Nations Joint Programme on HIV/AIDS (UNAIDS) and UNICEF.**

### **Standard of living**

59. The Committee, while recognising the overall reduction of poverty, is concerned over the discrepancies in the standard of living and the number of children living in poverty or extreme poverty, as it presents serious obstacles to enjoyment of the rights of the Convention. The Committee is concerned at the high percentage of the population that lacks access to basic services and is particularly concerned over the vast discrepancy in the coverage of clean and running water, as well as sewage systems, in urban compared to rural areas. The Committee notes that poverty levels are disproportionately high among female headed households and indigenous peoples.

**60. The Committee recommends that the State party prioritize and allocate sufficient funds in order to counteract the increasing inequality and effectively reduce the discrepancies in the standard of living, *inter alia*, between urban and rural areas. The Committee highlights the need to strengthen the capacity of departmental and municipal authorities to provide basic services. In particular, increased access to clean drinking water and sewage disposal should be a priority in rural areas.**

(...)

**7. Special Protection Measures (arts. 22, 30, 38, 39, 40, 37 (b)-(d), and 32-36 of the Convention)**

### **Migrant and refugee children**

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 foreigners 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.

**64. The Committee recommends that the State party:**

**(a) Ratify the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness;**

**(b) Ensure prompt adoption and implementation of adequate legislation in accordance with international obligations for refugee protection;**

**(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;**

**(d) Take all measures to guarantee protection of refugee children in line with international human rights and refugee law, while taking into account the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin;**

**(e) Provide adequate information on the situation of refugee, asylum-seeking and migrant children in its next periodic report under the Convention;**

**(f) Seek the advisory services of the Office of the United Nations High Commissioner for Refugees (UNHCR).**



## Malaysia<sup>300</sup>

(...)

### **B. Positive aspects**

4. The Committee commends the State party on its notable improvement in economic and social development, including continuous investments in the health services, the protection infrastructure and the educational system.

(...)

7. The Committee welcomes the adoption of the Child Act 2001 (Act 611), which is guided by the principles of the Convention and aims at providing every child with care, protection and psychosocial assistance.

(...)

9. The Committee notes with appreciation the establishment of child-protection teams to coordinate support services at the community level for children in need of care and protection and families in crisis. It notes with satisfaction that the child-protection teams carry out preventive and rehabilitative programmes such as the establishment of child activity centres and crisis intervention centres for children and families in high-risk areas.

(...)

### **D. Principal subjects of concern, and recommendations**

#### **1. General measures of implementation (arts. 4, 42 and 44 (6))**

(...)

#### **Allocation of resources**

23. The Committee commends the State party on its significant investment in social and health services, education and child protection but regrets that the impact of budgetary allocations on the implementation of child rights has not been systematically

<sup>300</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, Malaysia*, 25 June 2007 CRC/C/MYS/CO/1.

assessed.

24. The Committee recommends that the State party continue to prioritize budgetary allocations for the realization of children's rights to the maximum extent of available resources for social and health services, education and child protection and to allocate more resources for the implementation of special protection measures for vulnerable groups of children (for example, the *Orang Asli*, children living in economic hardship, children of indigenous populations living in remote places, children of migrant workers and child victims of trafficking). The Committee also recommends that the State party establish a systematic assessment of the impact of budgetary allocations on the implementation of the rights of the child and identify the yearly budgetary amount and proportion spent on persons under 18 years of age.

(...)

#### **Dissemination of the Convention, and training activities**

27. The Committee welcomes the State party's efforts to promote awareness of the rights of the child, including the awareness-raising workshops organized by the Department of Social Welfare, as well as efforts to disseminate the Convention, in close collaboration with the United Nations Children's Fund (UNICEF), SUHAKAM and non-governmental organizations (NGOs). Nevertheless, the Committee considers that education for children and the public at large and training activities for professional groups on children's rights need ongoing attention.
28. The Committee recommends that the State party strengthen its efforts to disseminate the Convention to children, their parents and the broader public, including appropriate material specifically for children translated into the different languages spoken in Malaysia, including those spoken by migrant children, asylum-seeking and refugee children and indigenous children. In addition, it recommends that the State party undertake systematic education and training programmes on the provisions of the Convention for all professional groups working for and with children, such as civil servants, teachers, social workers, health personnel

**(including psychologists), judges, lawyers and law-enforcement officials.**

(...)

### **3. General principles (arts. 2, 3, 6 and 12)**

#### **Non-discrimination**

31. While noting with appreciation the principle of non-discrimination in article 8 of the Federal Constitution, as well as in the preamble of the Child Act 2001 (Act 611) and the special measures taken to advance and protect the status and existence of indigenous peoples, the Committee is concerned that many children belonging to vulnerable groups are likely to experience de facto discrimination in everyday life. These include the *Orang Asli*, indigenous and minority children living in Sabah and Sarawak and particularly in remote areas, asylum-seeking and refugee children (for example, the unregistered children of Filipino refugees holding IMM13 refugee passes), children born out of wedlock and children of migrant workers. Acknowledging the State party's challenges in providing quality services in remote areas of the country, the Committee is concerned that many children are still suffering from disparities in the field of access to social and health services and education. Concern is expressed at the insufficient efforts made to address discrimination based on sexual orientation.

**32. In the light of article 2 and other related articles of the Convention, the Committee recommends that the State party carefully and regularly evaluate existing disparities in the enjoyment by children of their rights and on the basis of that evaluation undertake the necessary steps to prevent and combat discriminatory disparities against children belonging to vulnerable groups. These include the *Orang Asli*, indigenous and minority children living in Sabah and Sarawak and particularly in remote areas, asylum-seeking and refugee children (for example, the unregistered children of Filipino refugees holding IMM13 refugee passes), children born out of wedlock and children of migrant workers.**

(...)

36. The Committee notes with appreciation the provisions of the Child Act 2001 (Act 611) which incorporate the principle of the best interests of the child, and takes note of many other national laws that enshrine this principle. However, it is concerned that this general principle is not fully applied and duly integrated in the implementation of the legislation, policies and programmes of the State party as well as in administrative and judicial decisions. For example, while the State party has expressed its firm intention not to separate migrant children from their migrant parents to be deported, the implementation of current provisions of the Immigration Act 1959/63 (Act 155) has resulted in detaining and deporting migrant workers without effective efforts to prevent the separation of children from their parents. The Committee also notes that the Law Reform (Marriage and Divorce) Act 1976 (Act 164), as well as the Islamic Family Statutes, are based on a primary presumption that a mother is the best person to take care of a child, leaving the consideration of the best interests of the child as a secondary concern.

**37. As regards article 3, paragraph 1, of the Convention, the Committee emphasizes that the Convention is indivisible, that its articles are interdependent and that the best interests of the child is a general principle of relevance to the implementation of the whole Convention. The State party should ensure that the best interests of the child is a primary concern, taken into account in all revisions of the legislation as well as in judicial and administrative decisions, and in projects, programmes and services that have an impact on children.**

(...)

## **6. Basic health and welfare (arts. 6, 18 (3), 23, 24, 26, 27 (1-3))**

### **Children with disabilities**

60. The Committee notes with appreciation that a number of measures have been taken by the State party to improve the situation of children with disabilities, particularly the establishment of community-based rehabilitation centres which provide diagnosis, rehabilitation, treatment and special education for children with disabilities. The Committee is encouraged by the information that the State party is in the process of finalizing

a national policy on persons with disabilities, including a plan of action. Nevertheless, the Committee regrets the insufficient official data on the number of children with disabilities in the State party and that children with disabilities living in remote areas do not have access to the same level of services as children living in other parts of the country.

**61. The Committee recommends that the State party, taking into account the Committee's General Comment No. 9 (2006) on the rights of children with disabilities (CRC/C/GC/9), take all necessary measures to:**

**(a) Reinforce its efforts to adopt the national policy on persons with disabilities, including the national plan of action, and consider formulating a bill on persons with disabilities;**

**(b) Collect adequate statistical data on children with disabilities and ensure the use of such data in the development of policies and programmes for these children;**

**(c) Provide children with disabilities with equal access to adequate social and health services, including psychological and counselling services, and tailored services for children with learning difficulties and behavioural disorders, and raise awareness about all services available;**

**(d) Continue and increase the provision of community-based programmes and services in order to allow children with disabilities to stay at home with their families;**

**(e) Sign and ratify the Convention on the Rights of Persons with Disabilities and its Optional Protocol once open for ratification.**

#### **Health and health services**

**62. The Committee commends the State party on the significant progress achieved in the field of health care and the provision of health services, and especially on its efforts to improve maternal health care and to reduce infant mortality rates. While noting that 10 per cent of people in Malaysia have limited access to medical care, it welcomes the State party's efforts to address this human rights concern, including by launching the Village Health Promoters programme which helps to provide**

basic medical services to people living in the remote parts of the country. The Committee notes with concern that despite the declining rates of malaria and tuberculosis worldwide, these diseases are re-emerging in the State party. While noting that the State party promotes the six months of exclusive breastfeeding and that it is in the process of revising the Code of Ethics for Infant Formula Products of 1995, which will be released shortly, the Committee notes with concern that exclusive breastfeeding rates remain low. It is concerned that the private health sector does not fully implement the national Code of 1995 and that the distribution of samples and supplies of milk substitutes still takes place in private health facilities. The Committee regrets that the duration of maternity leave is only two months and that daily breastfeeding breaks for working mothers depend on the discretion of the employer.

**63. The Committee recommends that the State party continue its efforts to:**

**(a) Develop the health sector and strengthen the primary-care centres and the preventive health services and address the regional disparities in this regard;**

**(b) Prevent and reduce the spread of tuberculosis and malaria and, for instance, provide migrant children with regular physical examinations;**

**(c) Promote exclusive breastfeeding, among other things by strengthening the national Code of Ethics for Infant Formula Products, ensuring that it complies fully with the International Code of Marketing of Breast-milk Substitutes, and by monitoring the implementation of the national Code in both the public and the private health facilities, as well as by extending the length of maternity leave to comply with internationally acceptable standards, and by promoting daily breastfeeding breaks for working mothers who wish to continue breastfeeding their children for a longer period of time.**

**64. As regards the treatment of tsunami-affected children suffering from post-traumatic stress disorder and other emotional and mental problems, the Committee welcomes the project of Malaysia's HELP University College, with support from UNICEF and the Ministry of Health, which offers long-term**

psychosocial support, counselling and psychotherapy for these children and their families.

65. The Committee recommends that the State party continue and increase, where necessary, the provision of long-term psychosocial support, counselling and psychotherapy for children and their families traumatized by natural or man-made disasters as long as needed.

### **Adolescent health**

66. The Committee welcomes the State party's efforts to promote adolescent health, including the My Peer Programme which trains peer educators on adolescent reproductive health and kafe@TEEN drop-in centres which provide information and knowledge on adolescent sexuality and reproductive health as well as guidance and other services specifically for adolescents. However, the Committee notes with concern the absence of a comprehensive national youth study, the last national comprehensive survey on sexual and reproductive health of adolescents having been conducted in 1994-1995. It also notes with concern that adolescents have a limited knowledge of reproductive health issues and that pregnant adolescents are often stigmatized.

- 67. The Committee recommends that the State party, taking into account the General Comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child (CRC/GC/2003/4):**

**(a) Conduct a comprehensive national youth study and based on the results of this study provide adolescents with tailored and youth-sensitive health services and counselling, and respecting the privacy of the adolescent;**

**(b) Promote adolescent health, including sex and reproductive health education, in schools and in other appropriate places frequented by adolescents.**

### **HIV/AIDS**

68. While sharing the State party's concern that HIV/AIDS is an emerging health issue in Malaysia, the Committee notes with satisfaction that the State party has put the prevention of HIV

infections high on its health agenda and has taken measures to raise awareness about HIV/AIDS among adolescents. In particular, the Committee notes with appreciation the adoption in 2006 of the new National Strategic Plan for HIV/AIDS 2006-2010 and its subprogrammes, the establishment of PROSTAR youth centres, in collaboration with UNICEF and with community support, which focus on HIV/AIDS prevention through youth-friendly activities and provide counselling, anonymous HIV screening, peer-to-peer education and leadership opportunities for young people. The Committee also notes with appreciation the initiation of a three-year project to involve Islamic religious leaders in the response to HIV/AIDS, in partnership with the United Nations Development Programme (UNDP), the Ministry of Health, the Department of Islamic Religious Affairs, and the Malaysian AIDS Council (MAC).

69. The Committee is concerned that, despite these actions, the incidence of HIV/AIDS is rapidly rising in the State party and that the existing resources are not sufficient to meet expanding demands in this respect. Since HIV/AIDS continues to be a culturally and religiously sensitive topic in the State party, the raising of awareness on HIV/AIDS in terms of transmission channels, treatment and preventive measures remains challenging. The Committee is also concerned at the increasing number of children orphaned by AIDS.

**70. The Committee recommends that the State party, taking into account the Committee's General Comment No. 3 (2003) on HIV/AIDS and to the rights of the child (CRC/GC/2003/3) and the International Guidelines on HIV/AIDS and Human Rights (E/CN.4/1997/37):**

**(a) Strengthen its efforts to implement the National Strategic Plan for HIV/AIDS 2006-2010 and its subprogrammes in order to prevent the incidence and spread of HIV/AIDS;**

**(b) Ensure that children infected with HIV and/or affected by HIV/AIDS have access to adequate social and health services, including by strengthening the community level prevention and treatment programmes;**

**(c) Ensure that children have access to child-sensitive and confidential HIV/AIDS counselling with full respect for the**



**child's privacy, when such counselling is required by a child, and to accurate and comprehensive information about HIV/AIDS, its transmission channels, treatment and preventive measures, for example in schools;**

**(d) Establish special programmes to provide protection and support for children orphaned by AIDS;**

**(e) Seek technical assistance from, among others, the Joint United Nations Programme on HIV/AIDS (UNAIDS), WHO, UNICEF and UNDP and enhance collaboration with the Malaysian AIDS Council (MAC).**

### **Standard of living**

71. The Committee commends the State party on its continuous and remarkably successful efforts to reduce poverty in Malaysia. It notes with appreciation the plans to implement the Ninth Malaysia Plan 2006-2010, as well as the estimate that the State party is able to reach the Millennium Development Goal target of halving poverty well before 2015. Despite the State party's considerable progress made in poverty reduction, the Committee notes with concern that indigenous groups, especially indigenous communities in Sabah and Sarawak, and the *Orang Asli* in Peninsular Malaysia, are affected by poverty. It also notes with concern that urbanization and the growing number of low-income or unemployed migrant workers are likely to create new pockets of poverty in cities. Furthermore, the low-income level of single female-headed households gives rise to concern.

### **72. The Committee recommends that the State party:**

**(a) Continue to implement the Ninth Malaysia Plan 2006-2010 and to allocate resources for effective poverty-reduction measures at all levels, particularly among the *Orang Asli* and in the indigenous communities of Sabah and Sarawak, as well as in the rural and remote areas of the other less developed states;**

**(b) Raise the standard of living among its population living in poverty and enhance the capacity to develop and monitor poverty-reduction strategies at all levels, and ensure that children living in low-income households have access to social and health services, education and adequate housing;**

**(c) Provide children living in poverty with an opportunity to be heard and to express their views when planning and implementing poverty-reduction programmes at the local and community levels.**

(...)

### **Children of migrant workers**

87. The Committee takes note of the information that the State party is in the process of submitting a Bill on Foreign Workers to Parliament in 2007. The Committee notes the large number of migrants both documented and undocumented and welcomes the State party's initiative to document and register children of migrant workers and to provide all children in the State party with unrestricted access to education and health services. However, the Committee remains concerned that children of migrant workers still face many difficulties in the enjoyment of their rights under the Convention.

**88. The Committee recommends that the State party continue and strengthen its efforts to register and document all children of migrant workers and ensure their unrestricted access to education and health care services. It further recommends that the State party ensure that repatriation of migrant workers with children to their country of origin takes place with due regard to the rule of article 3 of the Convention providing that the best interests of the child shall be a primary consideration. When assessing the best interests of the child, the State party should take into account the totality of the circumstances, including paying attention to issues like the fact that the child is born in the State party, the length of the stay of the child on the State party's territory, the years of education enjoyed in the State party and the need to not separate the child from her/his parents.**

(...)

### **Economic exploitation, including child labour**

(...)

91. The Committee is alarmed at the high number of migrant domestic workers in the State party, including child domestic

workers who work under conditions that are hazardous and interfere with the child's education, and are harmful to the child's health and physical, mental, spiritual, moral or social development.

**92. In accordance with article 32 of the Convention, the Committee recommends that the State party:**

**(a) Amend the Children and Young Persons (Employment) Act 1966 (Act 350) and other relevant laws and regulations to ensure that acceptable conditions of permissible work, including light work and work as a domestic servant, are clearly and strictly detailed and that the national labour provisions fully comply with international labour standards as well as with the definition of the child as provided by the Convention (article 1);**

**(b) Vigorously pursue enforcement of minimum-age standards, including requiring employers to have, and to produce on demand, proof of age of all children working on their premises;**

**(c) Strengthen the labour inspectorate and provide the labour inspectors with all the necessary support, including child labour expertise, with a view to enabling them to monitor effectively at the state and local level the implementation of labour law standards and to receive, investigate and address complaints of alleged violations;**

**(d) Ensure that all working children, including those in the informal sector, have access to free and compulsory primary education as well as to secondary education, including vocational training, and that the nature of work does not interfere with their schooling;**

**(e) Seek technical assistance from the ILO International Programme on the Elimination of Child Labour (IPEC).**

**(...)**

**Trafficking in children for exploitative purposes**

95. The Committee notes with appreciation the establishment of a Coordinating Committee on Trafficking in July 2006 and it takes note of the information that the State party is in the process of submitting an Anti-trafficking of Persons Bill to Parliament in 2007. Considering that Malaysia is a destination country but

also a source and transit country for trafficking in children for the purposes of sexual exploitation and forced labour, the Committee notes with grave concern the absence of a specific law and policy to combat intercountry trafficking. It also notes with concern that trafficked children, although they are victims, are often detained, for example, in the case of missing residence/work permits or falsified documents, and subsequently deported, and that they are not provided with adequate specialist support for social reintegration and recovery. The Committee also notes with deep concern reports suggesting that babies are trafficked from neighbouring countries for sale to childless couples in Malaysia. The absence of data and information on the magnitude of this problem is also a matter of concern.

96. In the light of article 35 and other related articles of the Convention, the Committee recommends that the State party:

**(a) Conduct a comprehensive study to assess the nature and magnitude of trafficking in children for exploitative purposes and, based on the findings and recommendations of the study, develop and adopt a national anti-trafficking law as well as a comprehensive national plan of action to prevent and combat all forms trafficking within the country and across its borders;**

**(b) Strengthen and expand bilateral and multilateral agreements and cooperation programmes with other countries of origin, transit and destination to prevent trafficking in children;**

**(c) Establish an effective screening process to identify child victims of trafficking and ensure that they are neither detained nor deported and that they are provided with adequate recovery and social reintegration services and programmes;**

**(d) Take all necessary measures for reunification of children with their families when this is in the best interests of the child;**

**(e) Ensure that all trafficking cases are investigated and that perpetrators are charged and punished;**

**(f) Continue to raise public awareness about the detrimental effects of child trafficking and train professionals working with and for children, as well as the general public, to identify, prevent and combat trafficking in children;**

**(g) Ratify the Protocol to Prevent, Suppress and Punish Trafficking**

**in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000);**

**(h) Strengthen cooperation with, among others, the ILO International Programme on the Elimination of Child Labour (IPEC), IOM and NGOs.**

**Mali<sup>301</sup>**

(...)

#### **4. Civil rights and freedoms**

**(arts. 7, 8, 13-17 and 37 (a) of the Convention)**

(...)

#### **Birth registration**

37. The Committee welcomes the State party's initiatives to promote birth registration, such as the campaigns undertaken on the Day of the African Child in 2003; the 2004-2008 action plan to improve registration of civil status ("*Plan de la Mission d'Appui à la Consolidation de l'Etat Civil*") and in 2006 the adoption of Law No. 06-024, which governs civil status and ensures free birth registration. However, the Committee is concerned that birth registration is a complicated process, that a large number of children are neither registered at birth nor at a later stage, and that major disparities exist between the birth registration of children in urban and rural and remote areas.

38. The Committee recommends that the State party continue its efforts of systematic birth registration for all children born within the national territory, *inter alia* by ensuring a simplified and cost-free birth registration process, and by increasing the coverage of the mobile units, especially in rural and remote areas, in order to reach the most disadvantaged populations. The Committee also urges the State party to proceed with the registration of those children who have not yet been registered and to enable them to access, in particular, education and health care.

<sup>301</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, Mali*, 3 May 2007 CRC/C/MLI/CO/2.

(...)

**6. Basic health and welfare (arts. 6; 18, para. 3; 23; 24; 26; 27, paras. 1-3 of the Convention)**

(...)

**Health and health services**

50. While acknowledging the efforts undertaken by the State party to improve health services, particularly in the area of immunization, combating malaria and promoting breastfeeding, the Committee remains concerned at the low level of GDP allocated to health, the limited number of doctors and of health centres, especially in rural and remote areas, the high maternal and child-mortality rates, the high rate of child malnutrition, the still low breastfeeding rates and the prevalence of malaria.

**51. The Committee recommends that the State party:**

**(a) Strengthen its efforts to ensure universal access to maternal and child health-care services and facilities, in particular, in rural and remote areas, including by allocating increased financial and human resources;**

**(b) Strengthen its efforts to ensure that all children have access to basic health care, in urban as well as in rural and remote areas;**

**(c) Reinforce measures to prevent malnutrition and malaria and increase immunization coverage for as many children and mothers as possible;**

**(d) Reinforce measures to promote and encourage exclusive breastfeeding for an infant's first six months and adopt the International Code of Marketing of Breast-milk Substitutes.**

**Harmful traditional practices**

52. The Committee welcomes the establishment of the national programme that the State party implemented in cooperation with NGOs to combat female genital mutilation and the efforts undertaken to sensitize the population to the danger of other harmful practices. However, the Committee is deeply concerned at the lack of a specific legal prohibition to the practice of

female genital mutilation. It is also particularly concerned at the persistence of early and forced marriages and other harmful traditional practices listed in the State party report.

**53. The Committee urges the State party to:**

**(a) Implement legislative measures on the prohibition of female genital mutilation and the prohibition of traditional marriage practices, including early and forced marriages, which are harmful to children, and ensure that perpetrators are brought to justice;**

**(b) Continue and strengthen awareness-raising campaigns to combat female genital mutilation and reinforce sensitization programmes for practitioners and the general public to encourage change in traditional attitudes, by engaging with the extended family as well as with traditional and religious leaders;**

**(c) Take adequate measures to provide practitioners of female genital mutilation with the adequate training necessary to find alternative sources of income;**

**(d) Take appropriate measures to eradicate female genital mutilation and other traditional practices harmful to the health, survival and development of children, especially girls.**

(...)

**HIV/AIDS**

56. The Committee welcomes the efforts undertaken by the State party to combat HIV/AIDS, such as the establishment of the High National Council for Combating HIV/AIDS and the decision to provide free antiretroviral therapy. However, the Committee remains concerned at the high number of children infected with HIV and/or affected by HIV/AIDS, the lack of preventive measures taken and the inadequate assistance given to AIDS orphans, and the lack of data.

**57. The Committee recommends that the State party, while taking into account the Committee's general comment No. 3 (2003) on HIV/AIDS and the rights of the child and the international Guidelines on HIV/AIDS and Human Rights:**

**(a) Ensure universal and cost-free access to antiretroviral therapy;**

**(b) Involve children in the programme of the fight against HIV/AIDS, in particular by ensuring that more attention is given to the issue of children and HIV/AIDS;**

**(c) Continue and strengthen its efforts to prevent mother-to-child transmission of HIV;**

**(d) Strengthen its efforts to combat HIV/AIDS, including through ensuring availability of contraceptives throughout the country and through awareness-raising campaigns;**

**(e) Improve the protective and preventive support for AIDS orphans;**

**(f) Continue to prevent discrimination against children infected with HIV and/or affected by HIV/AIDS;**

**(g) Take steps to collect disaggregated data on the prevalence of HIV/AIDS in the State party, including among children, which can be used for the development, implementation and monitoring of policies and programmes for children living with HIV/AIDS.**

#### **Standard of living**

58. While noting the adoption of the Strategic Framework for Combating Poverty in 2002, which takes into account the protection of the child, the Committee remains concerned at the high numbers of children and their families living below the poverty line and the high and increasing number of children living and/or working on the streets.

**59. The Committee recommends that the State party further strengthen its Strategic Framework for Combating Poverty by providing adequate financial and human resources for it and by paying particular attention to the needs of the most vulnerable groups of children.**



## Oman<sup>302</sup>

(...)

### C. Principal subjects of concern and recommendations

(...)

#### Data collection

18. The Committee notes with appreciation the State party's efforts to collect, analyse and disaggregate statistical data on children. However, the Committee regrets the lack of a central database on children and notes with concern the insufficient data concerning many areas covered by the Convention, particularly groups of children in need of special protection, for example, children affected by violence and abuse, including sexual abuse, children in alternative care, street children, migrant children and working children.

**19. The Committee recommends that the State party continue to strengthen its mechanisms for data collection by establishing a central database on children and developing indicators consistent with the Convention in order to ensure that data are collected on all areas covered by the Convention and disaggregated, for example, by age for all persons under 18, sex, urban and rural areas, and by groups of children who are in need of special protection. It further encourages the State party to use these indicators and data to formulate policies and programmes for the effective implementation of the Convention.**

(...)

#### Non-discrimination

24. While noting that the Basic Law of the State and other domestic laws are based on the principle of non-discrimination and that the State party has taken measures to promote the principle of equality between women and men, particularly in the domain of civil and labour laws, the Committee is concerned about the weak implementation of these laws and the persisting de facto

<sup>302</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, Oman*, 29 September 2006 CRC/C/OMN/CO/2.

discrimination against women and girls in the Omani society. Despite the ongoing efforts of the State party to provide equal opportunities for children with disabilities, including through community-based support and services, the Committee notes that the traditional charity-based welfare approach to address the issue of children with disabilities still prevails. Furthermore, discrimination against children born out of wedlock is an issue of particular concern to Committee. As regards the high number of children of migrant workers in Oman, the Committee is concerned about discrimination on the basis of national origin in terms social benefits, health, education and housing.

- 25. The Committee recommends that the State party, by effectively implementing the existing laws which guarantee the principle of non-discrimination, make greater efforts to ensure that all children within its jurisdiction enjoy all the rights enshrined in the Convention without discrimination, in accordance with article 2 of the Convention. The Committee recommends that the State party adopt a proactive and comprehensive strategy to eliminate de facto discrimination on any grounds and against all children, paying particular attention to girls, children with disabilities, children born out of wedlock and children of migrant workers, and prioritize social and health services and equal opportunities to education and recreational activities for children belonging to the most vulnerable groups. The Committee also encourages the State party to create a supportive gender sensitive environment which promotes the equal rights of girls to participate in the family, at school, within other institutions, in local communities and in society in general.**

(...)

### **Health and health services**

45. The Committee commends the State party for the quality of health care services available in Oman and notes with appreciation the State party's efforts to extend health care services to the remote areas of the country. The Committee notes with appreciation the declining infant mortality rate and the results of the successful immunization programme. Despite these positive steps taken, the Committee is concerned about children's malnutrition rates, including micronutrient deficiencies, which are generally higher in comparison to the high gross domestic product per

capita levels. As regards exclusive breastfeeding of children, the Committee notes with regret that the length of a maternity leave in the public sector has been shortened from 60 to 45 days and that the breastfeeding hour for working mothers has been abolished.

46. **The Committee recommends that the State party continue to prioritize the allocation of financial and human resources to the health sector, in order to ensure equal access to quality health services for all children, including children of migrant workers and children living in the most remote areas of the country. The Committee recommends that the State party undertake urgent measures to improve the nutritional status of infants and children, for example, through education and promotion of healthy feeding practices on the household and community levels. The Committee recommends that the State party promote exclusive breastfeeding of children, *inter alia*, by extending the length of a maternity leave in the public sector to comply with internationally acceptable standards and by restoring the breastfeeding hour for mothers who wish to continue breastfeeding their children for a longer period of time. Finally, the Committee recommends that the State party increase its efforts to promote compliance with the International Code of Marketing of Breast-milk Substitutes.**

(...)

### **Adolescent health**

49. The Committee takes note of the low HIV/AIDS prevalence in the State party and notes with appreciation the State party's efforts to raise general awareness of HIV/AIDS among adolescents, including the campaign "Unite for Children, Unite against AIDS" launched in 2005. However, the Committee notes with concern that adolescents know little about other sexually transmitted infections (STIs) and have a limited knowledge of their own physical development during puberty. The Committee also notes with concern that many adolescents, both boys and girls, suffer from different types of mental disorders, including depression. As regards nutritional status of adolescents, the Committee expresses its concern about the high rate of anaemia among adolescent girls and the unbalanced diet of adolescents. In addition, the Committee is concerned that the level of smoking,

alcohol consumption and substance abuse among adolescents is underestimated in the State party.

**50. The Committee recommends that the State party, taking into account the Committee's general comment No. 3 on HIV/AIDS and the rights of the child and general comment No. 4 on adolescent health and development in the context of the Convention on the Rights of the Child:**

**(a) Promote adolescent health by establishing a national programme on adolescent health in order to support adolescents' successful transition to adulthood and ensure that this programme is rights-based, participatory and locally driven;**

**(b) Strengthen age-appropriate school education on sexuality and reproductive health, HIV/AIDS, sexually transmitted infections and family planning;**

**(c) Provide adolescents with youth-sensitive counselling and health care services that respect privacy and confidentiality;**

**(d) Establish adequate mental health services tailored for adolescents;**

**(e) Improve the nutritional status of adolescents, for example by introducing a school nutrition programme and proposing healthy choices in school canteens;**

**(f) Aiming at prevention, provide adolescents with information on the harmful consequences of alcohol, drug and tobacco use; and**

**(g) Seek technical cooperation with, among others, UNICEF, WHO, the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations Population Fund (UNFPA).**

### **Harmful traditional practices**

**51. The Committee notes with concern that a few communities still practice female genital mutilation in Oman. It also notes with concern the findings of the comprehensive health survey of 2001 which indicated that a very high percentage (85 %) of women still approved this harmful traditional practice. The Committee strongly emphasizes that female genital mutilation**

is incompatible with the principles and provisions of the Convention.

- 52. The Committee urges the State party to continue its efforts to end the practice of female genital mutilation), for example, through legal prohibition and the implementation of targeted programmes with a view to sensitizing the population to its extremely harmful effects. The Committee recommends that the State party involve and mobilize all partners at the local level, including teachers, midwives, traditional health practitioners, religious and community leaders, to prevent the practice of female genital mutilation. It also draws the attention of the State party to the recommendations adopted on the day of general discussion on the girl child held on 23 January 1995 (CRC/C/38, paras. 275-299).**

### **Standard of living**

53. The Committee notes with appreciation the various measures adopted by the State party to improve the standard of living among its population, including the implementation of the Seventh Five-year Development Plan (2006-2010) and the measures taken to assist low-income families with children, for example social security transfer payments. However, the Committee regrets the lack of information on poverty in general and child poverty in particular and is concerned at reports that many families still live in economic hardship. Concern is also expressed at the regional disparities in the standard of living.
- 54. In the light of article 27 of the Convention, the Committee recommends that the State party continue to take measures to raise the standard of living among its population, particularly rural population living in poverty, *inter alia*, through implementing the Seventh Five-year Development Plan (2006-2010) and providing well coordinated financial assistance support for all economically disadvantaged families. In addition, the Committee encourages the State party to strengthen community mobilization, including the participation of children, for poverty reduction at the local level.**

(...)

- 7. Special protection measures (arts. 22, 38, 39, 40, 37b-d, 32-36 and 30)**

### Children of migrant workers

59. As regards the large number of migrant workers, some of them without legal status, in the State party, the Committee notes with concern that the children of migrant workers are often vulnerable to violations of their human rights.
- 60. The Committee recommends that the State party develop and implement policies and practices that will better protect and provide basic services for children of migrant workers. It also recommends that the State party consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.**

(...)

### Sexual exploitation and trafficking

65. While noting that the domestic legislation prohibits forced child prostitution, manufacturing, acquiring or distribution of pornographic materials, bondage and slave trade, the Committee is concerned about the potential of the State party to be or become a destination country of trafficking in children owing to the large number of migrants in search of employment. It notes with concern the lack of data and the lack of research on the prevalence of national and cross-border trafficking, child prostitution and child pornography. Concern is also expressed about the lack of a comprehensive procedure to identify children who may be victims of trafficking and the absence of adequate recovery and reintegration services for these victims.
- 66. In the light of articles 34, 35 and other related articles of the Convention, the Committee recommends that measures be taken to:**
- (a) Conduct an in-depth study on sexual exploitation of children, including trafficking in children for this purpose and, in this context, collect data on trafficking and sexual exploitation of children and ensure that all data and indicators are used for the formulation, monitoring and evaluation of policies, programmes and projects;**
  - (b) Develop comprehensive procedures for the early-identification of child victims of trafficking;**

**(c) Ensure that victims of sexual exploitation and trafficking are not criminalized and that they are provided with adequate recovery and social reintegration services and programmes in accordance with the Declaration and Agenda for Action and the Global Commitment adopted at the 1996 and 2001 World Congresses against Commercial Sexual Exploitation of Children;**

**(d) Seek to establish bilateral and multilateral agreements and cooperation programmes with countries of origin and transit to prevent the sale and trafficking of children; and**

**(e) Seek cooperation, among others, with the International Organization for Migration, UNICEF and non-governmental organizations.**

**30. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (excerpts), 2000<sup>303</sup>**

**Adoption: 25 May 2000**

**Entry into force: 18 January 2002**

**Article 1**

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

(...)

**Article 9**

(...)

3. States Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery.

(...)

**Article 10**

(...)

2. States Parties shall promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation.
3. States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.

(...)

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<sup>303</sup> Source: U.N.G.A. Res. 54/263.



## **CRC Concluding observations**

**Austria**<sup>304</sup>

(...)

### **VI. Protection of the rights of child victims (arts. 8 and 9, paras. 3 and 4)**

#### **Measures adopted to protect the rights and interests of child victims of offences prohibited under the Optional Protocol**

(...)

29. The Committee is also concerned about the lack of support mechanisms for child victims of sale, prostitution and pornography, including for the purpose of sexual exploitation, from abroad and that staff at reception facilities for separated asylum-seeking children may not always be aware of traumatic experiences of children under their care.

#### **30. The Committee recommends that the State party:**

**(a) Create a nationwide policy on coordination, care and support for the child victims of sale, in line with the requirements under the Optional Protocol;**

**(b) Ensure that sufficient resources are allocated in order to strengthen social reintegration and physical and psychosocial recovery measures, in accordance with article 9 (3) of the Optional Protocol, in particular by providing interdisciplinary assistance for child victims;**

**(c) Develop and implement a comprehensive policy that includes an effective reporting and referral system of all cases of child victims of offences under the Optional Protocol, with necessary provisions for child-sensitive investigations of such cases;**

**(d) Ensure that the helpline “147 Rat auf Draht” is sufficiently funded to allow its permanent operation, and that it is fully accessible and known to children, and facilitate the collaboration of the helpline with child-focused NGOs, the police and health and social workers;**

<sup>304</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations: Austria*, 22 October 2008 CRC/C/OPSC/AUT/CO/1.

**(e) Ensure that legal representatives of separated asylum-seeking children are specially trained persons, familiar with the specific needs of child asylum-seekers;**

**(f) Ensure that support services with specifically trained staff are systematically made available to child victims of sale and trafficking from abroad, and ensure that the best interests of the child is the primary consideration in the case of a decision to**

**repatriate a child;**

**(g) Ensure that all bilateral agreements on repatriation are strictly guided by the principle of the best interest of the child, and that sufficient resources are allocated for the adequate monitoring and thorough follow-up of cases of repatriated children;**

**(h) Guarantee that all child victims of the offences described in the Optional Protocol have access to adequate procedures and to seek, without discrimination, compensation for damages from those legally responsible, in accordance with article 9(4) of the Optional Protocol.**

#### **Bulgaria<sup>305</sup>**

**(...)**

#### **IV. Prevention of the sale of children, child prostitution and child pornography**

##### **Measures adopted to prevent offences referred to in the Optional Protocol**

**(...)**

**20. The Committee is deeply concerned at the difficult situation of certain groups of children, such as Roma children, street children and children with disabilities, who are particularly vulnerable to all forms of exploitation.**

**21. The Committee urges the State party to pay increased attention to the situation of vulnerable groups of children who are at particular risk of being victims of offences referred to in the Optional Protocol. In this respect it**

<sup>305</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations: Bulgaria*, 21 January 2008 CRC/C/OPSC/BGR/CO/1.

**recommends that the State party allocate adequate human and financial resources for the implementation of targeted programmes for the prevention of violations of the rights of particularly vulnerable children, with special attention to their education and health care. More attention should also be devoted to raising awareness of their rights among these children.**

**China<sup>306</sup>**

**(...)**

### **C. Principal areas of concern and recommendations**

#### **1. General measures of implementation**

##### **Coordination and evaluation of the implementation of the Optional Protocol**

4. The Committee welcomes the heightened efforts of the State party to combat trafficking and sexual exploitation in mainland China and the information provided by the delegation that coordination between the mainland and the SARS is increasing, in particular with respect to the reunification of victims with their families. Nevertheless, it is concerned that on the mainland the issue is addressed primarily by the Ministry of Public Security with limited coordination with other ministries and insufficient attention paid to the socioeconomic aspects of human trafficking.
5. **The Committee recommends that in mainland China the State party consider establishing a central coordinating body which includes relevant line ministries, affected children and youth, and non-governmental organizations, in particular those able to address the socioeconomic aspects of trafficking and sexual exploitation. The Committee also urges the State party to further coordinate activities between the mainland and the SARS with regard to assistance to victims and prevention and prosecution of offences.**

<sup>306</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations: China*, 24 November 2005 CRC/C/OPSC/CHN/CO/1.

## National plans of action

6. While noting with appreciation the State party's signature of the Memorandum of Understanding against Human Trafficking in the Mekong Subregion in October of 2004, the Committee is concerned at the absence of a plan of action to combat trafficking and sexual exploitation applicable either to the mainland or the Macau SAR.
7. **The Committee recommends that the State party elaborate and implement a plan of action applicable respectively to the mainland and the Macau SAR based on the Stockholm and Agenda for Action, the Yokohama Global Commitment and the provisions of the Optional Protocol.**

## Data collection

8. The Committee regrets the limited statistical data on sexual exploitation and cross-border trafficking included in the State party's report, both with regard to mainland China and the Macau SAR. It is further concerned that the data refer almost exclusively to the number of women and children rescued rather than those abducted, and that data often refer to different time periods, which hampers accurate assessment and monitoring of the situation regarding the sale of children, child prostitution and child pornography.
9. **The Committee recommends that the State party strengthen its efforts to collect disaggregated data on the victims of trafficking, sale of children, child prostitution and child pornography, including data on the number of boys and girls affected, broken down by SAR, the mainland, the provinces and regions within the mainland, and, where applicable, neighbouring countries.**

(...)

## 4. Protection of the rights of child victims

### Measures adopted to protect the rights and interests of child victims of offences prohibited under the Optional Protocol

14. The Committee is concerned at the limited information provided about services to assist child victims with regard to reintegration and recovery on the mainland. It is also concerned about the

absence of assistance programmes specifically designed for child victims of trafficking and sexual exploitation in the Macau SAR.

- 15. The Committee recommends that the State party expand the services provided to child victims of trafficking and sexual exploitation on the mainland and the Macau SAR to assist their recovery and reintegration, and ensure that they are specifically designed to address the needs of such victims.**

**31. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (excerpts), 2000<sup>307</sup>**

**Adopted: 25 May 2000**

**Entered into force: 12 February 2002**

**Article 1**

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

**Article 2**

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

(...)

**Article 6**

1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction.
2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.
3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

**Article 7**

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned

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<sup>307</sup> Source: U.N.G.A. Res. 54/263.

and the relevant international organizations.

2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, *inter alia*, through a voluntary fund established in accordance with the rules of the General Assembly.

(...)

## CRC Concluding observations

### Croatia<sup>308</sup>

(...)

#### C. Main areas of concern and recommendations

(...)

#### 2. Measures adopted with regard to disarmament, demobilization and social reintegration

(...)

14. The Committee commends the State Party for including the protection, rehabilitation and social reintegration of children who have experienced war and armed conflict in the National Plan of Action as well as the fact that the Office of the United Nations High Commissioner for Refugees is involved in training activities involving participants to peace-keeping operations. It also notes the information that there were no children recruited or used in hostilities seeking asylum in Croatia.

#### 15. The Committee recommends that the State Party:

**(a) Identify at the earliest possible stage refugee, asylum-seeking and migrant children within their jurisdiction who may have been recruited or used in hostilities abroad, if any; and provide them with immediate, culturally sensitive and multidisciplinary assistance for their physical and psychological recovery and their social reintegration in accordance with article 6, paragraph 3, of the Optional Protocol;**

**(b) Continue to take concrete action to implement the National Plan of Action for Children with respect to the protection, rehabilitation and social reintegration of children victims of war, including by providing specific budget allocations to this end.**

<sup>308</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, Croatia*, 23 October 2007 CRC/C/OPAC/HRV/CO/1.



## Germany<sup>309</sup>

(...)

### A. Positive aspects

(...)

## IV. Protection, recovery and reintegration

### Assistance for physical and psychological recovery

16. The Committee welcomes amendments to the Youth Welfare Act and the Immigration Act of 2005, which recognizes the recruitment of child soldiers as a form of persecution on the grounds of which refugee status can be granted. The Committee regrets that sufficient measures are not applied in order to identify refugee or asylum-seeking children entering Germany who may have been recruited or used in hostilities abroad. Furthermore, the Committee is concerned that unaccompanied children may be detained, and that for those who have attained 16 years of age a guardian in the asylum-seeking procedure might not be assigned in a timely manner.

17. The Committee also remains concerned that unaccompanied asylum-seeking and refugee children involved in hostilities abroad have insufficient access to specialized professionals who can provide multidisciplinary assistance for their physical and psychological recovery and social reintegration in Germany. The Committee is concerned that within the migration authorities, specially trained staff is inadequate, in particular for the determination of asylum cases of children who are 16 or 17 years of age.

**18. The Committee recommends that the State party provide protection for asylumseeking and refugee children arriving in Germany who may have been recruited or used in hostilities abroad by taking, *inter alia*, the following measures:**

**(a) Identify at the earliest possible stage those refugee and asylum-seeking children who may have been recruited or used in hostilities;**

**(b) Improve the access to information, including through help**

<sup>309</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, Germany*, 13 February 2008 CRC/C/OPAC/DEU/CO/1.

lines, for asylumseeking children, reinforce the legal advisory services available to them, and ensure that all children under 18 years are assigned a guardian in a timely manner;

(c) Carefully assess the situation of these children and provide them with immediate and culturally and child-sensitive multidisciplinary assistance for their physical and psychological recovery and their social reintegration in accordance with article 6, paragraph 3, of the Optional Protocol;

(d) Ensure the availability of more specially trained staff within the migration authorities and that the best interests of the child and the principle of nonrefoulement are primary considerations taken into account in the decision-making process regarding the repatriation of a child. In this regard, the Committee recommends that the State party take note of the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, in particular paragraphs 54-60;

(e) Include information on measures adopted in this regard in its next report.

(...)

## **V. International assistance and cooperation**

### **Financial and other assistance**

19. The Committee commends the State party for its financial support to multilateral and bilateral activities aimed at protecting and supporting children who have been affected by armed conflict.
20. The Committee recommends that the State party continue and strengthen its financial support for multilateral and bilateral activities to address the rights of children involved in armed conflict, in particular by promoting preventive measures as well as physical and psychological recovery and social reintegration of children victims of acts contrary to the Optional Protocol.

## **United Kingdom of Great Britain and Northern Ireland<sup>310</sup>**

(...)

### **B. Positive aspects**

(...)

#### **4. Protection, recovery and reintegration**

23. The Committee notes the efforts of the State party in the processing of asylum requests from children recruited or used in hostilities abroad, as well as the requirement for the United Kingdom Border Agency to have a Code of Practice for Keeping Children Safe from Harm. However, the Committee is concerned that, while individual local authorities do have support services in place to assist migrant children entering the United Kingdom, there are no specific measures adopted to assist children recruited or used in hostilities abroad.

#### **24. The Committee recommends that the State party;**

**(a) Strengthen measures to identify and systematically collect data on refugee, asylum-seeking and migrant children within its jurisdiction who may have been recruited or used in hostilities;**

**(b) Ensure that these children receive appropriate care and treatment, including multidisciplinary assistance for their physical and psychological recovery and their social reintegration;**

**(c) Ensure that the best interests of the child is a primary consideration when processing asylum requests from or on behalf of these children, in particular in decisions concerning their repatriation.**

25. The Committee further recommends that the State party take note of the Committee's general comment No. 6 (CRC/GC/2005/6), in particular its paragraphs 54 to 60, on treatment of unaccompanied and separated children outside their country of origin.

<sup>310</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, United Kingdom of Great Britain and Northern Ireland*, 17 October 2008 CRC/C/OPAC/GBR/CO/1.

## United States of America<sup>311</sup>

(...)

### A. Positive aspects

(...)

### V. International assistance and cooperation

(...)

### Arms export and military assistance

(...)

35. The Committee notes information from the State party that Foreign Military Financing (FMF) may not be provided to Governments where the State or State-supported armed groups recruit children, however the Committee regrets that this restriction may be waived under certain circumstances if deemed important to the national interests of the United States. The Committee notes as positive the draft Child Soldiers Prevention Act of 2007 which, if adopted, would restrict military assistance for countries where State forces or paramilitaries are known to recruit and use child soldiers.
36. **The Committee recommends that the State party abolish Foreign Military Financing, when the final destination is a country where children are known to be - or may potentially be - recruited or used in hostilities, without the possibility of issuing waivers. In the interest of strengthening measures to prevent the recruitment or use of children in hostilities, the Committee recommends that the State party adopt the draft Child Soldiers Prevention Act of 2007.**

<sup>311</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, United States of America*, 25 June 2008 CRC/C/OPAC/USA/CO/1.

## Timor-Leste<sup>312</sup>

(...)

### **B. Main subjects of concern and recommendations**

(...)

#### **4. Protection, recovery and reintegration**

15. While noting that the Timorese children who were involved in hostilities during Timor- Leste's struggle for independence have long been demobilized and, in the meantime, have exceeded the age of eighteen years, the Committee notes that the consequences for the children and communities concerned persist to this day. The Committee regrets the lack of information about available services devoted exclusively to former child soldiers.

**16. The Committee recommends that the State party carry out studies on the full social implications of the experiences of the children involved in hostilities during Timor-Leste's armed struggle for independence, aim to identify former child soldiers and provide appropriate psychological and rehabilitative services.**

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<sup>312</sup> CRC, *UN Committee on the Rights of the Child: Concluding observations, Timor-Leste* 14 February 2008 CRC/C/OPAC/TLS/CO/1.

## **32. World Declaration on the Survival, Protection and Development of Children, 1990<sup>313</sup>**

**Adopted at the World Summit for Children, New York, USA, 30 September 1990**

1. We have gathered at the World Summit for Children to undertake a joint commitment and to make an urgent universal appeal - to give every child a better future.
2. The children of the world are innocent, vulnerable and dependent. They are also curious, active and full of hope. Their time should be one of joy and peace, of playing, learning and growing. Their future should be shaped in harmony and co-operation. Their lives should mature, as they broaden their perspectives and gain new experiences.
3. But for many children, the reality of childhood is altogether different.

### **THE CHALLENGE**

4. Each day, countless children around the world are exposed to dangers that hamper their growth and development. They suffer immensely as casualties of war and violence; as victims of racial discrimination, apartheid, aggression, foreign occupation and annexation; as refugees and displaced children, forced to abandon their homes and their roots; as disabled; or as victims of neglect, cruelty and exploitation.
5. Each day, millions of children suffer from the scourges of poverty and economic crisis - from hunger and homelessness, from epidemics and illiteracy, from degradation of the environment. They suffer from the grave effects of the problems of external indebtedness and also from the lack of sustained and sustainable growth in many developing countries, particularly the least developed ones.
6. Each day, 40,000 children die from malnutrition and disease, including acquired immunodeficiency syndrome (AIDS), from the lack of clean water and inadequate sanitation and from the effects of the drug problem.

<sup>313</sup> 30 Sep. 1990, U.N. Doc. E/CN.4/1991/59, Annex. See <http://www.un.org/geninfo/bp/child.html>. The World Summit for Children (WSC), held at UN Headquarters, Geneva, was an unprecedented gathering of world leaders to promote the well-being of children. The high point of the occasion, held under the auspices of the UN in New York, was the joint signing of a World Declaration on the Survival, Protection and Development of Children and a Plan of Action comprising a detailed set of child-related human development goals for the year 2000. These included targeted reductions in infant and maternal mortality, child malnutrition and illiteracy, as well as targeted increases in access to basic services for health and family planning, education, water and sanitation. Of the 159 Governments represented at the Summit, 73 signed the joint Declaration and Plan of Action on behalf of the world's children.

7. These are challenges that we, as political leaders, must meet.

## **THE OPPORTUNITY**

8. Together, our nations have the means and the knowledge to protect the lives and to diminish enormously the suffering of children, to promote the full development of their human potential and to make them aware of their needs, rights and opportunities. The Convention on the Rights of the Child provides a new opportunity to make respect for children's rights and welfare truly universal.
9. Recent improvements in the international political climate can facilitate this task. Through international co-operation and solidarity it should now be possible to achieve concrete results in many fields - to revitalize economic growth and development, to protect the environment, to prevent the spread of fatal and crippling diseases and to achieve greater social and economic justice. The current moves towards disarmament also mean that significant resources could be released for purposes other than military ones. Improving the well-being of children must be a very high priority when these resources are reallocated.

## **THE TASK**

10. Enhancement of children's health and nutrition is a first duty, and also a task for which solutions are now within reach. The lives of tens of thousands of boys and girls can be saved every day, because the causes of their death are readily preventable. Child and infant mortality is unacceptably high in many parts of the world, but can be lowered dramatically with means that are already known and easily accessible.
11. Further attention, care and support should be accorded to disabled children, as well as to other children in very difficult circumstances.
12. Strengthening the role of women in general and ensuring their equal rights will be to the advantage of the world's children. Girls must be given equal treatment and opportunities from the very beginning.
13. At present, over 100 million children are without basic schooling, and two-thirds of them are girls. The provision of basic education and literacy for all are among the most important contributions that can be made to the development of the world's children.
14. Half a million mothers die each year from causes related to childbirth. Safe motherhood must be promoted in all possible ways. Emphasis must be placed on responsible planning of family size and on child spacing. The family, as a fundamental group and natural environment

for the growth and well-being of children, should be given all necessary protection and assistance.

15. All children must be given the chance to find their identity and realize their worth in a safe and supportive environment, through families and other care-givers committed to their welfare. They must be prepared for responsible life in a free society. They should, from their early years, be encouraged to participate in the cultural life of their societies.
16. Economic conditions will continue to influence greatly the fate of children, especially in developing nations. For the sake of the future of all children, it is urgently necessary to ensure or reactivate sustained and sustainable economic growth and development in all countries and also to continue to give urgent attention to an early, broad and durable solution to the external debt problems facing developing debtor countries.
17. These tasks require a continued and concerted effort by all nations, through national action and international co- operation.

## **THE COMMITMENT**

18. The well-being of children requires political action at the highest level. We are determined to take that action.
19. We ourselves hereby make a solemn commitment to give high priority to the rights of children, to their survival and to their protection and development. This will also ensure the well-being of all societies.
20. We have agreed that we will act together, in international co-operation, as well as in our respective countries. We now commit ourselves to the following 10-point programme to protect the rights of children and to improve their lives:
  - (1) We will work to promote earliest possible ratification and implementation of the Convention on the Rights of the Child. Programmes to encourage information about children's rights should be launched world-wide, taking into account the distinct cultural and social values in different countries.
  - (2) We will work for a solid effort of national and international action to enhance children's health, to promote pre-natal care and to lower infant and child mortality in all countries and among all peoples. We will promote the provision of clean water in all communities for all their children, as well as universal access to sanitation.



- (3) We will work for optimal growth and development in childhood, through measures to eradicate hunger, malnutrition and famine, and thus to relieve millions of children of tragic sufferings in a world that has the means to feed all its citizens.
- (4) We will work to strengthen the role and status of women. We will promote responsible planning of family size, child spacing, breastfeeding and safe motherhood.
- (5) We will work for respect for the role of the family in providing for children and will support the efforts of parents, other care-givers and communities to nurture and care for children, from the earliest stages of childhood through adolescence. We also recognize the special needs of children who are separated from their families.
- (6) We will work for programmes that reduce illiteracy and provide educational opportunities for all children, irrespective of their background and gender; that prepare children for productive employment and lifelong learning opportunities, i.e. through vocational training; and that enable children to grow to adulthood within a supportive and nurturing cultural and social context.
- (7) We will work to ameliorate the plight of millions of children who live under especially difficult circumstances - as victims of apartheid and foreign occupation; orphans and street children and children of migrant workers; the displaced children and victims of natural and man-made disasters; the disabled and the abused, the socially disadvantaged and the exploited. Refugee children must be helped to find new roots in life. We will work for special protection of the working child and for the abolition of illegal child labour. We will do our best to ensure that children are not drawn into becoming victims of the scourge of illicit drugs.
- (8) We will work carefully to protect children from the scourge of war and to take measures to prevent further armed conflicts, in order to give children everywhere a peaceful and secure future. We will promote the values of peace, understanding and dialogue in the education of children. The essential needs of children and families must be protected even in times of war and in violence-ridden areas. We ask that periods of tranquillity and special relief corridors be observed for the benefit of children, where war and violence are still taking place.
- (9) We will work for common measures for the protection of the environment, at all levels, so that all children can enjoy a safer and healthier future.

(10) We will work for a global attack on poverty, which would have immediate benefits for children's welfare. The vulnerability and special needs of the children of the developing countries, and in particular the least developed ones, deserve priority. But growth and development need promotion in all States, through national action and international co-operation. That calls for transfers of appropriate additional resources to developing countries as well as improved terms of trade, further trade liberalization and measures for debt relief. It also implies structural adjustments that promote world economic growth, particularly in developing countries, while ensuring the well-being of the most vulnerable sectors of the populations, in particular the children.

## **THE NEXT STEPS**

21. The World Summit for Children has presented us with a challenge to take action. We have agreed to take up that challenge.
22. Among the partnerships we seek, we turn especially to children themselves. We appeal to them to participate in this effort.
23. We also seek the support of the United Nations system, as well as other international and regional organizations, in the universal effort to promote the well-being of children. We ask for greater involvement on the part of non-governmental organizations, in complementing national efforts and joint international action in this field.
24. We have decided to adopt and implement a Plan of Action, as a framework for more specific national and international undertakings. We appeal to all our colleagues to endorse that Plan. We are prepared to make available the resources to meet these commitments, as part of the priorities of our national plans.
25. We do this not only for the present generation, but for all generations to come. There can be no task nobler than giving every child a better future.

### **33. World Medical Association, Declaration of Ottawa on the Right of the Child to Health Care, 1998<sup>314</sup>**

**Adopted by the 50th World Medical Assembly Ottawa, Canada, October 1998**

#### **PREAMBLE**

1. The health care of a child, whether at home or in hospital, includes medical, emotional, social and financial aspects which interact in the healing process and which require special attention to the rights of the child as a patient.
2. Article 24 of the 1989 United Nations Convention on the Rights of the Child recognizes the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, and states that nations shall strive to ensure that no child is deprived of his or her right of access to such health care services.
3. In the context of this Declaration a child signifies a human being between the time of birth and the end of her/his seventeenth year, unless under the law applicable in the country concerned children are legally recognized as adults at some other age.

#### **GENERAL PRINCIPLES**

4. Every child has an inherent right to life, as well as the right of access to the appropriate facilities for health promotion, the prevention and treatment of illness and the rehabilitation of health. Physicians and other health care providers have a responsibility to acknowledge and promote these rights, and to urge that the material and human resources be provided to uphold and fulfill them. In particular every effort should be made:

i) to protect to the maximum extent possible the survival and development of the child, and to recognize that parents (or legally entitled representatives) have primary responsibility for the development of the child and that both parents have common responsibilities in this respect;

ii) to ensure that the best interests of the child shall be the primary consideration in health care;

iii) to resist any discrimination in the provision of medical assistance and

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<sup>314</sup> Adopted by the 50th World Medical Assembly, Ottawa, Canada, October 1998, available at <http://www.wma.net/e/policy/c4.htm> (as of 3 Nov. 2008).

health care from considerations of age, gender, disease or disability, creed, ethnic origin, nationality, political affiliation, race, sexual orientation, or the social standing of the child or her/his parents or legally entitled representatives;

iv) to attain suitable pre-natal and post-natal health care for the mother and child;

v) to secure for every child the provision of adequate medical assistance and health care, with emphasis on primary health care, pertinent psychiatric care for those children with such needs, pain management and care relevant to the special needs of disabled children;

vi) to protect every child from unnecessary diagnostic procedures, treatment and research;

vii) to combat disease and malnutrition;

viii) to develop preventive health care;

ix) to eradicate child abuse in its various forms; and

x) to eradicate traditional practices prejudicial to the health of the child.

## **SPECIFIC PRINCIPLES**

### **Quality of care**

5. Continuity and quality of care should be ensured by the team providing health care for a child.
6. Physicians and others providing health care to children should have the special training and skills necessary to enable them to respond appropriately to the medical, physical, emotional and developmental needs of children and their families.
7. In circumstances where a choice must be made between child patients for a particular treatment which is in limited supply, the individual patients should be guaranteed a fair selection procedure for that treatment made on medical criteria alone and without discrimination.

### **Freedom of choice**

8. The parents or legally entitled representatives, or the child herself/himself if she/he is of sufficient maturity, should be able: to choose freely and to change the child's physician; to be satisfied that the physician of choice is free to make clinical and ethical judgments

without any outside interference; and to ask for a second opinion of another physician at any stage.

### **Consent and self-determination**

9. A child patient and her/his parents or legally entitled representatives have a right to active informed participation in all decisions involving the child's health care. The wishes of the child should be taken into account in such decision making, and should be given increasing weight dependant on her/his capacity of understanding. The mature child, in the judgment of the physician, is entitled to make her/his own decisions about health care.
10. Except in an emergency (see par 12 below), informed consent is necessary before beginning any diagnostic process or therapy on a child, especially where it is an invasive procedure. In the majority of cases the consent shall be obtained from the parents or legally entitled representatives, although any wishes expressed by the child should be taken into account before consent is given. However, if the child is of sufficient maturity and understanding, the informed consent shall be obtained from the child herself/himself.
11. In general, a competent child patient and her/his parents or legally entitled representatives are entitled to withhold consent to any procedure or therapy. While it is presumed that parents or legally entitled representatives will act in the best interests of the child, occasionally this may not be so. Where a parent or legally entitled representative refuses consent to a procedure and/or treatment, without which the child's health would be put in grave and irreversible danger and to which there is no alternative within the spectrum of generally accepted medical care, the physician should obtain the relevant judicial or other legal authorization to perform such a procedure or treatment.
12. If the child is unconscious, or otherwise incapable of giving consent, and a parent or legally entitled representative is not available, but a medical intervention is needed urgently, then specific consent to the intervention may be presumed, unless it is obvious and beyond any reasonable doubt on the basis of a previous firm expression or conviction that consent to the intervention would be refused in the particular situation (subject to the proviso detailed in paragraph 7 above).
13. A child patient and her/his parents or legally entitled representatives are entitled to refuse to participate in research or in the teaching of medicine. Such refusal must never interfere with the patient-physician relationship or jeopardize the child's medical care or other benefits to

which she/he is entitled.

### **Access to information**

14. The child patient and (except in the circumstances outlined in paragraph 18 below) her/his parents or legally entitled representatives are entitled to be fully informed about her/his health status and medical condition, provided this would not be contrary to the interests of the child. However, confidential information in the child's medical record about a third party should not be provided to the child, the parents or the legally entitled representatives without the consent of that third party.
15. Any information should be provided in a manner appropriate to the culture and to the level of understanding of the recipient. This is particularly important in the case of information provided to the child, who should have the right of access to general health information.
16. Exceptionally, certain information may be withheld from the child, or her/his parents or legally entitled representatives, when there is good reason to believe that this information would create a serious hazard to the life or health of the child or to the physical or mental health of a person other than the child.

### **Confidentiality**

17. In general the obligation of physicians and other health care workers to maintain the confidentiality of identifiable personal and medical information of patients (including information about health status, medical condition, diagnosis, prognosis, and treatment) applies as much in the case of child patients as it does for those who are adult.
18. The child patient mature enough to be unaccompanied at a consultation by her/his parents or legally entitled representatives is entitled to privacy and may request confidential services. Such a request should be respected, and information obtained during such a consultation or counseling session should not be disclosed to the parents or legally entitled representatives except with the consent of the child, or in circumstances where adult confidentiality can be breached. In addition, where the attending physician has strong reason to conclude that, despite unaccompanied attendance, the child is not competent to make an informed decision about treatment, or that without parental guidance or involvement the child's health would be put in grave and irreversible danger, then in exceptional circumstances, the physician may disclose to the parents or legally entitled representatives confidential information gained during an unaccompanied attendance.

However, the physician should first discuss with the child her/his reasons for doing so and attempt to persuade the child to agree to this action.

### **Admission to Hospital**

19. A child should be admitted to hospital only if the care he/she requires cannot be provided at home or on an outpatient basis.
20. A child admitted to hospital should be accommodated in an environment designed, furnished and equipped to suit her/his age and health status, and a child should not be admitted to adult accommodation except in special circumstances dictated only by her/his medical condition, e.g. where the child is admitted for childbirth or termination of pregnancy.
21. Every effort should be made to allow a child admitted to hospital to be accompanied by her/his parents or parent substitutes, who should be provided, where relevant, with appropriate accommodation in or near the hospital at no or minimal cost and with the opportunity to be absent from their place of work without prejudice to their continued employment.
22. Every child in hospital should be allowed as much outside contact and visiting as possible consistent with good care, without restriction as to the age of the visitor, except in circumstances where the attending physician has strong reason to believe that visiting would not be in the best interests of the child herself/himself.
23. Where a child of relevant age has been admitted to hospital her/his mother should not be denied the opportunity to breast-feed, unless there is a positive medical contra-indication to such.
24. A child in hospital should be afforded every opportunity and facility appropriate to her/his age for play, recreation and the continuation of education. To facilitate the latter the provision of specialized teachers should be encouraged or the child afforded access to appropriate distance learning programmes.

### **Child Abuse**

25. All appropriate measures must be taken to protect children from all forms of neglect or negligent treatment, physical and mental violence, coercion, maltreatment, injury or abuse, including sexual abuse. In this context attention is drawn to the provisions of the WMA's<sup>315</sup> Statement on Child Abuse and Neglect (WMA Document 17.W).

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<sup>315</sup> World Medical Association's.

### **Health Education**

26. Parents, and children appropriate to their age and/or development , should have access to, and full support in the application of, basic knowledge of child health and nutrition, including the advantages of breast-feeding, and of hygiene, environmental sanitation, the prevention of accidents, and sexual and reproductive health education.

### **Dignity of the patient**

27. A child patient should be treated at all times with tact and understanding and with respect for her/his dignity and privacy.
28. Every effort should be made to prevent, or if that is not possible to minimize, pain and/or suffering, and to mitigate physical or emotional stress in the child patient.
29. The terminally ill child should be provided with appropriate palliative care and all the assistance necessary to make dying as comfortable and dignified as possible.

### **Religious assistance**

30. The terminally ill child should be provided with appropriate palliative care and all the assistance necessary to make dying as comfortable and dignified as possible.





## **II.2.12 ELDERLY PERSONS**



### **34. United Nations Principles for Older Persons (excerpts), 1991<sup>316</sup>**

**Adoption: 16 December 1991**

(...)

#### **Independence**

1. Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.

(...)

#### **Care**

(...)

11. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.
12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.
13. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.
14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

#### **Self-fulfilment**

(...)

16. Older persons should have access to the educational, cultural, spiritual and recreational resources of society.

#### **Dignity**

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

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<sup>316</sup> G.A. Res. 46/9, 46<sup>th</sup> Sess., 16 Dec. 1991, U.N. Doc. A/RES/46/91, Annex.

18. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

## **II.2.13 PERSONS WITH DISABILITIES<sup>317</sup>**

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<sup>317</sup> See also the Report of the Special Rapporteur, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, sixty-first session, 2005. U.N. Doc. E/CN.4/2005/51, available online at: [http://ap.ohchr.org/documents/dp\\_e.aspx?m=100](http://ap.ohchr.org/documents/dp_e.aspx?m=100). Moreover, see the Montreal Declaration on Intellectual Disabilities, adopted in Montreal, Canada, 6 October 2004, available online at: <http://www.aamr.org/pdf/DeclarationMTL.pdf>.



**CESCR General Comment No. 5: persons with disabilities, 1994 (see section II.1)**

**CEDAW General Recommendation No. 18: disabled women, 1991 (see section II.2.10 Women)**



## **35. Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991<sup>318</sup>**

**Adoption: 17 December 1991**

### *Application*

These Principles shall be applied without discrimination of any kind such as on grounds of disability, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, legal or social status, age, property or birth.

### *Definitions*

In these Principles:

“Counsel” means a legal or other qualified representative;

“Independent authority” means a competent and independent authority prescribed by domestic law;

“Mental health care” includes analysis and diagnosis of a person’s mental condition, and treatment, care and rehabilitation for a mental illness or suspected mental illness;

“Mental health facility” means any establishment, or any unit of an establishment, which as its primary function provides mental health care;

“Mental health practitioner” means a medical doctor, clinical psychologist, nurse, social worker or other appropriately trained and qualified person with specific skills relevant to mental health care;

“Patient” means a person receiving mental health care and includes all persons who are admitted to a mental health facility;

“Personal representative” means a person charged by law with the duty of representing a patient’s interests in any specified respect or of exercising specified rights on the patient’s behalf, and includes the parent or legal guardian of a minor unless otherwise provided by domestic law;

“The review body” means the body established in accordance with Principle 17 to review the involuntary admission or retention of a patient in a mental health facility.

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<sup>318</sup> G.A. Res. 46/119, 46<sup>th</sup> Sess., 17 Dec. 1991, U.N. Doc. A/RES/46/119, Annex, loc. cit. n. 158.

*General limitation clause*

The exercise of the rights set forth in these Principles may be subject only to such limitations as are prescribed by law and are necessary to protect the health or safety of the person concerned or of others, or otherwise to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

*Principle 1**Fundamental freedoms and basic rights*

1. All persons have the right to the best available mental health care, which shall be part of the health and social care system.
2. All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person.
3. All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment.
4. There shall be no discrimination on the grounds of mental illness. "Discrimination" means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of these Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.
5. Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and in other relevant instruments, such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
6. Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after

a fair hearing by an independent and impartial tribunal established by domestic law. The person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it. The counsel shall not in the same proceedings represent a mental health facility or its personnel and shall not also represent a member of the family of the person whose capacity is at issue unless the tribunal is satisfied that there is no conflict of interest. Decisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law. The person whose capacity is at issue, his or her personal representative, if any, and any other interested person shall have the right to appeal to a higher court against any such decision.

7. Where a court or other competent tribunal finds that a person with mental illness is unable to manage his or her own affairs, measures shall be taken, so far as is necessary and appropriate to that person's condition, to ensure the protection of his or her interest.

### *Principle 2*

#### *Protection of minors*

Special care should be given within the purposes of these Principles and within the context of domestic law relating to the protection of minors to protect the rights of minors, including, if necessary, the appointment of a personal representative other than a family member.

### *Principle 3*

#### *Life in the community*

Every person with a mental illness shall have the right to live and work, as far as possible, in the community.

### *Principle 4*

#### *Determination of mental illness*

1. A determination that a person has a mental illness shall be made in accordance with internationally accepted medical standards.
2. A determination of mental illness shall never be made on the basis of political, economic or social status, or membership of a cultural, racial or religious group, or any other reason not directly relevant to mental

health status.

3. Family or professional conflict, or non-conformity with moral, social, cultural or political values or religious beliefs prevailing in a person's community, shall never be a determining factor in diagnosing mental illness.
4. A background of past treatment or hospitalization as a patient shall not of itself justify any present or future determination of mental illness.
5. No person or authority shall classify a person as having, or otherwise indicate that a person has, a mental illness except for purposes directly relating to mental illness or the consequences of mental illness.

#### *Principle 5*

##### *Medical examination*

No person shall be compelled to undergo medical examination with a view to determining whether or not he or she has a mental illness except in accordance with a procedure authorized by domestic law.

#### *Principle 6*

##### *Confidentiality*

The right of confidentiality of information concerning all persons to whom these Principles apply shall be respected.

#### *Principle 7*

##### *Role of community and culture*

1. Every patient shall have the right to be treated and cared for, as far as possible, in the community in which he or she lives.
2. Where treatment takes place in a mental health facility, a patient shall have the right, whenever possible, to be treated near his or her home or the home of his or her relatives or friends and shall have the right to return to the community as soon as possible.
3. Every patient shall have the right to treatment suited to his or her cultural background.

## *Principle 8*

### *Standards of care*

1. Every patient shall have the right to receive such health and social care as is appropriate to his or her health needs, and is entitled to care and treatment in accordance with the same standards as other ill persons.
2. Every patient shall be protected from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort.

## *Principle 9*

### *Treatment*

1. Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.
2. The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff.
3. Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners, including internationally accepted standards such as the Principles of Medical Ethics adopted by the United Nations General Assembly. Mental health knowledge and skills shall never be abused.
4. The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.

## *Principle 10*

### *Medication*

1. Medication shall meet the best health needs of the patient, shall be given to a patient only for therapeutic or diagnostic purposes and shall never be administered as a punishment or for the convenience of others. Subject to the provisions of paragraph 15 of Principle 11, mental health practitioners shall only administer medication of known or demonstrated efficacy.
2. All medication shall be prescribed by a mental health practitioner

authorized by law and shall be recorded in the patient's records.

### *Principle 11*

#### *Consent to treatment*

1. No treatment shall be given to a patient without his or her informed consent, except as provided for in paragraphs 6, 7, 8, 13 and 15 below.
2. Informed consent is consent obtained freely, without threats or improper inducements, after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient on:
  - (a) The diagnostic assessment;
  - (b) The purpose, method, Likely duration and expected benefit of the proposed treatment;
  - (c) Alternative modes of treatment, including those less intrusive; and
  - (d) Possible pain or discomfort, risks and side-effects of the proposed treatment.
3. A patient may request the presence of a person or persons of the patient's choosing during the procedure for granting consent.
4. A patient has the right to refuse or stop treatment, except as provided for in paragraphs 6, 7, 8, 13 and 15 below. The consequences of refusing or stopping treatment must be explained to the patient.
5. A patient shall never be invited or induced to waive the right to informed consent. If the patient should seek to do so, it shall be explained to the patient that the treatment cannot be given without informed consent.
6. Except as provided in paragraphs 7, 8, 12, 13, 14 and 15 below, a proposed plan of treatment may be given to a patient without a patient's informed consent if the following conditions are satisfied:
  - (a) The patient is, at the relevant time, held as an involuntary patient;
  - (b) An independent authority, having in its possession all relevant information, including the information specified in paragraph 2 above, is satisfied that, at the relevant time, the patient lacks the capacity to give or withhold informed consent to the proposed plan of treatment or, if domestic

legislation so provides, that, having regard to the patient's own safety or the safety of others, the patient unreasonably withholds such consent; and

(c) The independent authority is satisfied that the proposed plan of treatment is in the best interest of the patient's health needs.

7. Paragraph 6 above does not apply to a patient with a personal representative empowered by law to consent to treatment for the patient; but, except as provided in paragraphs 12, 13, 14 and 15 below, treatment may be given to such a patient without his or her informed consent if the personal representative, having been given the information described in paragraph 2 above, consents on the patient's behalf.
8. Except as provided in paragraphs 12, 13, 14 and 15 below, treatment may also be given to any patient without the patient's informed consent if a qualified mental health practitioner authorized by law determines that it is urgently necessary in order to prevent immediate or imminent harm to the patient or to other persons. Such treatment shall not be prolonged beyond the period that is strictly necessary for this purpose.
9. Where any treatment is authorized without the patient's informed consent, every effort shall nevertheless be made to inform the patient about the nature of the treatment and any possible alternatives and to involve the patient as far as practicable in the development of the treatment plan.
10. All treatment shall be immediately recorded in the patient's medical records, with an indication of whether involuntary or voluntary.
11. Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. All instances of physical restraint or involuntary seclusion, the reasons for them and their nature and extent shall be recorded in the patient's medical record. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff. A personal representative, if any and if relevant, shall be given prompt notice of any physical restraint or involuntary seclusion of the patient.
12. Sterilization shall never be carried out as a treatment for mental

illness.

13. A major medical or surgical procedure may be carried out on a person with mental illness only where it is permitted by domestic law, where it is considered that it would best serve the health needs of the patient and where the patient gives informed consent, except that, where the patient is unable to give informed consent, the procedure shall be authorized only after independent review.
14. Psychosurgery and other intrusive and irreversible treatments for mental illness shall never be carried out on a patient who is an involuntary patient in a mental health facility and, to the extent that domestic law permits them to be carried out, they may be carried out on any other patient only where the patient has given informed consent and an independent external body has satisfied itself that there is genuine informed consent and that the treatment best serves the health needs of the patient.
15. Clinical trials and experimental treatment shall never be carried out on any patient without informed consent, except that a patient who is unable to give informed consent may be admitted to a clinical trial or given experimental treatment, but only with the approval of a competent, independent review body specifically constituted for this purpose.
16. In the cases specified in paragraphs 6, 7, 8, 13, 14 and 15 above, the patient or his or her personal representative, or any interested person, shall have the right to appeal to a judicial or other independent authority concerning any treatment given to him or her.

## *Principle 12*

### *Notice of rights*

1. A patient in a mental health facility shall be informed as soon as possible after admission, in a form and a language which the patient understands, of all his or her rights in accordance with these Principles and under domestic law, which information shall include an explanation of those rights and how to exercise them.
2. If and for so long as a patient is unable to understand such information, the rights of the patient shall be communicated to the personal representative, if any and if appropriate, and to the person or persons best able to represent the patient's interests and willing to do so.
3. A patient who has the necessary capacity has the right to nominate



a person who should be informed on his or her behalf, as well as a person to represent his or her interests to the authorities of the facility.

### *Principle 13*

#### *Rights and conditions in mental health facilities*

1. Every patient in a mental health facility shall, in particular, have the right to full respect for his or her:
  - (a) Recognition everywhere as a person before the law;
  - (b) Privacy;
  - (c) Freedom of communication, which includes freedom to communicate with other persons in the facility; freedom to send and receive uncensored private communications; freedom to receive, in private, visits from a counsel or personal representative and, at all reasonable times, from other visitors; and freedom of access to postal and telephone services and to newspapers, radio and television;
  - (d) Freedom of religion or belief.
2. The environment and living conditions in mental health facilities shall be as close as possible to those of the normal life of persons of similar age and in particular shall include:
  - (a) Facilities for recreational and leisure activities;
  - (b) Facilities for education;
  - (c) Facilities to purchase or receive items for daily living, recreation and communication;
  - (d) Facilities, and encouragement to use such facilities, for a patient's engagement in active occupation suited to his or her social and cultural background, and for appropriate vocational rehabilitation measures to promote reintegration in the community. These measures should include vocational guidance, vocational training and placement services to enable patients to secure or retain employment in the community.
3. In no circumstances shall a patient be subject to forced labour. Within the limits compatible with the needs of the patient and with the requirements of institutional administration, a patient shall be able to choose the type of work he or she wishes to perform.
4. The labour of a patient in a mental health facility shall not be exploited. Every such patient shall have the right to receive the same remuneration

for any work which he or she does as would, according to domestic law or custom, be paid for such work to a non-patient. Every such patient shall, in any event, have the right to receive a fair share of any remuneration which is paid to the mental health facility for his or her work.

#### *Principle 14*

##### *Resources for mental health facilities*

1. A mental health facility shall have access to the same level of resources as any other health establishment, and in particular:
  - (a) Qualified medical and other appropriate professional staff in sufficient numbers and with adequate space to provide each patient with privacy and a programme of appropriate and active therapy;
  - (b) Diagnostic and therapeutic equipment for the patient;
  - (c) Appropriate professional care; and
  - (d) Adequate, regular and comprehensive treatment, including supplies of medication.
2. Every mental health facility shall be inspected by the competent authorities with sufficient frequency to ensure that the conditions, treatment and care of patients comply with these Principles.

#### *Principle 15*

##### *Admission principles*

1. Where a person needs treatment in a mental health facility, every effort shall be made to avoid involuntary admission.
2. Access to a mental health facility shall be administered in the same way as access to any other facility for any other illness.
3. Every patient not admitted involuntarily shall have the right to leave the mental health facility at any time unless the criteria for his or her retention as an involuntary patient, as set forth in Principle 16, apply, and he or she shall be informed of that right.

#### *Principle 16*

##### *Involuntary admission*

1. A person may (a) be admitted involuntarily to a mental health facility as

a patient; or (b) having already been admitted voluntarily as a patient, be retained as an involuntary patient in the mental health facility if, and only if, a qualified mental health practitioner authorized by law for that purpose determines, in accordance with Principle 4, that person has a mental illness and considers:

(a) That, because of that mental illness, there is a serious likelihood of immediate or imminent harm to that person or to other persons; or

(b) That, in the case of a person whose mental illness is severe and whose judgement is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative.

In the case referred to in subparagraph (b), a second such mental health practitioner, independent of the first, should be consulted where possible. If such consultation takes place, the involuntary admission or retention may not take place unless the second mental health practitioner concurs.

2. Involuntary admission or retention shall initially be for a short period as specified by domestic law for observation and preliminary treatment pending review of the admission or retention by the review body. The grounds of the admission shall be communicated to the patient without delay and the fact of the admission and the grounds for it shall also be communicated promptly and in detail to the review body, to the patient's personal representative, if any, and, unless the patient objects, to the patient's family.
3. A mental health facility may receive involuntarily admitted patients only if the facility has been designated to do so by a competent authority prescribed by domestic law.

### *Principle 17*

#### *Review body*

1. The review body shall be a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law. It shall, in formulating its decisions, have the assistance of one or more qualified and independent mental health practitioners and take their advice into account.
2. The review body's initial review, as required by paragraph 2 of Principle 16, of a decision to admit or retain a person as an involuntary

patient shall take place as soon as possible after that decision and shall be conducted in accordance with simple and expeditious procedures as specified by domestic law.

3. The review body shall periodically review the cases of involuntary patients at reasonable intervals as specified by domestic law.
4. An involuntary patient may apply to the review body for release or voluntary status, at reasonable intervals as specified by domestic law.
5. At each review, the review body shall consider whether the criteria for involuntary admission set out in paragraph 1 of Principle 16 are still satisfied, and, if not, the patient shall be discharged as an involuntary patient.
6. If at any time the mental health practitioner responsible for the case is satisfied that the conditions for the retention of a person as an involuntary patient are no longer satisfied, he or she shall order the discharge of that person as such a patient.
7. A patient or his personal representative or any interested person shall have the right to appeal to a higher court against a decision that the patient be admitted to, or be retained in, a mental health facility.

### *Principle 18*

#### *Procedural safeguards*

1. The patient shall be entitled to choose and appoint a counsel to represent the patient as such, including representation in any complaint procedure or appeal. If the patient does not secure such services, a counsel shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.
2. The patient shall also be entitled to the assistance, if necessary, of the services of an interpreter. Where such services are necessary and the patient does not secure them, they shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.
3. The patient and the patient's counsel may request and produce at any hearing an independent mental health report and any other reports and oral, written and other evidence that are relevant and admissible.
4. Copies of the patient's records and any reports and documents to be submitted shall be given to the patient and to the patient's counsel, except in special cases where it is determined that a specific disclosure

to the patient would cause serious harm to the patient's health or put at risk the safety of others. As domestic law may provide, any document not given to the patient should, when this can be done in confidence, be given to the patient's personal representative and counsel. When any part of a document is withheld from a patient, the patient or the patient's counsel, if any, shall receive notice of the withholding and the reasons for it and shall be subject to judicial review.

5. The patient and the patient's personal representative and counsel shall be entitled to attend, participate and be heard personally in any hearing.
6. If the patient or the patient's personal representative or counsel requests that a particular person be present at a hearing, that person shall be admitted unless it is determined that the person's presence could cause serious harm to the patient's health or put at risk the safety of others.
7. Any decision whether the hearing or any part of it shall be in public or in private and may be publicly reported shall give full consideration to the patient's own wishes, to the need to respect the privacy of the patient and of other persons and to the need to prevent serious harm to the patient's health or to avoid putting at risk the safety of others.
8. The decision arising out of the hearing and the reasons for it shall be expressed in writing. Copies shall be given to the patient and his or her personal representative and counsel. In deciding whether the decision shall be published in whole or in part, full consideration shall be given to the patient's own wishes, to the need to respect his or her privacy and that of other persons, to the public interest in the open administration of justice and to the need to prevent serious harm to the patient's health or to avoid putting at risk the safety of others.

### *Principle 19*

#### *Access to information*

1. A patient (which term in this Principle includes a former patient) shall be entitled to have access to the information concerning the patient in his or her health and personal records maintained by a mental health facility. This right may be subject to restrictions in order to prevent serious harm to the patient's health and avoid putting at risk the safety of others. As domestic law may provide, any such information not given to the patient should, when this can be done in confidence, be given to the patient's personal representative and counsel. When any of the information is withheld from a patient, the patient or the patient's

counsel, if any, shall receive notice of the withholding and the reasons for it and it shall be subject to judicial review.

2. Any written comments by the patient or the patient's personal representative or counsel shall, on request, be inserted in the patient's file.

### *Principle 20*

#### *Criminal offenders*

1. This Principle applies to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness.
2. All such persons should receive the best available mental health care as provided in Principle 1. These Principles shall apply to them to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances. No such modifications and exceptions shall prejudice the persons' rights under the instruments noted in paragraph 5 of Principle 1.
3. Domestic law may authorize a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility.
4. Treatment of persons determined to have a mental illness shall in all circumstances be consistent with Principle 11.

### *Principle 21*

#### *Complaints*

Every patient and former patient shall have the right to make a complaint through procedures as specified by domestic law.

### *Principle 22*

#### *Monitoring and remedies*

States shall ensure that appropriate mechanisms are in force to promote compliance with these Principles, for the inspection of mental health facilities, for the submission, investigation and resolution of complaints and for the institution of appropriate disciplinary or judicial proceedings for professional misconduct or violation of the rights of a patient.

### *Principle 23*

#### *Implementation*

1. States should implement these Principles through appropriate legislative, judicial, administrative, educational and other measures, which they shall review periodically.
2. States shall make these Principles widely known by appropriate and active means.

### *Principle 24*

#### *Scope of principles relating to mental health facilities*

These Principles apply to all persons who are admitted to a mental health facility.

### *Principle 25*

#### *Saving of existing rights*

There shall be no restriction upon or derogation from any existing rights of patients, including rights recognized in applicable international or domestic law, on the pretext that these Principles do not recognize such rights or that they recognize them to a lesser extent.

## **36. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (excerpts), 1993<sup>319</sup>**

**Adoption: 20 December 1993**

### **I. Preconditions for Equal Participation**

#### **Rule 2. Medical care**

States should ensure the provision of effective medical care to persons with disabilities.

States should work towards the provision of programmes run by multidisciplinary teams of professionals for early detection, assessment and treatment of impairment. This could prevent, reduce or eliminate disabling effects. Such programmes should ensure the full participation of persons with disabilities and their families at the individual level, and of organizations of persons with disabilities at the planning and evaluation level.

- Local community workers should be trained to participate in areas such as early detection of impairments, the provision of primary assistance and referral to appropriate services.
- States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society.
- States should ensure that all medical and paramedical personnel are adequately trained and equipped to give medical care to persons with disabilities and that they have access to relevant treatment methods and technology.
- States should ensure that medical, paramedical and related personnel are adequately trained so that they do not give inappropriate advice to parents, thus restricting options for their children. This training should be an ongoing process and should be based on the latest information available.
- States should ensure that persons with disabilities are provided with any regular treatment and medicines they may need to preserve or improve their level of functioning.

(...)

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<sup>319</sup> U.N.G.A. Res. 48/96, annex, loc. cit. n. 159.



## **II. Target Areas for Equal Participation**

### **Rule 5. Accessibility**

States should recognize the overall importance of accessibility in the process of the equalization of opportunities in all spheres of society. For persons with disabilities of any kind, States should (a) introduce programmes of action to make the physical environment accessible; and (b) undertake measures to provide access to information and communication.

- Access to the physical environment
  - States should initiate measures to remove the obstacles to participation in the physical environment. Such measures should be to develop standards and guidelines and to consider enacting legislation to ensure accessibility to various areas in society, such as housing, buildings, public transport services and other means of transportation, streets and other outdoor environments.
  - States should ensure that architects, construction engineers and others who are professionally involved in the design and construction of the physical environment have access to adequate information on disability policy and measures to achieve accessibility.
  - Accessibility requirements should be included in the design and construction of the physical environment from the beginning of the designing process.
  - Organizations of persons with disabilities should be consulted when standards and norms for accessibility are being developed. They should also be involved locally from the initial planning stage when public construction projects are being designed, thus ensuring maximum accessibility.
- Access to information and communication
  - Persons with disabilities and, where appropriate, their families and advocates should have access to full information on diagnosis, rights and available services and programmes, at all stages. Such information should be presented in forms accessible to persons with disabilities.
  - States should develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other

appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments. Similarly, appropriate technologies should be used to provide access to spoken information for persons with auditory impairments or comprehension difficulties.

- Consideration should be given to the use of sign language in the education of deaf children, in their families and communities. Sign language interpretation services should also be provided to facilitate the communication between deaf persons and others.
- Consideration should also be given to the needs of people with other communication disabilities.
- States should encourage the media, especially television, radio and newspapers, to make their services accessible.
- States should ensure that new computerized information and service systems offered to the general public are either made initially accessible or are adapted to be made accessible to persons with disabilities.
- Organizations of persons with disabilities should be consulted when measures to make information services accessible are being developed.

(...)

## **Rule 7. Employment**

States should recognize the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. In both rural and urban areas they must have equal opportunities for productive and gainful employment in the labour market.

(...)

- States, workers' organizations and employers should cooperate to ensure equitable recruitment and promotion policies, employment conditions, rates of pay, measures to improve the work environment in order to prevent injuries and impairments and measures for the rehabilitation of employees who have sustained employment-related injuries.

(...)

## **Rule 8. Income maintenance and social security**

States are responsible for the provision of social security and income maintenance for persons with disabilities.

- States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities. States should ensure that the provision of support takes into account the costs frequently incurred by persons with disabilities and their families as a result of the disability.
- In countries where social security, social insurance or other social welfare schemes exist or are being developed for the general population, States should ensure that such systems do not exclude or discriminate against persons with disabilities.
- States should also ensure the provision of income support and social security protection to individuals who undertake the care of a person with a disability.
- Social security systems should include incentives to restore the income-earning capacity of persons with disabilities. Such systems should provide or contribute to the organization, development and financing of vocational training. They should also assist with placement service. Social security programmes should also provide incentives for persons with disabilities to seek employment in order to establish or re-establish their income-earning capacity.
- Income support should be maintained as long as the disabling conditions remain in a manner that does not discourage persons with disabilities from seeking employment. It should only be reduced or terminated when persons with disabilities achieve adequate and secure income.
- States, in countries where social security is to a large extent provided by the private sector, should encourage local communities, welfare organizations and families to develop self-help measures and incentives for employment or employment-related activities for persons with disabilities.

## **Rule 9. Family life and personal integrity**

States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood.

- Persons with disabilities should be enabled to live with their families. States should encourage the inclusion in family counselling of appropriate modules regarding disability and its effects on family life. Respite-care and attendant-care services should be made available to families which include a person with disabilities. States should remove all unnecessary obstacles to persons who want to foster or adopt a child or adult with disabilities.
- Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. Taking into account that persons with disabilities may experience difficulties in getting married and setting up a family, States should encourage the availability of appropriate counselling. Persons with disabilities must have the same access as others to family-planning methods, as well as to information in accessible form on the sexual functioning of their bodies.
- States should promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons with disabilities, especially of girls and women with disabilities, which still prevail in society. The media should be encouraged to play an important role in removing such negative attitudes.
- Persons with disabilities and their families need to be fully informed about taking precautions against sexual and other forms of abuse. Persons with disabilities are particularly vulnerable to abuse in the family, community or institutions and need to be educated on how to avoid the occurrence of abuse, recognize when abuse has occurred and report on such acts.

(...)

## **Rule 11. Recreation and sports**

States will take measures to ensure that persons with disabilities have equal opportunities for recreation and sports.

(...)

### III. Implementation Measures

(...)

#### Rule 15. Legislation

States have a responsibility to create the legal bases for measures to achieve the objectives of full participation and equality for persons with disabilities.

- National legislation, embodying the rights and obligations of citizens, should include the rights and obligations of persons with disabilities. States are under an obligation to enable persons with disabilities to exercise their rights, including their human, civil and political rights, on an equal basis with other citizens. States must ensure that organizations of persons with disabilities are involved in the development of national legislation concerning the rights of persons with disabilities, as well as in the ongoing evaluation of that legislation.
- Legislative action may be needed to remove conditions that may adversely affect the lives of persons with disabilities, including harassment and victimization. Any discriminatory provisions against persons with disabilities must be eliminated. National legislation should provide for appropriate sanctions in case of violations of the principles of non-discrimination.
- National legislation concerning persons with disabilities may appear in two different forms. The rights and obligations may be incorporated in general legislation or contained in special legislation. Special legislation for persons with disabilities may be established in several ways:
  - By enacting separate legislation, dealing exclusively with disability matters;
  - By including disability matters within legislation on particular topics;
  - By mentioning persons with disabilities specifically in the texts that serve to interpret existing legislation.
  - A combination of those different approaches might be desirable. Affirmative action provisions may also be considered.
- States may consider establishing formal statutory complaints mechanisms in order to protect the interests of persons with disabilities.

(...)

## **Rule 22. International cooperation**

States will participate actively in international cooperation concerning policies for the equalization of opportunities for persons with disabilities.

- Within the United Nations, the specialized agencies and other concerned intergovernmental organizations, States should participate in the development of disability policy.
- Whenever appropriate, States should introduce disability aspects in general negotiations concerning standards, information exchange, development programmes, etc.
- States should encourage and support the exchange of knowledge and experience among:
  - Non-governmental organizations concerned with disability issues;
  - Research institutions and individual researchers involved in disability issues;
  - Representatives of field programmes and of professional groups in the disability field;
  - Organizations of persons with disabilities;
  - National coordinating committees.
- 4. States should ensure that the United Nations and the specialized agencies, as well as all intergovernmental and interparliamentary bodies, at global and regional levels, include in their work the global and regional organizations of persons with disabilities.

### **37. Convention on the Rights of Persons with Disabilities, 2006<sup>320</sup>**

**Adoption: 13 December 2006**

**Entry into force: 3 May 2008**

#### **ARTICLE 1 – PURPOSE**

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

(...)

#### **ARTICLE 22 - RESPECT FOR PRIVACY**

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.
2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

#### **ARTICLE 23 – RESPECT FOR HOME AND THE FAMILY**

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:
  - (a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;
  - (b) The rights of persons with disabilities to decide freely and responsibly

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<sup>320</sup> 13 Dec. 2006, U.N. Doc. A/61/611, Annex I (entry into force 3 May 2008), loc. cit. n. 160.

on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognised, and the means necessary to enable them to exercise these rights;

(c) Persons with disabilities, including children, shall retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.
3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realising these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.
4. 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. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.
5. States Parties shall undertake that where the immediate family is unable to care for a child with disabilities, to take every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

(...)

## ARTICLE 25 – HEALTH

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive, including health-related rehabilitation. In particular, States Parties shall:



- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided other persons, including in the area of sexual and reproductive health and population-based public health programmes;
- (b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and the elderly;
- (c) Provide these health services as close as possible to people's own communities, including in rural areas;
- (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, *inter alia*, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
- (e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;
- (f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

## **ARTICLE 26 - HABILITATION AND REHABILITATION**

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain their maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services, particularly in the areas of health, employment, education and social services, in such a way that:
  - (a) Habilitation and rehabilitation services and programmes begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
  - (b) Habilitation and rehabilitation services and programmes support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.
2. bis States parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

(...)

## **ARTICLE 28 - ADEQUATE STANDARD OF LIVING AND SOCIAL PROTECTION**

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing and to the continuous improvement of living conditions and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
2. States Parties recognize the right of persons with disabilities to social protection, and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
  - (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability related needs;
  - (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and the aged with disabilities, to social protection programmes and poverty reduction programmes;
  - (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses (including adequate training, counselling, financial assistance and respite care);
  - (d) To ensure access by persons with disabilities to public housing programmes;
  - (e) To ensure equal access by persons with disabilities to retirement benefits and programmes.



# RATIFICATIONS

As of 19 January 2010

	ICESCR	ICCPR	ICERD	CRSP	ICRMW	C 97	C 143	Trafficking in Persons Protocol	Geneva Convention IV	Protocol I	Protocol II	Refugee Convention	CEDAW	CRC	OP CRC-SC	OP CRC-AC	CRPD	C169
Afghanistan	x	x	x						x	x	x	x	x	x	x	x		
Albania	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x		
Algeria	x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x	
Andorra		x	x						x				x	x	x	x		
Angola	x	x							x	x		x	x	x	x	x		
Antigua and Barbuda			x	x					x	x	x	x	x	x	x			
Argentina	x	x	x	x	x			x	x	x	x	x	x	x	x	x	x	x
Armenia	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x		
Australia	x	x	x	x				x	x	x	x	x	x	x	x	x	x	
Austria	x	x	x	x				x	x	x	x	x	x	x	x	x	x	
Azerbaijan	x	x	x	x	x			x	x			x	x	x	x	x	x	
Bahamas	x	x	x			x		x	x	x	x	x	x	x				
Bahrain	x	x	x					x	x	x	x		x	x	x	x		
Bangladesh	x	x	x						x	x	x		x	x	x	x	x	
Barbados	x	x	x	x		x			x	x	x		x	x				
Belarus	x	x	x					x	x	x	x	x	x	x	x	x		
Belgium	x	x	x	x		x		x	x	x	x	x	x	x	x	x	x	
Belize		x	x	x	x	x		x	x	x	x	x	x	x	x	x		
Benin	x	x	x				x	x	x	x	x	x	x	x	x	x		
Bhutan									x				x	x	x	x		
Bolivia	x	x	x	x	x			x	x	x	x	x	x	x	x	x	x	x
Bosnia and Herzegovina	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x		
Botswana		x	x	x				x	x	x	x	x	x	x	x	x		
Brazil	x	x	x	x		x		x	x	x	x	x	x	x	x	x	x	x
Brunei Darussalam									x	x	x		x	x	x			
Bulgaria	x	x	x					x	x	x	x	x	x	x	x	x		
Burkina Faso	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	
Burundi	x	x	x						x	x	x	x	x	x	x	x		
Cambodia	x	x	x					x	x	x	x	x	x	x	x	x		
Cameroon	x	x	x			x	x	x	x	x	x	x	x	x				
Canada	x	x	x					x	x	x	x	x	x	x	x	x		
Cape Verde	x	x	x		x			x	x	x	x		x	x	x	x		

	ICESCR	ICCPR	ICERD	CRSPP	ICRMW	C 97	C 143	Trafficking in Persons Protocol	Geneva Convention IV	Protocol I	Protocol II	Refugee Convention	CEDAW	CRC	OP CRC-SC	OP CRC- AC	CRPD	C169
Central African Republic	x	x	x					x	x	x	x	x	x	x				
Chad	x	x	x	x				x	x	x	x	x	x	x	x	x		
Chile	x	x	x		x			x	x	x	x	x	x	x	x	x	x	x
China	x		x						x	x	x	x	x	x	x	x	x	
Colombia	x	x	x		x			x	x	x	x	x	x	x	x	x		x
Comoros			x						x	x	x		x	x	x			
Congo (Republic of)	x	x	x						x	x	x	x	x	x	x			
Cook Islands									x	x	x		x	x			x	
Costa Rica	x	x	x	x				x	x	x	x	x	x	x	x	x	x	x
Côte d'Ivoire	x	x	x						x	x	x	x	x	x				
Croatia	x	x	x	x				x	x	x	x	x	x	x	x	x	x	
Cuba			x			x			x	x	x		x	x	x	x	x	
Cyprus	x	x	x			x	x	x	x	x	x	x	x	x	x			
Czech Republic	x	x	x	x					x	x	x	x	x	x		x	x	
Congo (RDC)	x	x	x					x	x	x	x	x	x	x	x	x		
Denmark	x	x	x	x				x	x	x	x	x	x	x	x	x	x	x
Djibouti	x	x						x	x	x	x	x	x	x				
Dominica	x	x				x			x	x	x	x	x	x	x	x		x
Dominican Republic	x	x	x					x	x	x	x	x	x	x	x		x	
Ecuador	x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x
Egypt	x	x	x		x			x	x	x	x	x	x	x	x	x	x	
El Salvador	x	x	x		x			x	x	x	x	x	x	x	x	x	x	
Equatorial Guinea	x	x	x					x	x	x	x	x	x	x	x			
Eritrea	x	x	x						x				x	x	x	x		
Estonia	x	x	x					x	x	x	x	x	x	x	x			
Ethiopia	x	x	x						x	x	x	x	x	x				
Fiji			x	x					x	x	x	x	x	x				x
Finland	x	x	x	x				x	x	x	x	x	x	x		x		
France	x	x	x	x		x		x	x	x	x	x	x	x	x	x		
Gabon	x	x	x						x	x	x	x	x	x	x		x	
Gambia	x	x	x					x	x	x	x	x	x	x				
Georgia	x	x	x					x	x	x	x	x	x	x	x			
Germany	x	x	x	x		x		x	x	x	x	x	x	x	x	x	x	
Ghana	x	x	x		x				x	x	x	x	x	x				

	ICESCR	ICCPR	ICERD	CRSSP	ICRMW	C 97	C 143	Trafficking in Persons Protocol	Geneva Convention IV	Protocol I	Protocol II	Refugee Convention	CEDAW	CRC	OP CRC-SC	OP CRC- AC	CRPD	C169
Greece	x	x	x	x					x	x	x	x	x	x	x	x		
Grenada	x	x				x		x	x	x	x		x	x				
Guatemala	x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x
Guinea	x	x	x	x	x		x	x	x	x	x	x	x	x			x	
Guinea-Bissau	x							x	x	x	x	x	x	x				
Guyana	x	x	x			x		x	x	x	x		x	x				
Haiti		x	x						x	x	x	x	x	x			x	
Holy See			x						x	x	x	x		x	x	x		
Honduras	x	x	x		x			x	x	x	x	x	x	x	x	x	x	x
Hungary	x	x	x	x				x	x	x	x	x	x	x			x	
Iceland	x	x	x						x	x	x	x	x	x	x	x		
India	x	x	x						x				x	x	x	x	x	
Indonesia	x	x	x					x	x				x	x				
Iran	x	x	x						x			x		x	x		x	
Iraq	x	x	x					x	x				x	x	x	x		
Ireland	x	x	x	x					x	x	x	x	x	x		x		
Israel	x	x	x	x		x		x	x			x	x	x	x	x		
Italy	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	
Jamaica	x	x	x		x	x		x	x	x	x	x	x	x		x	x	
Japan	x	x	x						x	x	x	x	x	x	x	x		
Jordan	x	x	x					x	x	x	x		x	x	x	x	x	
Kazakhstan	x	x	x					x	x	x	x	x	x	x	x	x		
Kenya	x	x	x			x	x	x	x	x	x	x	x	x		x	x	
Kiribati				x				x	x				x	x				
Korea (DPR)	x	x							x	x			x	x				
Korea (Republic of)	x	x	x	x					x	x	x	x	x	x	x	x	x	
Kuwait	x	x	x					x	x	x	x		x	x	x	x		
Kyrgyzstan	x	x	x		x	x		x	x	x	x	x	x	x	x	x		
Laos	x	x	x					x	x	x	x		x	x	x	x	x	
Latvia	x	x	x	x				x	x	x	x	x	x	x	x	x		
Lebanon	x	x	x					x	x	x	x		x	x	x			
Lesotho	x	x	x	x	x			x	x	x	x	x	x	x	x	x	x	
Liberia	x	x	x	x				x	x	x	x	x	x	x				
Libyan Arab Jamahiriya	x	x	x	x	x			x	x	x	x		x	x	x	x		
Liechtenstein	x	x	x	x				x	x	x	x	x	x	x		x		

	ICESCR	ICCPR	ICERD	CRSSP	ICRMW	C 97	C 143	Trafficking in Persons Protocol	Geneva Convention IV	Protocol I	Protocol II	Refugee Convention	CEDAW	CRC	OP CRC-SC	OP CRC- AC	CRPD	C169
Lithuania	x	x	x	x				x	x	x	x	x	x	x	x	x		
Luxembourg	x	x	x	x				x	x	x	x	x	x	x		x		
Macedonia, Yugoslav Republic of	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x		
Madagascar	x	x	x	x		x		x	x	x	x	x	x	x	x	x		
Malawi	x	x	x	x		x		x	x	x	x	x	x	x	x		x	
Malaysia						x		x	x				x	x				
Maldives	x	x	x						x	x	x		x	x	x	x		
Mali	x	x	x		x			x	x	x	x	x	x	x	x	x	x	
Malta	x	x	x					x	x	x	x	x	x	x		x		
Marshall Islands									x				x	x				
Mauritania	x	x	x		x			x	x	x	x	x	x	x	x			
Mauritius	x	x	x			x		x	x	x	x		x	x		x	x	
Mexico	x	x	x	x	x			x	x	x		x	x	x	x	x	x	x
Micronesia									x	x	x		x	x				
Moldova	x	x	x			x		x	x	x	x	x	x	x	x	x		
Monaco	x	x	x					x	x	x	x	x	x	x	x	x		
Mongolia	x	x	x					x	x	x	x		x	x	x	x	x	
Montenegro	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	
Morocco	x	x	x		x				x			x	x	x	x	x	x	
Mozambique		x	x					x	x	x	x	x	x	x	x	x		
Myanmar								x	x				x	x				
Namibia	x	x	x					x	x	x	x	x	x	x	x	x	x	
Nauru									x	x	x			x				
Nepal	x	x	x						x				x	x	x	x		x
Netherlands	x	x	x	x		x		x	x	x	x	x	x	x	x	x		x
New Zealand	x	x	x			x		x	x	x	x	x	x	x		x	x	
Nicaragua	x	x	x		x			x	x	x	x	x	x	x	x	x	x	
Niger	x	x	x		x			x	x	x	x	x	x	x	x		x	
Nigeria	x	x	x		x	x		x	x	x	x	x	x	x				
Norway	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x		x
Oman			x					x	x	x	x		x	x	x	x	x	
Pakistan	x		x						x				x	x				
Palau									x	x	x			x				
Panama	x	x	x					x	x	x	x	x	x	x	x	x	x	

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Papua New Guinea	x	x	x						x			x	x	x				
Paraguay	x	x	x		x			x	x	x	x	x	x	x	x	x	x	x
Peru	x	x	x		x			x	x	x	x	x	x	x	x	x	x	x
Philippines	x	x	x		x	x	x	x	x		x	x	x	x	x	x	x	
Poland	x	x	x					x	x	x	x	x	x	x	x	x		
Portugal	x	x	x			x	x	x	x	x	x	x	x	x	x	x	x	
Qatar			x					x	x	x	x		x	x	x	x	x	
Romania	x	x	x	x				x	x	x	x	x	x	x	x	x		
Russian Federation	x	x	x					x	x	x	x	x	x	x		x		
Rwanda	x	x	x	x	x			x	x	x	x	x	x	x	x	x	x	
Saint Kitts and Nevis			x					x	x	x	x	x	x	x				
Saint Lucia			x			x			x	x	x		x	x				
Saint Vincent & Grenadines	x	x	x	x					x	x	x	x	x	x	x			
Samoa		x							x	x	x	x	x	x				
San Marino	x	x	x				x		x	x	x		x	x			x	
Sao Tome Principe								x	x	x	x	x	x	x				
Saudi Arabia			x					x	x	x	x		x	x			x	
Senegal	x	x	x	x	x			x	x	x	x	x	x	x	x	x		
Serbia	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	
Seychelles	x	x	x		x			x	x	x	x	x	x	x			x	
Sierra Leone	x	x	x						x	x	x	x	x	x	x	x		
Singapore									x				x	x		x		
Slovakia	x	x	x	x				x	x	x	x	x	x	x	x	x		
Slovenia	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	
Solomon Islands	x		x						x	x	x	x	x	x				
Somalia	x	x	x						x			x						
South Africa		x	x					x	x	x	x	x	x	x	x	x	x	
Spain	x	x	x	x		x		x	x	x	x	x	x	x	x	x	x	x
Sri Lanka	x	x	x		x				x				x	x	x	x		
Sudan	x	x	x						x	x	x	x		x	x	x	x	
Suriname	x	x	x					x	x	x	x	x	x	x				
Swaziland	x	x	x	x					x	x	x	x	x	x				
Sweden	x	x	x	x			x	x	x	x	x	x	x	x	x	x	x	
Switzerland	x	x	x	x				x	x	x	x	x	x	x	x	x		



	ICESCR	ICCPR	ICERD	CRSSP	ICRMW	C 97	C 143	Trafficking in Persons Protocol	Geneva Convention IV	Protocol I	Protocol II	Refugee Convention	CEDAW	CRC	OP CRC-SC	OP CRC- AC	CRPD	C169
Syrian Arab Republic	x	x	x		x			x	x	x			x	x	x	x	x	
Tajikistan	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x		
Tanzania	x	x	x			x		x	x	x	x	x	x	x	x	x	x	
Thailand	x	x	x						x				x	x	x	x	x	
Timor-Leste	x	x	x		x			x	x	x	x	x	x	x	x	x		
Togo	x	x	x				x	x	x	x	x	x	x	x	x	x		
Tonga			x						x	x	x			x				
Trinidad y Tobago	x	x	x	x		x		x	x	x	x	x	x	x				
Tunisia	x	x	x	x				x	x	x	x	x	x	x	x	x	x	
Turkey	x	x	x		x			x	x			x	x	x	x	x	x	
Turkmenistan	x	x	x					x	x	x	x	x	x	x	x	x	x	
Tuvalu									x			x	x	x				
Uganda	x	x	x	x	x		x		x	x	x	x	x	x	x	x	x	
Ukraine	x	x	x					x	x	x	x	x	x	x	x	x		
United Arab Emirates			x					x	x	x	x		x	x				
United Kingdom	x	x	x	x		x		x	x	x	x	x	x	x	x	x	x	
United States of America		x	x					x	x						x	x		
Uruguay	x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x	
Uzbekistan	x	x	x					x	x	x	x		x	x	x	x		
Vanuatu		x							x	x	x		x	x	x	x	x	
Venezuela	x	x	x			x	x	x	x	x	x		x	x	x	x		x
Viet Nam	x	x	x						x	x			x	x	x	x		
Yemen	x	x	x						x	x	x	x	x	x	x	x	x	
Zambia	x	x	x	x		x		x	x	x	x	x	x	x				
Zimbabwe	x	x	x	x					x	x	x	x	x	x				

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## STORIES

The following stories present real life situations and reflect the work carried out by IOM in various part of the world. Additionally, two journal articles have been included to illustrate the challenges migrating persons with health conditions face. The names of the people involved in the stories have been changed to protect their identities.

## **Irregular Migration: Struggling for Life on the Other Side<sup>321</sup>**

It is November 2005. I am at home in Zimbabwe for only three weeks after being deported from Lindela, “the repatriation centre”. I am recovering from a strange flu that I contracted there. Money is out of my pocket, and my wife is suffering from the drought and food shortage. I don’t have an option other than going down to South Africa again.

I am wearing long trousers, a T-shirt, a shirt, and a jacket. I have an “Awake” magazine in my hand. My friend Moses has offered me \$300,000 Zimbabwean dollars to get to the border post. I am with four other guys now, traveling on foot to cross the border. Not through the formal entrance, of course. Our company is important for a night-time journey of more than 40 kilometers through thorny thickets, game wires, and over mountains. The next morning, I say farewell to my colleagues and find a place to hide in the neighboring farm. Wandering for three days without food, I arrive finally at a mango plot.

I am harvesting mangoes for ten Rand a day. Accommodation and food are major problems, and getting employment has been very difficult. Farmers are required by law to hire people who have South African ID books.

A few weeks have gone by. I have found a job as a farm security guard. My work mate Jonas is the only other Zimbabwean. We are desperately looking for girlfriends to provide shelter, love, and belonging. We are having unprotected sex and contract sexually transmitted infections for the first time in our lives. Going for treatment is a challenge because we do not know the local language, and we are afraid of being deported once again.

Ten months later, and it is November 2006. So much, in only a year. I feel lucky now. I have brought my wife from Zimbabwe, and my working conditions have improved greatly. My friend has not been so lucky – he tested HIV positive.

I think often about the difficult times and bad treatment we faced. I think of the 100 other Zimbabweans who are taken to Lindela every day to wait for deportation. They face starvation, dangerous animals, the Limpopo river floods, thugs, cruel farmers, and diseases, all in an attempt to make a living on the other side.

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<sup>321</sup> *A Better Life than Me: Migrants' Stories from Southern Africa*, DVD, IOM, 2007. The DVD is a collection of eight personal stories told by migrants and members of their families from various countries in southern Africa.

## **Fleeing Labour Exploitation: Healing the Fractures<sup>322</sup>**

Twenty-five-year-old Jane left her family and friends in a town called Brebes in Central Java in March 2007 with a month of training under her belt, optimistic that the money she would make as a domestic worker in Malaysia promised a brighter future.

The first hint that something was wrong came when Jane learned the position she was supposed to fill was not ready, and she along with several other young women would spend three days living in the tiny offices of the employment agency in Kuala Lumpur with little to eat.

Relief at the arrival of her new employer quickly turned to horror as Jane was forced to work from 5 a.m. until well past midnight every day. The long hours took their toll. Her health suffered, and by the end of the second month Jane was too weak to work. Jane's employer took her to a clinic and provided her with medication but a week later ordered Jane to pack her bags and return to the employment agency.

What followed was months of unpaid work as a cleaner in a series of homes and hotels where she was regularly scolded and beaten by her temporary employers.

"All I had in my mind was the need to run away from this agency as soon as possible", she recalls. "It was a real hell on earth; we were treated like animals".

Early one morning in September 2007, Jane took the drastic step of leaping from the second floor of the employment agency's offices, seriously injuring her arm in the process before fleeing into the streets of the Malaysian capital.

Ultimately she was discovered by a fellow Indonesian who took her home and gave her some food and money. She contacted the Indonesian Embassy in Kuala Lumpur who advised her to file a report at the police station.

Jane followed the advice but during the police interview officers noticed her injuries. They brought her to a hospital where she learned that the broken bones in her arm required immediate surgery and three days' stay in the hospital.

During her time at the hospital, the Malaysian police alerted the Indonesian Embassy in Kuala Lumpur who in turn contacted IOM Indonesia to begin coordinating the young woman's return home.

<sup>322</sup> Annual Report 2007, IOM Indonesia, 2007.

Embassy staff monitored her medical condition to ensure she would be fit to travel to Indonesia once her papers were processed. One week later, with IOM's assistance, Jane was on her way home.

"When the Indonesian Embassy sent me back to Indonesia, I could not stop crying. I couldn't believe that I was finally really going home", she says.

Upon arrival in Jakarta, Jane was immediately admitted to IOM's medical recovery centre at the PPT-Pusat Pelayanan Terpadu (Integrated Service Centre) of the Indonesia Police Hospital in Jakarta for further treatment for the fractures to both bones in her right forearm. She also received psychological assistance from trained hospital staff.

"They are all friendly and cared about me. If I were not brought to the hospital, I don't know what I would have done, especially how I would pay to cure my hand", she says. "And even though now I am handicapped, I am still very happy I can see my family again. IOM is also helping me to claim my work insurance".

On the third week of October 2007, Jane's brother and a representative of the Indonesian agency that recruited her arrived at the hospital for the final leg of the journey home to Brebes, Central Java. Jane expects to use proceeds from the work insurance claim to start up her own business to support her child and extended family. She has no plans to return to Malaysia.

## Life as a Refugee living with HIV

### Nathalie's Story<sup>323</sup>

Nathalie is a Congolese Refugee living in Mayukwayukwa Refugee Camp in Zambia. She arrived in 2006 after her husband and two children were killed during the conflict. Even though she was born in the Democratic Republic of the Congo, she was targeted in the fighting because she was a “Banyamulenge”. Since arriving in Zambia, she has supported herself by selling fritters in the local market.

Although her story may not be very unusual for a refugee, what makes Nathalie unusual is that all of this happened to her while she was on anti-retroviral treatment (ART). Nathalie first learned that she was HIV positive in 2002 while she was working in a hospital. In 2003, she became very sick with diarrhea and malaria. After three months of sickness and weight loss, she started taking triomune and began to recover. Although she still complains of coughing and chest pain, Nathalie feels much better now.

After fleeing the Congo, she began getting her drugs from Kalingalinga Clinic in Lusaka. It was hard for her to make the 500 km journey from Mayukwayukwa Refugee Camp to Lusaka every two months, but at least she could stay with her brother while she was in Lusaka. The hardest part is finding the money for the bus trip, which costs 85,000 Zkw (\$21 USD or 284 fritters).

During the last couple of months, the Zambian government has made ART available closer to the camp (in Kaoma, 90 km), but Nathalie still likes to go to Lusaka to receive treatment because the Kalingalinga Clinic also distributes food such as wheat flour, high energy protein supplement (HEPS), and milk along with the drugs.

Despite all her hardship, Nathalie is still optimistic. She believes that “if you don’t know your status, you can just die like that, but, me, sometimes, I get to eat nice food”. Nathalie hopes to start a support group within the camp to help other refugees come to terms with being HIV positive.

<sup>323</sup> These are two scenarios from Mayukwayukwa Refugee camp in the Western Province of Zambia. It currently hosts 10,611 refugees. They are mostly Angolans (10,118), with a few others, including DRC (344), Burundi (59) and Rwandan (89) refugees. One (1) is listed as “other”. IOM is providing HIV Awareness and Prevention programmes in this camp. The cases have been taken by Scott Kinkelaar, IOM Agricultural trainer in the Mayukwayukwa Refugee camp in the Western Province of Zambia. He and Elizabeth Barnhart should be thanked for their contribution.



### **Paula's story**<sup>324</sup>

Paula is an Angolan Refugee living in Mayukwayukwa Refugee Camp in Zambia. Paula was born in Zambia and has spent all of her life in Mayukwayukwa. In 2005, she tested positive for HIV. She first suspected that she had HIV in 2004 during a difficult pregnancy where she suffered from diarrhea and weight loss. She struggles to make ends meet for her and her young daughter, but her sickness sometimes prevents her from working in her fields. Her family helps, but there is only so much that they can do. Recently she was referred to Kaoma District Hospital, which recently began prescribing ARV treatment in Kaoma District (90 km from the refugee camp) for anti-retroviral therapy (ART), but has yet to receive treatment. She states that it is difficult to receive the treatment because the hospital requires her to stay in Kaoma for two weeks, so physicians can observe her reaction to the drugs. She finds this requirement discouraging. She knows that transport to Kaoma is another challenge, requiring the monthly expense of a bus ticket. Paula hopes to start treatment soon, but is reluctant to leave her field in the middle of the rainy season.

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<sup>324</sup> *Ibidem.*

**Veronica and the IOM's mitigation programme: nutrition**<sup>325</sup>

Veronica lives in a village in Zimbabwe with her elderly husband. It is her third marriage. Her brothers asked her to re-marry after her second husband died, as they could not afford to look after her. Housebound for the past three years, and identified as chronically ill since April 2004, she has been one of the beneficiaries of the supplementary nutritional food packs distributed by IOM's Migration Health Unit. On the day of the baseline interviews, Veronica said she was grateful for the mitigation programme, and that she hoped that assistance of this kind would continue. "I am feeling a little better because I can now get out of the hut and sit in the sun. The peanut butter helped a lot". Indeed, Veronica now has the strength to do simple tasks whilst seated, and at the time of the interview, she was applying her newfound knowledge of the nutritious value of peanut butter, by actually being in the midst of preparing some herself using a small stone grinder.

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<sup>325</sup> Newsletter September 2005, IOM Harare.

## **Displacement: Bringing New Life to Aceh Province<sup>326</sup>**

At about 4:00 in the morning on August 14, 2007, Agustina felt she was about to deliver her second child. Her husband quickly contacted the midwife, Mary, working out of a Satellite Health Center near Leuhan. Shortly after her water broke at 4:30 am, the midwife arrived and after almost five hours of labour, her baby boy was born. Alarming, the baby was in very bad condition, his skin was pale and cyanotic, and emergency action was required.

When the new-born baby did not cry, family members panicked and began shouting. Within seconds, however, midwife Mary recalled her training and applied the techno tube procedure she had recently learned. She put the cup of the techno tube in the baby's mouth and inhaled to clear his clogged nose. The stimulation succeeded, the baby started breathing and, to everyone's amazement, he began to cry. The family members who were gathered in Agustina's small house were overcome with joy.

Midwife Mary is one of 491 midwives who has been trained on how to use the techno-tube to treat asphyxia in newborn babies. In this IOM implemented programme, an additional 60 clinical midwife educators have completed a "training of trainers" course in the management of postpartum hemorrhage and asphyxia and will use their knowledge to train more midwives and community health workers. Supplies, such as 400 techno-tubes, have also been distributed to midwives in the three participating districts towards this life-saving project.

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<sup>326</sup> Americares, 2007

## Indigenous Migrant Peoples: Ngöbe-Buglé in Costa Rica<sup>327</sup>

Dr. Pablo Ortiz is the Director of the Health Area of Coto Brus (a county located at the southern border of Costa Rica) of the Costa Rica Social Security Fund (public health system), and partner of FINCA SANA, a programme implemented by IOM together with the CCSS (Caja Costarricense de Seguro Social) and coffee farm workers in the region. The objective of the project is to improve the health of the 12,000 migrants that are members of the Ngöbe-Buglé indigenous community (comprised of 200,000 inhabitants and situated near Costa Rica's southern border with Panama) that year after year travel to the region of Coto Brus to harvest coffee. Since 2003, mobile teams of health technicians and nurses have visited the coffee farms to provide health care services and to fulfill the community's right to health.

When Dr. Pablo Ortiz reflects on the lack of access to such services, he sorrowfully remembers a young Ngöbe girl that became ill with bronchopneumonia on a coffee farm. After examining her, Dr. Pablo Ortiz discovered that she had a ventricular septal defect (VSD). She was operated in a hospital in San José and she remained there for months of intensive care. After her health improved, she returned to the San Vito Hospital and then to her parents. After just three short months of being home, she became ill and was rushed to the emergency room, lifeless. The family explained that they lived on the Panamanian side of the border and that they didn't have enough money to purchase her treatment. After reviewing her case, doctors realized that the girl's treatment would have consisted of one simple aspirin a day, but it was already too late.

"This is one of the most dramatic cases that I have ever seen. If only the institution had realized its obligation to treat the immigrant child, in something so simple as to explain what aspirin is and its cost in a local store! The system failed...in something so simple", laments the doctor.

The town people of Ngöbe-Buglé are considered one of the populations with the worst overall health in the hemisphere. Added to their poor health, the Ngöbe people also suffer from exclusion, and cultural and geographic barriers. Dr. Pablo Ortiz affirms that the Ngöbe-Buglé migrant is invisible: "They do not appear in national data, have no documentation, are irregular, and are simply unaccounted for". According to his experience, many of these indigenous peoples have shared the same culture as the locals for hundreds of years, yet they are perceived as strange and foreign. They suffer from malnutrition and prior to the mobile teams efforts did not receive basic vaccinations and pregnant women did not have access

<sup>327</sup> Rosilyne Borland and Ana Beatriz Fernández should be thanked for their contribution.

to prenatal care. And the list goes on: contagious preventable illnesses, tuberculosis, diabetes, or high blood pressure without treatment are all rampant in their community. Unfortunately, without having the proper documentation, these indigenous people have no access to public health care services. Geographic borders aggravate the situation. Dr. Pablo Ortiz mentions examples such as neglected roads and the vast distances between the coffee farms and the San Vito Hospital.

FINCA SANA allows for the collection of comparative statistics that are vital in measuring the levels of malnutrition of migrant children, and then compares the findings to local populations. So far, the CCSS's efforts have contributed to reduced infant mortality rates, less waiting time in the emergency room, and reduced hospitalization of migrants. Apart from the palpable improvements that have already been made, Dr. Pablo Ortiz considers that the most important step is to focus on the process of public awareness, in particular, targeting farmers, health care workers, and local populations.

“Start by eradicating discriminatory treatment, regardless of whether the person is an indigenous Ngöbe Buglé migrant, Costa Rican, or not”, Dr. Pablo Ortiz concludes.

## The Story of Obi: Residence Permit on Medical Grounds<sup>328</sup>

Obi regularly travelled between Nigeria and the Netherlands on account of his trading business until about four years ago, when he suddenly fell ill on one of his visits to the Netherlands. He was brought to hospital and was found to have TB and HIV.

While being treated for TB, Obi's CD4 count started falling rapidly. At this time he wanted to go back to Nigeria to die: "My conclusion by HIV [was] that if you have it, you are going to die". "But the doctor said that... if you have HIV [that] doesn't mean that you are dying, you can still lead a normal life". "But I didn't believe; I insisted I wanted to go back... They had to put someone at my door to be sure that I don't go and run away". Eventually Obi was convinced to continue treatment and to apply for a residence permit in the Netherlands on medical grounds. By now, Obi has been on treatment for several years, and has a residence permit. He is an active member of a support group for Africans living with HIV.

On being asked about the prospect of returning to Nigeria some day, Obi produces several boxes of medicines and shows the prices: € 404.00, € 222.22, € 561.88. He explains:

"And this I have to consume every month. So what kind of work would I do [in Nigeria], so I can earn such an amount of money to be able to buy this medication every month? If you stop for one reason that you can't continue for a few days, it becomes a problem... And if you get resistance of these things, then it becomes more difficult for the doctor to handle... When I started medication I didn't start with this one. They have to take blood to see which one works well, which one does not. Even with advanced technology they cannot get it [right] in one time... Let's assume I [can] buy medication in my country. What about other factors like a good professional doctor? ... In my country I don't know many people who can earn € 1000 permanently in a month. And if I don't earn this money how can I buy this medication [and] the intensive treatment you get from the [Dutch] hospital also? ...we do not have health insurance... If anything goes wrong you have to learn how to survive, it is your own responsibility, not the responsibility of anybody else. The rich are the only people who can buy good health care".

<sup>328</sup> Christian Mommers, *Health, Hope and Home? The (im)possibilities of voluntary return for African rejected asylum seekers and irregular migrants living with HIV in the Netherlands*, IOM the Netherlands, loc. cit. n. 87.

In addition, Obi does not see how he would be able to go back into business in Nigeria again. He was involved in the business venture with several others who:

“when they find out about my AIDS, might be keeping their distance. Because I know in Nigeria, when somebody says that you are HIV, because of ignorance people cannot even use the cup that you have used. And nobody wants to be treated like a complete waste object”.

It is primarily the treatment that is keeping Obi in the Netherlands, though he says: “Otherwise I am not so comfortable; all my family [is] back there and I am staying here. But as it is now, because I have a permit, I can always go visit them and come back within one month”. On being asked about his prospects for the future, Obi is equally clear:

“I am already in my future. I’ll be fifty. A man of fifty should not be interested in his future. So I am living my future. I have kids. I am not looking for children anymore; I am not looking for a wife. What I am thinking is just to stay alive for a while. I don’t know how many more years I have to live with this illness. I am living my future now”.

## **Life as a Migrant with disabilities**

### **No Residency for a migrant children with Down Syndrome<sup>329</sup>**

A doctor coming from Germany hoping to gain permanent residency in Australia said he will fight an immigration department decision denying his application because his son has Down syndrome.

The doctor came from Germany with his family two years ago to help fill a doctor shortage in a rural area of Victoria State.

His temporary work visa is valid until 2010, but his application for permanent residency was rejected in October 2008. The immigration department said the doctor's 13-year-old son "did not meet the health requirement".

"A medical officer of the Commonwealth assessed that his son's existing medical condition was likely to result in a significant and ongoing cost to the community", a departmental spokesman said in a statement issued by the Department of Immigration and Citizenship.

"This is not discrimination. A disability in itself is not grounds for failing the health requirement - it is a question of the cost implications to the community", the statement said.

The doctor said he would appeal the decision.

"We like to live here, we have settled in well, we are welcomed by the community here and we don't want to give up just because the federal government doesn't welcome my son", he told reporters.

The doctor has powerful supporters. Victorian Premier has pledged to support the family's appeal, and federal Health Minister said she would speak to the immigration minister about the case.

She said the case must go through proper channels - an appeal to the Migration Review Tribunal and then the immigration minister - but that "there is a valid reason for this doctor and his family to be eligible to stay here in".

"As a government, we understand the importance of having doctors working in our rural and regional communities and we support them in many ways and continue to do this", she said.

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<sup>329</sup> The New York Times, October 31, 2008. The German doctor has been allowed to stay after the federal immigration minister intervened. See also the article of the New York Times of November 26, 2008.



The director of clinical services said the hospital had invested a lot of time and energy in recruiting the specialist.

“We were very surprised by the decision”, he said of the immigration department’s rejection. “It’s distressing for the doctor’s family and distressing for the community who have welcomed him and relied on his medical services”.

Immigration Minister has no power to intervene in the case until the review tribunal or a court upholds the department’s decision.

The executive director of the Atlanta-based National Down Syndrome Congress, said he was disappointed by the decision.

“What is the cost implication to the community of a doctor shortage?” he asked. “I assume the son had the same costs for the last two years and they were happy to have the family and use the dad as a doctor”.

Down syndrome, caused by an extra chromosome, is characterized by mental retardation of varying degrees. Those with Down syndrome also can have other problems: nearly half will have a heart defect, some serious enough to require surgery soon after birth.

He said that people with Down syndrome have a spectrum of abilities.

“Some need more support, some go on to graduate from college with a four-year degree, and most are somewhere in between”, he said.

The immigration department said it appreciates the doctor’s contribution to the community but said it must follow the relevant laws in considering residency applications.

“If we did not have a health requirement, the costs to the community and health system would not be sustainable”, the statement said.

More than 150,000 migrants settled in B in 2007-08, the department said.

Shortages of medical practitioners in rural parts of have led a number of recent government initiatives to boost the numbers of doctors and nurses nationwide.

**No passport for people with mental disabilities: a community refuses to naturalize a child because of a mental disability<sup>330</sup>**

The S family, originally from the Balkans, has been living in Switzerland for 20 years. The family has fully integrated into Swiss society, and thus sought to naturalize and become Swiss citizens. All of their applications were accepted ... almost. The authorities rejected the application of one of the family's children a child of the age of 12. According to the authorities, the child's application was refused due to the child's mental disability.

This story, originally revealed by "Tages-Anzeiger", has outraged people in the German speaking part of Switzerland. The story particularly affected the head of the Center Egalité-Handicap, who took up the Zug family's case. "It is discrimination", she exclaimed. "It is a violation of the article of the Federal Constitution that guarantees equality".

The community justified its decision by saying that "the child is incapable of understanding the advantages and the consequences that come with obtaining a Swiss passport". But this reasoning does not convince the head of the Center Egalité-Handicap. "It's ridiculous. Two-year old children don't understand these issues either. But nonetheless, we give them citizenship". She also added that "an appeal has been filed with the Conseil d'Etat".

The S family's case is not unique. In Thurgovia, a 22 year old woman who suffers from Down's syndrome was unable to obtain Swiss nationality because it was determined that she could not support herself. Nonetheless, she continues to receive disability insurance from the state that allows her to live her life.

In Zurich, a similar case is pending before the Federal Tribunal.

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<sup>330</sup> Le Matin Bleu N. 213, Friday, October 31, 2008, Geneva. The article has been translated into English by Sam Shapiro.



“The right to health is the right to health care and the right to a certain number of underlining preconditions for health such as an adequate supply of safe food, nutrition and housing; access to safe and drinkable water and adequate sanitation; safe and healthy working conditions and healthy environment; access to health-related education and information, including on sexual and reproductive health.”