The human rights of children in the context of international migration

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1. Introduction

Children and adolescents are increasingly migrating in search of family reunification, survival, security, improved standards of living, education, or protection from abuse and violence. Millions of children and young people are on the move, both within and between regions, accompanied by their families or on their own. Also when not migrating themselves, they are affected, because migrating parents often leave them behind or because they are born to migrant parents in destination countries.

However, until very recently children in the context of international migration remained largely invisible in several aspects (policy making, legislation, research, among others). For this reason, no proper attention has been given to the particularities of child migrants, whether with parents or unaccompanied, or to other categories of children whose lives are impacted by their parents’ migration. This invisibility has been particularly prevalent in the field of public policy (Bhabha, 2008; UNLa/UNICEF, 2009), and has in many cases led to ineffective, inadequate, or illegal responses from a human rights perspective.

The Convention on the Rights of the Child (CRC) is the most comprehensive international legal instrument for the protection of the human rights of all children under a State’s jurisdiction. As it establishes in Article 2, states must respect and ensure these rights without discrimination of any kind, irrespective of the child’s, child’s parents’ or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Although comprehensive and comparable data is lacking, it has largely been shown that youth and child migration are important phenomena. While available data indicates that developing countries host a higher proportion of young migrants overall, the percentage of children and young migrants is considerably higher in less developed regions, where 26 percent of international migrants are under the age of 20. This is double the percentage found in the more developed regions (Cortina and Hovy, 2009).

A key publication on human rights and migration is Chetail and Bauloz (2014). It does not explicitly focus on children.
In addition, in General Comment No. 6, on unaccompanied and separated children, the Committee on the Rights of the Child (CRC Committee) asserted that “the enjoyment of rights stipulated in the Convention is not limited to children who are nationals of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.” (CRC Committee, 2005: §12).

Following the rapid approval and ratification of the CRC by most states – currently there are 195 member states – most countries have developed a set of policies, legislation, programmes, and practices aimed at ensuring the rights of children under their jurisdiction. Of course, the extent to which each state actually fulfils these obligations differs, and in all countries, many challenges remain regarding the effective realization of all the rights enshrined in the Convention.

When it comes to the rights of children in the context of migration, the tasks ahead are far-reaching. As will be argued in this chapter, the many issues currently pending reveal to what extent changes are still needed to apply children’s rights principles and standards to migration policies and other related policies that impact the rights of child migrants and children affected by migration.

A child rights-based perspective is generally absent from migration laws and policies in countries of origin, transit and destination. The Special Rapporteur on the Human Rights of Migrants (2009), as well as other literature (Bhabha, 2008; UNICEF-UNLa, 2010), has argued that there is a general absence of an “age” approach in migration policies. Migration has been mainly discussed in terms of adult male movement, and children have been considered dependents: passive, vulnerable and exploited (Touzenis, 2008). A lack of distinction between adults and children in migration policies may lead to the denial or arbitrary restriction of migrant children’s rights.

Additionally, the youth policies of many countries (as well as related public policies in key areas such as education, health care and employment) do not take the implications for and connections to migration into account. In host countries, this absence leads to failed integration policies, or to practices so restrictive that they might contribute to the social exclusion of child migrants and children born to migrant parents. In countries of origin, failure and deficiency of such policies may impact on the decision to migrate of children and/or their parents.

This chapter aims to depict some of the key international principles and standards on the human rights of children in the context of migration, with the objective of developing from a critical perspective alternative ideas and proposals on children’s rights. It will also describe some of the main challenges and gaps between the CRC and migration policies and practices, especially in the field of migration control mechanisms such as detention and deportation. In addition, it will point out how other public policies, e.g. education or health care, may negatively impact child migrants’ rights, particularly, but not exclusively, when they are undocumented.

First, this chapter will identify the categories of children affected by migration in order to reveal the variety of situations in which children’s rights are linked to international migration (policies). Next, a brief section will be devoted to reflecting on some of the root causes of child migration in the current context of globalization. Thereinafter, the analysis focuses on the main aspects of international human rights standards both with regard to the root causes of migration and the deficiencies of and challenges to children’s rights in the context of migration. In particular, it is based on the four guiding principles of the Convention on the Rights of the Child: best interests of the child, right to participation, right to survival and development, and non-discrimination.
2. Categories of children in the context of migration

Children are impacted by migration in at least two ways: 1) by migration itself: migration of children or migration of their parents or other relatives is a fact that may substantially impact children’s lives, and 2) by migration policies: state responses to migration, and particularly the level of recognition and granting of migrants’ rights, might be essential to either reducing or increasing the vulnerability of these children.

Various categories of children and adolescents affected by migration can be distinguished. It is important to note that in all these categories, the impact of both migration and policies will vary considerably according to the immigration status of children and/or their parents. While this condition will differ depending on the region and country, it has been widely evidenced that the degree of vulnerability of children in the context of migration – their capability to effectively exercise their human rights – is conditioned by their immigration status and whether states consider this status as a relevant condition for restricting or denying their rights (Rafferty 2007: 408).

Migrants become irregular in a number of ways: by irregularly entering the country of destination, by staying in the country after a rejected asylum application or after the expiration of a temporary status, by having residence documents arbitrarily confiscated by employers, or by losing their job. Some people decide to migrate irregularly because of a lack of lawful options, but others find themselves in an irregular situation due to administrative barriers or a lack of information (IOM, 2010). Actually, legal entry followed by overstaying the terms of entry is one of the main paths into irregularity. Irregular entry, on the other hand, occurs least frequently and is the exception rather than the norm (Düvell, 2011).

2.1. Unaccompanied and separated children

Unaccompanied children are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for their welfare. Separated children have been separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from other relatives. Both separated and unaccompanied children are in a particularly vulnerable situation and face a number of protection deficits. Their migrations occur for a number of reasons including family reunification, domestic violence, and a number of forms of persecution of the child. They may also leave their country due to international conflict and civil war; discrimination based on ethnic origin, sexual orientation and other prohibited grounds; trafficking in various contexts and forms; and the search for economic opportunities unavailable in countries of origin – namely, access to key social rights.

In 2005, the Committee on the Rights of the Child adopted General Comment No. 6, which describes a set of principles and standards that states must respect in order to ensure and protect the rights of unaccompanied and separated children outside their countries of origin (CRC Committee 2005). At regional level, for instance, the Parliamentary Assembly of the Council of Europe adopted a resolution setting out a number of guidelines on this issue (Council of Europe, 2011). In addition, MERCOSUR’s member states have recently requested

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3 MERCOSUR, created in 1991, is an economic and political integration mechanism among Argentina, Bolivia, Brazil, Paraguay, Uruguay and – since 2012 – Venezuela to promote the free movement of goods, services and people among member states. The MERCOSUR associated states are Bolivia, Chile, Colombia and Ecuador.
an Inter-American Court of Human Rights Advisory Opinion on children and migration. This opinion was adopted in August 2014 and will contribute to underpinning a number of regional human rights standards on the treatment of child migrants, including some guiding principles on unaccompanied and separated children (Inter-American Court of Human Rights, 2014).

2.2. Children who migrate with their families

During the last decades, there has been an increase in the number of adults who migrate with all or some of their children, both regularly and irregularly. Children’s migration status usually depends on that of their parents. While in some cases these children are likely to be deported if the entire family is in an irregular status, in other situations, they may be able to regularize the family’s status or their own one, based on grounds such as studies or length of residence in the country.

2.3. Children left behind by migrant parents

Many migrant parents leave their children in the country of origin. In several situations, legal restrictions in destination countries impede migration with the entire family. Often, countries of origin do not properly take into account the particular vulnerabilities and needs of children left behind. If their parents do not have a regular migration status, the children left behind may lack financial and emotional support, impacting their development and often placing them at risk of losing substantial access to social protection. Under such residence status, children are not entitled to family reunification in their parents’ host country. Moreover, parents are not likely to regularly visit their children in the country of origin, due to the fear of being unable to return to the host country. These circumstances may increase the vulnerable situation of the children, prolong family disruption and, in many cases, push children and adolescents seeking to reunite with their parents into irregular migration.

2.4. Children born to migrant parents in host countries

This category concerns children born to parents who have migrated to the host country. Parents may have migrated through either regular or irregular channels. They may have a residence permit, have entered irregularly, or may have overstayed a residence authorization in the destination country. Even if they possess regular status, in some countries the parents may not have a work permit, or they may face restrictions regarding the freedom of seeking and choosing a job. In this case, as in the case of children that migrate with their parents, the migration and labour status of parents, as well as migrants’ own opportunities in the labour market tend to considerably impact children’s development and living conditions. The irregular status of parents may result in family separation due to deportation measures enacted against them.

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4 The original request made by MERCOSUR Member States, as well as the information and Amici Curiae sent by several American states, international UN agencies, universities and non governmental organizations are available on the official website of the Inter-American Court of Human Rights, www.corteidh.or.cr/soloc.cfm.

5 One example of this is the US Government’s decision aimed at regularizing the migration status of hundreds of thousands of young migrants who had arrived in the country years before and had studied in the US (see Gonzales and Bautista-Chavez, 2014).
Moreover, according to nationality regulations in each host country, children born to migrant parents could be recognized as nationals (*ius soli*) or not (*ius sanguinis*). Restrictive, arbitrary practices at registration offices may lead to a stateless condition for children.

2.5. Returned and deported children

Children who are returned, repatriated or deported to their country of origin (the terminology may vary according to the regulation of each country or the legal nature of the decision) could be in a particularly vulnerable condition, especially those who had migrated unaccompanied.

Several factors could have a critical impact on the living conditions of the children after their return to their countries of origin. Among others, the following can be mentioned: their experiences in transit and their stay in host countries, the existence of a Best Interest Determination Procedure in the country that decided the repatriation or a lack thereof, the extent of rights-based policies in the countries of origin and destination aimed at ensuring these children’s reintegration in both the short and long term.

These categories are not mutually exclusive, and children may fit into different ones at various times. For instance, unaccompanied children may start out as children left behind and, if successful in their migration project for family reunification, they may end up with their parents in the host country. They can also move between regular and irregular situations.

If estimating the overall number of irregular migrants around the world is a challenge, it is even more difficult to estimate the percentage of children living without lawful residence or migrating through irregular channels in both transit and destination countries. It is equally problematic to identify the number of children left behind by irregular migrant parents and those born to parents with no regular status in host countries, even if some of those children are nationals of the countries where they are born.

Some national and regional studies try to estimate the percentage of children within the overall number of migrants in an irregular situation based on data obtained through border detentions. However, data on border detention or data on deportation procedures in general, underestimate the number of migrant children in an irregular situation, given that they may not take into account those who successfully cross the border. In addition, it does not take into account those children whose administrative situation becomes irregular once they are in receiving countries, although they had originally entered in a regular way. Finally, there are no statistics for children born to migrant parents and nationals of host countries who are themselves in an irregular migration status. In these cases, again, data only become available to the extent that they relate to deportation measures taken against the parents (Applied Research Center, 2011; Beckles Flores, 2011).

Both individual and objective circumstances of each case, along with some characteristics of migration policies and regulations in receiving countries, are critical for shaping the experience and outcome of migration. In particular, these determine whether a migrant enters or stays in a host country regularly or irregularly.

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6 *Ius soli* (Latin: right of the soil) is the right of anyone born in the territory of a state to nationality.

7 *Ius sanguinis* (Latin: right of blood) is a principle of nationality law by which nationality is not determined by place of birth but by having one or both parents who are nationals of the state.

In the case of children, there are a number of factors that drive children to migrate through irregular channels, such as: increasingly restrictive migration policies in host countries, absence of family reunification programmes, or bureaucratic, illegitimate conditions for family reunification, the growth of informal and unregulated labour markets, which demand an adolescent and young labour force, unprotected jobs for adolescent and young girls based on gender inequity, the growth of smuggling networks that take advantage of this context, and, last but not least, trafficking of persons. Trafficking is an issue that especially impacts children and women; it is exacerbated by, amongst other factors, restrictive migration policies, social exclusion and misinformation to victims in origin countries, and sexual and labour exploitation practices in host countries.

Irregular migration of unaccompanied and separated children, many of whom have been left behind by their parents, has increased in part due to the obstacles for access to a legal residence in countries of destination and the restrictions to family reunification. In many countries unaccompanied children are not authorized to enter if they do not have a formal permit given by their parents; this practice attests to the absence of policies driven by a child protection approach. Also, the phenomenon of circular migration programmes is another closely related problem. Many low-skilled temporary labour programmes do not permit migrants to bring relatives with them, leading to irregular migration, mainly by children, for the purpose of family reunification.

In addition, the absence of regularization policies – either extraordinary programmes or permanent channels – has led millions of migrants to stay in the destination country permanently, even though their plan had originally been temporary migration. As they might stay irregularly for a long period of time, the impossibility of even occasionally visiting the children left behind, may contribute to aggravating family separation and pushing families into the irregular unaccompanied migration of children (Kuhner, 2010).

Irregularity impacts children in many other ways. While several countries provide a residence permit to adults whose children are born in their territory, on the grounds of family unity, others do not embrace programmes that grant regular status to irregular migrant parents of child nationals, despite the fact that the right to family protection is widely enshrined in several core international human rights treaties.

3. Children’s rights and root causes of migration: Ensuring the right to development in a globalized world

A comprehensive rights-based approach to the phenomenon of children in the context of migration should address the entire process of migration, starting with the root causes in the country of origin. The latter constitute one of the cornerstone issues that must be addressed in order to achieve effective, long-term, and legitimate responses to the existing challenges. In this regard, the Human Rights Council (2009) has stated that policies and initiatives on migration “should promote holistic approaches that take into account the causes and consequences and challenges and opportunities of the phenomenon and full respect for the human rights and fundamental freedoms of migrants, with due regard for the specific needs of children in vulnerable situations, such as unaccompanied children, girls, children with disabilities and those who may be in need of international refugee protection.”

Individuals decide to migrate for many different reasons, whether through regular or irregular channels. Root causes of adult migration are not necessarily different from those that drive child migration. Moreover, root causes of irregular migration generally do not differ greatly from the determinants of regular migration. These include poverty, a lack of opportunities,
socio-economic inequality, regional disparities, political instability, gender inequity, discrimination, effects of climate change, armed conflict, labour market demands (including informal economy and unprotected jobs, amongst others). Addressing the root causes of migration requires engagement with the social, economic, and political patterns that drive migration, in both origin and host countries. This necessarily leads to facing structural causes such as poverty and inequality between and within countries and regions. It implies examining and addressing the factors that currently impede millions of people from enjoying the right to human development.

Human development, root causes of migration, and migration are inseparably linked, as has been acknowledged for almost two decades. Indeed, this issue was raised during the Programme of Action of the 1994 International Conference on Population and Development: “International economic imbalances, poverty and environmental degradation, combined with the absence of peace and security, human rights violations and the varying degrees of development of judicial and democratic institutions are all factors affecting international migration … The long-term manageability of international migration hinges on making the option to remain in one’s country a viable one for all people. Sustainable economic growth with equity and development strategies consistent with this aim are a necessary means to that end” (ICPD, 1994: §10.1). More recently, the Global Commission for International Migration affirmed that the world’s most prosperous states need to acknowledge the impact of their policies on the

### Table 19.1 Determining factors that influence children’s irregular migration status

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<thead>
<tr>
<th>Crossing borders (through irregular channels)</th>
<th>In destination countries (becoming irregular)</th>
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<tr>
<td>• Limited and overly-selective possible categories for regular migration (visas, departure/entry regulations worldwide)</td>
<td>• Absence of regularization policies, both extraordinary plans and permanent avenues</td>
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<tr>
<td>• Demand for irregular migration by informal areas of the labour market</td>
<td>• Absence of regularization avenues for workers in informal and precarious jobs</td>
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<td>• Deprivation of social rights in origin, social exclusion, and vulnerable conditions</td>
<td>• Loss of employment or termination of a labour contract</td>
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<tr>
<td>• Lack of long-term opportunities and family migration within circular/temporal migration programs</td>
<td>• Omission of the right to family unit as sufficient grounds for granting regular status to irregular migrant parents of child nationals</td>
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<tr>
<td>• Absence of information and awareness campaigns in countries of origin</td>
<td>• Increased severity of detention, deportation and criminalization policies leading to invisibility, and non-regularization</td>
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<tr>
<td>• Obstacles or lack of policies for family reunification, irregular migration of unaccompanied children</td>
<td>• Unaccompanied children facing a lack of special procedures for access to regular status, based on child protection approach</td>
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<tr>
<td>• Rise of smuggling networks in the above mentioned context</td>
<td>• Unaccompanied children with regular status becoming irregular upon reaching 18 years of age.</td>
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<tr>
<td>• Gender stereotypes and discrimination against women in the labour market.</td>
<td>• Increase of trafficking networks in the aforementioned context.</td>
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<td>• Increase of trafficking networks in the aforementioned context.</td>
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*Source: UNICEF-UNLa, 2011.*
dynamics of international migration, for instance through trade reform that would give developing countries better and fair access to global markets (GCIM, 2005).

From a human rights perspective, Skogly has pointed out that if states are to take seriously their responsibility to the right to development, they will need to pay attention to the human rights effects of their development cooperation, the consequences of international trade rules and the results in the international community of their behaviour in intergovernmental institutions (Skogly, 2002). Similarly, reflecting on states’ obligations on the right to development,9 Salomon asserts that the gross inequality that characterizes world poverty today, the power differential that accompanies it, and the reality of global economic interdependence, should lead to a principle of shared responsibility. This means that developed states should contribute to fulfilling basic rights – for example, to food, water, and health – of people elsewhere, beyond international cooperation (Salomon, 2008).

Despite the fact that these root causes may apply to all kinds of current migration flows, it is important to note that there are root causes that specifically drive the regular and irregular migration of children, such as family reunification,10 improved education and labour opportunities, escaping from family, social, or institutional violence and abuse, or in some contexts, social violence impacting adolescents (UNHCR, 2014). Addressing both the rights of children in origin and destination countries and the causes that generate migration – not only regular, but mainly irregular – is critical for comprehensively coping with the challenges linked to migration in the short and long term. The duty to ensure the right to development for everyone, which entails the full realization of all human rights, and the commitment to ensuring sustainable development, with its three pillars of economic development, social development and environmental protection, are principles that should be fully incorporated into a comprehensive approach aimed at effectively addressing the needs and vulnerabilities of children within the migration-development nexus (Abramovich et al., 2011).

One of the four general principles of the CRC is children’s right to life, survival and development (as textually reflected in Art. 6 CRC). This right relates to a continuum of well-being that begins at maximum survival and progresses to an endpoint represented by children’s optimum development, ensuring the conditions that enable them to develop to their full potential. In addition, this right informs the interpretation of the Convention, as it is intrinsically linked with the effective exercise of all the rights laid down in the CRC (Dutschke and Abrahams, 2006). The denial of this core right is one of the major root causes of migration for children, adolescents or their parents. Therefore, every aspect that undermines child survival and development in countries of origin must be taken into account in any analysis, discussion and initiative aimed at addressing the causes of migration, its characteristics (regular/irregular), and its consequences and impact on children, families, receiving and sending societies, as well as public policies meant to respond to this phenomenon.

Similarly, the violation of the other CRC general principles – best interests of the child, non-discrimination, and the right to participation – is always associated with factors that impact child migration. For instance, discriminatory practices that affect children on grounds such as

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9 It is important to bear in mind the definition of the right to development given by the 1986 United Nations Declaration on the Right to Development: “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals”.

10 Many children are left behind by parents that migrate alone due to increasing restrictions to family migration. After few or many years, those children seek to reunite with their parents in destination countries.
ethnic origin or sexual orientation, amongst others, may force them to migrate. The same result might be produced by the absence or failure of childhood policies and mechanisms aimed at ensuring children’s right to participate in policies and programmes that affect them. And, in many countries, the omission of the best interests principle as a guiding rule for every policy, practice, and decision impacting the rights of children, is behind most children’s decisions to migrate.11

4. The rights of children in the context of migration: International standards and key challenges

4.1. The primacy of children’s rights: Implementing CRC principles in migration policies

The implementation of CRC obligations and principles in the context of migration is supported by an underlying principle: that the standards set out by the CRC should have primacy over any other aspect or policy involved. As was asserted by the CRC Committee and other stakeholders, childhood policies and legislation take precedence in a normative and policy migration framework (CRC Committee, 2012; Mercosur Member States, 2011; UNICEF, 2012: §27). This statement has many implications.

For one, children’s rights should never be subjected to migration goals defined by a state. In other words, children must be treated first and foremost as children, rather than migrants. Despite the discretionary margin that states have traditionally held in regulating and managing migration and although the ends sought through migration policies by a particular state may be considered legitimate, the rights of children potentially affected by such policies and practices must be a primary consideration. In other words, children’s rights (including principles and standards that guide the effective realization of these rights) should be explicitly included in any migration policy, piece of legislation, and decision that might impact them. The Office of the High Commissioner for Human Rights has argued that all authorities and institutions in contact with children in the context of migration should be required to assess whether their actions unequivocally protect the interests of each individual child. This principle should override all others, and be decisive in cases when conflicting provisions of migration policy arise (OHCHR, 2010: §24).

In reality, there are major gaps between migration policies and legislation, on the one hand, and the principles and obligations enshrined in the CRC, on the other. Therefore, one of the key challenges today is widely and correctly introducing all the CRC provisions into every migration policy and programme as well as related areas that may impact the rights of child migrants and other categories of children affected by migration. Clearly, this objective must also take into account the core principles of the Convention mentioned above.

First, all policies, programmes, decisions, practices on migration and related matters, both at the general level and on a case-by-case basis, must apply “the best interests of the child” principle. For instance, policies on detention, deportation of migrants (children and/or their parents), decisions aimed at addressing parents’ irregular status, practices on access to health care and education in host countries, social, intercultural integration policies, and family reunification programmes, among other issues, should be guided by the best interest principle. As was stated by the CRC Committee, non rights-based arguments, such as those relating to general

11 For an in-depth analysis of the Best Interest Principle, see UN CRC Committee (2013).
migration control, cannot override a child’s best interests consideration (CRC Committee, 2005: §86).

Below we explain how this principle should be applied to particular issues, including through the so-called Best Interests Determination Procedure (BID) in the case of unaccompanied children. Of course, as the UN Office of the High Commissioner for Human Rights (OHCHR) noted, the meaning of what constitutes “best interest” will necessarily change in different contexts, depending on the situation of the individual child. This makes it necessary to ensure that the individual circumstances (including his or her nationality, upbringing, cultural and linguistic background, vulnerability and particular protection needs) of the child be taken into account when determining what is in his or her best interests (OHCHR, 2010: §25).

Second, the principle of non-discrimination (a *jus cogens* principle, according to the Inter-American Court of Human Rights, 2003) forbids arbitrary distinctions based on grounds such as nationality or migration status of children or their parents when it comes to the entitlement and effective realization of any right enshrined in the Convention. In issues such as undocumented migrants’ access to social rights – either by children or their parents – access to justice, child birth registration, ensuring due process of law, or getting a residence permit, amongst others, the non-discrimination principle can play a key role in ensuring the rights of children in the context of migration. The European Court of Human Rights (ECtHR) has accepted, however, that differential treatment on the basis of immigration status may be justified under certain conditions, in particular with regard to public services (ECtHR, 27 September 2011, Bah v. the United Kingdom, §§ 38–52).

Third, regarding the right to participation, it is important to note that there are a number of programmes and procedures directly or indirectly related to migration that should provide effective mechanisms for children’s participation. In the specific area of migration, it is evident that children should be entitled to participate in procedures that may have consequences to them, such as: entering a country, applying for a residence permit, repatriation, and detention and deportation of their parents. The extent and mode of this participation might vary in each case due to various factors, including the principle of progressive autonomy of the child (IIN, 2010).

Additionally, the right to participation of these child migrants and children born to migrant parents in host countries could also include: participation in designing and implementing integration policies as well as in inter-cultural programmes at the educational system, initiatives on labour opportunities for adolescents, plans aimed at preventing xenophobia, and, of course, discussions on migration policy and legislative reform. In countries of origin, some examples would be: child participation in defining child-sensitive consular assistance policies, in evaluating processes on the impact of reintegration mechanisms for repatriated children, in designing and implementing child development policies meant to ensure adequate standards of living aimed at the prevention of migration due to necessity, and in drawing bilateral and regional strategies directed at upholding more regular avenues for migration, including fairly accessible family reunification programmes.

The previous section addressed children’s rights to survival and development and their intrinsic relationship with key current discussions on migration. It is also important to note that these rights are also at stake when host countries regulate migrants’ access to other basic rights.

Restrictions on the rights to health care, education, or social security based on grounds such as nationality or migration status often have direct consequences for child migrants and children born to migrant parents, or even for those children left behind. For instance, parents’ access to labour rights and opportunities under conditions equal to those available to nationals is a key factor for social integration, and hence for child development in the broader sense, as emphasized above. The right to development for children in migrant families might also be positively or negatively affected according to whether or not regularization programmes exist, and if so, whether as extraordinary measures or permanent mechanisms.

Finally, it is worth remembering that other core principles of international human rights law should be explicitly taken into account for any policy or decision that may impact children in the context of migration. The principle of *Pro Persona* (*pro homine*), entailing an obligation to apply the regulation most favourable for the child’s rights or best interest, as reflected for example in Art. 41 CRC,\(^{13}\) is essential for policy and legislative interpretation on a case-by-case basis. Similarly, the principle of progressiveness\(^ {14}\) should lead to in-depth discussions on the approach of current migration policies and their impact on children’s rights and welfare. In a climate of increased vulnerability of migrants, particularly children, are policies being designed from a rights-based perspective? Are they aimed at ensuring child protection? Or are these policies rather dominated by preventive and punitive considerations that regressively affect basic rights?

The principle of dynamism requires that, since human rights treaties are “living instruments”, they should be implemented according to present-day challenges. Therefore, to what extent are states currently adequately responding to migration? And how is human rights law being enforced in this context? Is it being applied – by different stakeholders – in a way that ensures all migrants’ rights, or by contrast, is it interpreted in a restrictive sense in order to justify migrants’ rights constraints?\(^ {15}\) Finally, yet of great importance, although international standards require that vulnerable social groups be protected by special measures, migrants – especially undocumented children, the weakest of this group – are being subjected to several restrictions of their most basic rights, such as education, health care and the right to family.

The following sections will explore how the interpretation and implementation of the abovementioned principles and provisions are leading towards the establishment of a number of international human rights standards about the rights of children in the context of migration. These standards, as will be explained, are related to some of the most pressing problems and challenges that these children are currently facing.

### 4.2. Children’s rights within migration control policies

One area that conspicuously lacks a children’s rights perspective within migration policies is that of immigration control policies and practices. As a traditional manifestation of state

13 Article 41 CRC provides that

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or
(b) International law in force for that State.

14 The principle of progressiveness means that States must adopt measures aimed at continuously improving the level of realization of all human rights to every individual under to their jurisdiction.

15 For instance, the European Court of Human Rights has adopted a narrow interpretation of Article 8 of the European Convention on Human Rights, on the right to family life, when it comes to issues related to migrants’ rights (see Ceriani Cernadas, 2009).
sovereignty, immigration control has long been detached from the strides made in human rights protection. Only very recently, some key human rights obligations have been progressively incorporated in immigration control in many countries to prevent rights restrictions due to the enforcement of border control mechanisms, deportation measures, etc. As will be explained next, this progress, though, remains inadequate because a number of serious challenges remains, and when it comes to the protection of children’s rights, the deficiencies are considerably greater. Some of the most acute violations of rights occur in the detention and deportation of children and/or their parents.

In particular with regard to unaccompanied or separated undocumented children, the CRC Committee has stated that “at any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child’s life” (CRC Committee, 2005: §19). The Best Interest Determination (BID) Procedure, originally envisaged for addressing asylum seeker cases (see UNHCR, 2008), is the most important tool for ensuring the respect, protection and fulfilment of the rights of unaccompanied migrant children, by means of a uniform process at the national and international level to determine what constitutes the best interests of the child on a case-by-case basis.

The BID Procedure entails the adoption of a public policy that includes a focus on the holistic protection of children in the responses of states towards the migration of unaccompanied children. Therefore, its effective implementation requires a series of factors to be contemplated, such as human and budgetary resources, training in children’s rights, and inter-institutional coordination (UNICEF, 2012: §48).

In practice, details about conformity and implementation (including which governmental agencies can or should take part in the BID Procedure) should be specifically tailored to each country. Aspects such as structure and institutional organization, the impact of the phenomenon of unaccompanied child migration and institutional capabilities, among others, determine the concrete measures in each place. Nevertheless, the principles and objectives that guide the BID Procedure and its specific application in each case must not vary from country to country.

Moreover, in order to be able to duly satisfy the fundamental principles that characterize the BID Procedure, other core requirements must also be fulfilled. Among these are the guarantees of due process, including the children’s right to be heard and right to participate, which should be gradually implemented according to the age and maturity of the child. Another section of this chapter is dedicated to the indispensable rights to legal assistance and a guardian. Additionally, the right to be permanently informed, the right to an interpreter, if necessary, as well as a right to an effective remedy and access to the justice system must also all be guaranteed.

The guarantee of consular assistance may also be greatly relevant in many cases. This guarantee and other elements of BID Procedures should include specific duties for the country of origin, as will be analysed further on. The consular action should, in turn, be part of effective cooperation between the country of origin and the destination (or transit) country in which the unaccompanied child is found. The information that the authorities in the country of origin can provide may be essential for effectively determining the best interests of the child, by revealing whether the family, social, or community conditions are adequate for the return and reintegration of the child.

4.2.1. The principle of non-deportation of children

Adapting migration policies so that they conform to the CRC involves revising all the mechanisms that can affect the rights of children. One of the issues that require a significant
reformulation is that of the treatment of irregular migration, namely, the question of deporting a child, or not, under circumstances of migratory non-compliance, i.e. illegal entry, remaining after the period of stay or residence in the country expires, etc.

Deportation is a measure that emphasizes the infraction, implicitly assigns blame, and on this basis imposes a penalty. It has a legal nature and has motivations very different from the rights-related goals described above. Worse yet, in the majority of cases, deportation re-victimizes the child or even replicates the possible threat to his/her life, freedom, or physical health. Different semantics — “deportation”, “expulsion”, “return”, “repatriation” — do not alter the effect; rather, what is pertinent is the type of procedure applied, the ends that such a decision seeks, and the means that are used to achieve this goal.

Many agree that children should not face deportation as a punitive measure (Human Rights Council, 2009; Special Rapporteur, 2009; OHCHR, 2010; Abramovich et al., 2011). The principle of non-deportation states that the proper response to irregular migration is not found among traditional measures provided by immigration policies, such as expulsion or deportation. On the contrary, the response to irregular migration must be consonant with the spirit, principles, and guidelines that derive from the CRC. A focus on holistic protection and key principles, such as the best interests of the child, the right to participation along with the principle of progressive autonomy and the principle of non-discrimination are core components for reaching a decision in every case.

The principle of non-deportation applies to all categories of migrant children, i.e. unaccompanied children, those separated from their parents, and children that migrated together with their families and happen to be in circumstances of irregular migration. This last situation is one which, in various countries, may lead to expulsion (as a disciplinary measure) for the entire family. Nevertheless, this decision does not conform to the precepts of the CRC. If the state determines that the adult parents should be expelled due to an immigration infraction that they have committed, the expulsion of their children should not automatically follow; rather, their fate must derive from principles that underlie the rights of children.

For example, a child will leave the country with her parents not because she or he is being expelled, but rather because the interests of the child (among other rights, like the right to life and family unity) is best served by maintaining the family unit intact. This also implies that any penalty that usually accompanies expulsion, such as prohibition of re-entry for a specified time, should not be applied to the child. Such a change of perspective is not only based on the fact that the response should be directed towards the rights of child – rather than the criteria of immigration control – but also on the fact that children should never be held responsible for the irregular migration.

When families migrate irregularly or when they fall into an irregular status in the host country, the irregularity might be the result of a mix of factors, such as: the increasing number of obstacles and permits for regular family migration, for access to a residence, or for renewing a regular residence; the loss of the job by their parents (when residence permit is tied to a particular job); the denial of an asylum application; among many others. It is a combination of objective factors (in origin and destination) and subjective decisions taken by the parents. In these cases, in general, children are in a vulnerable, passive position, and they face a number of challenges in many aspects of the daily life in origin, transit and the host countries.

Therefore, when the status of the family is addressed, the particular treatment of the child should be done through a child-protection lens. As it was noted, even if the ultimate decision is the deportation of the parents due to their migration status, the individual resolution in the case of the children shouldn’t have a punitive approach. Then, a repatriation decision would be based in family unit and best interest principles. On the contrary, issuing them a deportation
measure – which also usually includes a prohibition of entry for a period of time – seems a disproportionate, unreasonable response that prioritizes migration control over child protection.

Respecting the rights of children may also lead to the conclusion that no family member should be expelled. As UNICEF has observed, a holistic interpretation of the CRC may result in abstaining from ordering the expulsion of a migrant family based on the irregular migration status of the parents or children. On many occasions, children have migrated with their parents in early childhood or been born in destination countries that do not recognize the principle of *ius soli*. In these circumstances or similar ones (like that of adolescents completely integrated into the destination country), the expulsion can severely affect the rights and development of a child (UNICEF, 2012: §156). The ECtHR has been willing to more or less equate a long-term immigrant who has lawfully spent all or the major part of his or her childhood and youth in the host country with a national (ECtHR, 23 June 2008, *Maslov v. Austria*, §75).

It might be more appropriate that in order to ensure the holistic protection of children, alternative responses to expulsion be sought for administrative infractions such as irregular migration, for example, the regularization of the children’s status in the destination country, and by extension, through the principle of family unity, regularization of the parents’ status as well (UNICEF, 2012: §157).

The principle of non-deportation should also prevail in the case of unaccompanied and separated children. Beyond the general obligation to protect all children, unaccompanied children should be given greater protection in light of their particularly vulnerable circumstances (compare the ECtHR who has argued that the vulnerability of an irregular child may take precedence over her migration status, ECtHR, 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, §55).

First, this is necessary because frequently these children have migrated in an irregular way or without adequate documentation for migration. Second, because both the causes that drove their migration, as well as the conditions of the route, reveal a context of extreme vulnerability due to a number of rights deprivations and abuses. Third, the mere fact that they turn up alone at a border or outside of their country of origin reveals that the situation requires special measures: protection, reparation of rights that have been violated, and of course, mechanisms that will permit these children the dignified and adequate exercise of all of their rights in the short and long term.

The Best Interest Determination (BID) Procedure, originally envisaged for addressing asylum seekers’ cases (see UNHCR, 2008), is the most important tool for ensuring the respect, protection and fulfilment of the rights of unaccompanied migrant children. The information to be gathered in each case within the framework of the BID Procedure from different sources – including the testimony of the child – can shed light on the existence of risks and opportunities that would decide the case, for example, if there are sufficient rights-based reasons for returning the child. This information could, among other things, indicate whether the child has escaped from abuse or family violence, or from institutional or social violence, or abandonment, or whether the child seeks reunification of the family in the country in which he/she has been found or in some other country; it could also uncover a wide range of other circumstances that must be duly considered in order to arrive at the decision that will be most consonant with the best interests of the child.

A BID Procedure must fully respect the core international principle of *non-refoulement*. This means that under no circumstance should the return of a child be contemplated in the case where he or she would be sent to a country where there are substantial grounds for fearing real risk of irreparable harm. Moreover, the CRC Committee has pointed out that 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 grave consequences of inadequate food or health services (CRC Committee, 2005: §26–28, 58, 82, 84). Where children are at these kinds of risks, both short- and long-term alternatives suited to their best interests should be sought within the BID Procedure.

In this sense, if the causes that led to the unaccompanied migration are not sufficiently considered, it is very probable that the child will shortly migrate again, as has recently been documented. This is the case, for example, when repatriation is determined on the simple basis of family unity, but without a larger analysis of the individual, family and social circumstances.

Lasting solutions should be determined based on an individual assessment within the BID Procedure. Thus, according to the specific circumstances of each case, what constitutes a durable solution can vary substantially. Some of the options are: family reunification in the country of origin (immediate or delayed), family reunification and integration in the country of transit or destination, integration in the country of transit or destination (either independently, with foster family or child-care institutions), and resettlement in a third country.

4.2.2. The principle of non-detention of child migrants

The non-detention of migrant children found in a country without authorization for residence, is another of the essential principles that derive from an adequate adjustment of migration policies to a standard based on the rights of the child. As noted by UNICEF (2012: §92), in such cases, even Article 37.b of the CRC, which allows for depriving children of their liberty “in conformity with the law and only as a measure of last resort…” could not be applied appropriately. For Article 37.b was conceived to be applied to cases in which children have committed criminal offences, not infractions of an administrative nature, such as irregular migration. The CRC Committee has been very clear on this point:

International law provides that the detention of children, including children in the context of migration, should be avoided (Article 37 CRC). Article 37(b) of the CRC allows the detention of children in the context of juvenile justice, exclusively as a last resort and for the shortest appropriate period of time. However, the detention of children on the sole basis of migration status is not in accordance with the CRC.

(CRC Committee, 2012: 22)

UNICEF (2012: §93) echoes that the principle of non-detention of child migrants is an essential standard for all cases which require, conversely, the adoption of special protective measures according to the sensitive position in which these children are found.

This principle is valid for both unaccompanied children and child migrants who are with (one of) their parents. In the latter case, it has been erroneously argued that for reasons of

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16 A couple of examples are the cases of Moroccan children repatriated from Spain and Central American children from Honduras, Guatemala and El Salvador repatriated from the United States and Mexico. On the case of Mexico, see Ceriani Cernadas (2013).

17 Both the CRC Committee (2005: §83) and the UN Special Rapporteur (2009: §58) stated that the possibility of reunification in the country of destination should also be considered, and if in child’s best interest, should be implemented, as per Articles 9 and 10 CRC.

18 On this, see the UN General Assembly (2010) Guidelines for the Alternative Care of Children.
family unity, children could be detained along with their parents. Nonetheless, a correct reading of the CRC and its principles – best interests, family unity, and non-detention (except as last resort in the case of juvenile justice) among others – must lead to releasing the entire family unit, and, if necessary, housing it in social protection centres, whose purpose is to ensure the protection of the child and its family; these centres, plainly, are not locked facilities (UNICEF 2012, OHCHR, 2010, Special Rapporteur, 2009, 2012).

Having observed the impact of detention on children, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) considers that the deprivation of liberty of an irregular migrant child is rarely justified and can certainly not be motivated merely by a lack of resident status (CPT, 2009). The CRC Committee has stated that “detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof,” and that “all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation” (CRC Committee, 2005: §61). Somewhat more cautiously, the ECtHR has argued that detention of children for reasons of migration control can only be justified if deprivation of liberty can be shown to be necessary. So far, it has not accepted that the necessity standard was ever met (see, e.g., ECtHR 19 January 2010, Muskhadzhiyeva e.a. v. Belgium, §74).

In the exceptional case that children are located in a facility for families or unaccompanied children, it should be designed (and additional safeguards put in place) in order to cater to the specific needs of children (CPT, 2009: §97; ECtHR 13 December 2011, Kanagaratnam et alii v. Belgium, §§61–69). The placement of migrant children in detention should be addressed from the approach of child protection, rather than a punitive or disciplinary approach. Authorities in charge of facilities should not be security guards or immigration authorities, but inter-institutional agencies, trained in children’s rights and with a specific mandate for child protection, rather than migration control.

Moreover, it has been shown that when children are detained with their families, trauma is caused to the child by the violent circumstances intrinsic to the process of detention (American Psychological Association, 2013). It is traumatizing for a child to observe authority transferred from a parent to a security official, thus rendering the role of the father and/or mother weakened. In this way, detention also undermines the primacy of the family, in that family dynamics change due to the state interference.

Nevertheless, currently, many countries, such as the United States, detain both unaccompanied children and migrant families. Sometimes, family unity is mistakenly invoked. In others, like Mexico, it has been argued that detention is a protective measure for the children in vulnerable circumstances (Ceriani Cernadas, 2013). Arguments of this kind apply traditional pre-CRC policies in which the child is an object of assistance rather than being a subject of rights. Such policies were, and in many countries continue to be, an amalgam of welfare programmes and mechanisms of social control – in this case, of border control. In a number of countries, the situation is even more serious, since detention can be resorted to without any justification and can thus be directly utilized to meet the objectives of immigration control and the supposed interests of national and international security.

The principle of non-detention leads to the design of alternative measures, guided by the principles and obligations of the CRC, rather than the objectives of migration control. This entails the inclusion of alternative measures in legislation, and requirement from the competent authorities to implement these alternative measures effectively and to ensure mechanisms for permanent and independent monitoring for compliance. Ultimately, in the case of unaccompanied children, if policies are to be oriented towards determining the best interests
of the child, then it is essential that the child be sheltered in a place that has adequate conditions for carrying out this purpose.

4.2.3. Due process of law guarantees in detention and deportation procedures

As long as a migration procedure may lead to a repatriation or deportation measure against a child and/or his or her parents, it is essential to ensure as the very minimum an entire series of guarantees of due process. Correspondingly, if a detention measure is ordered for an unaccompanied child or a family (based upon the migration circumstances or even by way of an alternative measure applied in lieu of detention, the decision should be adopted within the framework of legal due process.

Therefore, due process of law should be guaranteed to migrant children both \textit{de jure} and \textit{de facto} in all decisions – border admission, deportation or repatriation, detention or alternative measures, etc. The set of guarantees includes, firstly, \textit{the right to be heard and participate}, critical in every procedure, particularly those involving unaccompanied children. In this regard, the OHCHR (2010) has stated that with respect to border control, orders for return, or access to social services, decisions should not be reached without consulting the affected children. Migrant children should also be able to be heard in a variety of judicial or administrative settings including in all aspects of immigration and asylum proceedings. The irregular status of children should not limit their right to participation. On the contrary, in order to fully guarantee and implement a Best Interest Determination process, children’s opinions and voices must be considered.

Other key guarantees that all child migrants should effectively be able to exercise are: the right to be informed of all matters concerning their rights, migration procedures and safeguards; the right to an interpreter, critical for ensuring children’s right to be heard; the right to access justice and effective remedies, in both administrative and judicial procedures; and the right to consular assistance.

In the case of unaccompanied children – whether there is a BID Procedure or not – two additional essential guarantees are the right to a legal representative and a guardian. In order to effectively secure the rights provided, migrant children must be granted adequate, prompt, and free legal assistance, including the assignment of a guardian or legal representative to defend their rights, interests and secure their welfare (CRC Committee, 2005: §21, 33–37). Children should have access to legal aid services that specifically deal with migration issues and the rights of migrants. Even so, these guarantees should also be taken into account in the framework of other procedures, especially those determining the most adequate option for the case. It is equally important that legal advisers be properly trained in children’s rights and that they work with professionals from other disciplines, including child psychologists.

In addition, in order to give substance to the right to be heard and to participate, it is vital that all relevant personnel are adequately trained in applying a child-sensitive, rights-based approach to their tasks. This includes the figure of the guardian, who should be an independent advocate for the child’s best interest both when the process takes place and in any decision to be adopted.

4.2.4. Children's rights and parents' detention and deportation

Detention and deportation of migrant parents greatly impacts children’s lives and their human rights. Parents caught up in immigration enforcement processes are separated from their young children and often disappear into the detention system. If no relative is identified who can take
the children, at the time of an immigrant parent’s apprehension, these children may be placed in state custody or foster homes, abruptly unable to communicate with their parents or even to know where their parents are living. If parents choose to accept deportation (often at the encouragement of immigration officials), they run the risk of being forever separated from their children, given that in all likelihood these children will be unable to accompany them as long as they remain in state custody.

Recent reports have shown how the enforcement of immigration control policies – detention and deportation of parents – without consideration of the child’s best interest, has led to thousands of shattered families and a correspondingly dramatic impact on children’s rights and welfare. These reports also describe the lack of policies facilitating family reunification between child nationals born in destination countries and their deported parents, not only in the countries where parents have been removed, but also in their countries of origin (Applied Research Center, 2011; University of Arizona, 2011), and reveal the strong impact on child development and family bonds (Beckles Flores, 2011).

In these situations, a children’s rights perspective implies that alternative measures for parents must be developed in order to protect children. In this regard, when analysing parents’ status, authorities must fully consider the right to family life and the situation of the child, especially if ties to the host country have been developed or if the child was born in the country contemplating a deportation measure. A more comprehensive response considering the overall interests of the child and the future of the whole family is preferred. A child’s best interests requires the adoption of alternative policies addressing the migration status of the parents, including alternatives to detention and mechanisms protecting the family unit and child development, mental health etc., through regularization rather than deportation.

Ultimately, as has already been mentioned, the best interests of the child in conjunction with other rights at play, can lead to a situation in which the state grants residence to a migrant family in an irregular situation rather than imposing a punishment of expulsion. The development of the child in the destination country, her personality, identity, social and community relationships, among others factors, will be seriously affected by an expulsion, impacting her mental and emotional health as well. In these circumstances, it does not appear that the mere state goal of punishing (administrative) infractions is serious enough to justify meddling in the lives of these children. Neither, of course, does it justify separating the family through the expulsion of the parents.

4.3. Children’s right to family life

In the previous section we have seen how the right to family life should be taken into account by immigration control mechanisms. This right is recognized in numerous international and regional human rights treaties. Nevertheless, in the domain of immigration policies and practices, or even in the decisions of international tribunals regarding migration (such as the European Court of Human Rights; Ceriani Cernadas, 2009), it seems that this right carries less weight.


20 More recently, the European Court of Human Rights has acknowledged that the right to respect for family life may be violated by detaining children accompanying their parents (ECtHR 19 January 2012, Popov v. France, §§116–117).
An important aspect of the right to family life in the context of migration is family reunification. The procedures on family reunification can be decisive for achieving a regular migration process under dignified and appropriate conditions for the child. By contrast, the inexistence of such mechanisms or the imposition of unreasonable restrictions may lead to the weakening of rights and other risks.

For instance, the principle of family unity has an important protective function for children in the context of migration, particularly in the case of irregular migrant children. However, increasing restrictions on the right to family reunification in destination countries have led to the irregular migration of children and adolescents seeking to reunite with their parents.

Moreover, children's right to family life has been increasingly impacted by policies that prioritize migration control goals over the protection of children's rights. In the United States, more than 70,000 migrants that were removed from the country in 2013, alleged they had one or more US-born children. An estimated 4.5 million US citizen children have at least one parent who is undocumented (Human Impact Partners, 2013).

Parents' irregular migration status at destination, along with restrictive regularization mechanisms (and absence of regularization programmes) may present long-term obstacles for family reunification. This situation can prolong or augment the social exclusion of migrant families, may impact on child development, and lead to family disruption. In this regard, it is important to stress that other migrants' rights issues, such as access to a regular residence, access to social rights regardless of residence status, the extension of migration control mechanisms at work, at social services and other public spaces, may considerably impact the right to family life and other related children's rights enshrined in the CRC of child migrants and children born to migrant parents. Addressing such issues could be critical for ensuring that parents are able to fulfil their responsibilities for child development (UNICEF, 2012).

4.4. Social rights of migrants: A key for child development and social integration

The CRC recognizes social rights for all persons less than 18 years of age on the basis of the principles of universality, non-discrimination, and best interests (among others, in Articles 23–32). The exercise of these rights is indispensable, in turn, for the right to survival and development, and the right to an adequate standard of living. The International Covenant on Economic, Social and Cultural Rights also recognizes these rights, which may not be subjected to any kind of discrimination, including nationality or immigration status (ESCR Committee, 2009).

However, migrants, particularly those with irregular migration status, often work in precarious and dangerous jobs; they are excluded from health, education, and other social welfare institutions, or else their access to these systems is subject to additional conditions compared to nationals and they are often victims of exploitation in the housing market (Special Rapporteur, 2010; Cuadra, 2011). In countries of transit and destination, children who hold irregular immigration status are often discriminated against; they face restrictions in accessing basic rights and services such as education, housing, health care, and social security.

Unaccompanied children who migrate irregularly often live in precarious situations and are especially vulnerable to discrimination and difficulties when accessing basic social services.

22 Social rights include a range of human rights such as the right to health, education, social security, and the right to an adequate standard of living.
Without documented status, in many countries they face difficulties acquiring education and health care, and risk facing hunger, homelessness, and sexual or labour exploitation. Moreover, they may end up living with poor or undocumented migrant caregivers, living and working on the streets, or becoming domestic or seasonal farm or mine workers.

Even when countries have laws providing rights and protection to undocumented migrant children and adolescents, there are often huge discrepancies between policy and practice that prevent these groups from enjoying their rights. These barriers, include, inter alia, administrative obstacles, linguistic hurdles, the complexity of the administrative, judicial, and other systems, discrimination, lack of information, fear of being reported, etc. For instance, the law may guarantee universal access to primary education, but schools may request documents prior to enrolling students (see also Vandenhole et al., 2011 on education).

The rights and development of children in the context of migration are often tied to the condition of their migrant parents. The situation and safeguards provided to their parents may critically impact children’ lives. Children born to irregular migrant parents in host countries are at risk of being denied legal status. There are countries – such as the Dominican Republic – in which children of undocumented workers and refugees are automatically classified as undocumented by virtue of the irregular status of their parents, a situation that may lead to the statelessness of children.

Removing these policies in host countries will assist in the effort to fulfil the economic and social rights of undocumented migrant adults, including the right to work; this right not only has a critical impact on other human rights, but is also paramount for ensuring the right to development and the right to an adequate standard of living for the migrants’ children, who may have migrated regularly or irregularly, may have been left behind, or may be nationals of host countries. In addition, the lack of regularization programmes to benefit parents could negatively impact their children’ s rights and undermine their opportunities for improving their socio-economic conditions.

Moreover, it is important to note that the social rights of migrants can also be directly or indirectly affected by the mechanisms of immigration control. Some States have laws and policies that impose a duty on public officials and also on private actors – e.g., health care and education workers, and landlords, among others – to report undocumented migrants to immigration authorities (HUMA Network, 2009; UNICEF-UNLa, 2010). Such policies deter irregular migrants, including children, from accessing fundamental social rights. These constraints negatively impact children’s right to development and right to an adequate standard of living, and contribute to the social exclusion and marginalization of migrant families.

These practices are difficult to reconcile with international standards. First, it is completely unjustifiable and discriminatory, explicitly or implicitly, to consider an irregular migration status (an administrative infraction) as a ground for denying access to social services. Second, this distinction based on migration status – much like the restrictions on the social rights of migrants in general – is yet more evidence not only of discriminatory treatment, but also of the absence of a child’s rights-based perspective. The impact on the life and rights of children, whose basic rights are already severely limited, can be decisive to their physical and mental health, and appropriate and worthwhile development in the short and long terms. These restrictions on social rights are usually populist devices to send messages to the host society, suggesting on the one hand, that these measures will improve the living conditions of the national population, and on the other, that they will lower the cost of social services. In this regard, it should be noted that affecting the social rights of children may impede the process of social integration and increase the rates of social conflict and segregation – effectively mortgaging the future of the whole society and increasing the overall (monetary and non-monetary) toll on the society.
Ensuring access to basic social rights of migrants is a *sine qua non* condition for social integration and cohesion in host societies, thus facilitating the contribution of migrants to the human development of destination countries and countries of origin, and preventing social exclusion, poverty, and economic disparities (Mahal and Marks, 2007: 36). As to the costs-based argument, trustworthy data do not only prove this reduction of layout, but they also point to the contrary: the abridgement of social rights – for example, the right to health – tends to have a negative impact in the middle and long term, including in terms of “economic profitability”. For instance, granting undocumented migrants access to only emergency health services, could lead to higher costs of these services due to the treatment of illness that could have been easily prevented if all migrants could have access to preventive health services.

To sum up, in light of the impact of denying social rights and of migration control mechanisms on social services, it is appropriate to highlight the key functions that migration regularization can fulfil. This refers not only to extraordinary regularization plans, but rather, especially, the permanent mechanisms for accessing a regular status, including those that prevent the transition to irregular status by those persons who already have residence. The recognition of labour connections, roots in society, family ties, or concretely, the state of vulnerability of child migrants and children of migrants, should lead to the granting of residence, as does indeed occur in some South–South destination countries (such as Argentina), rather than expulsion from the country or the denial of social rights.

For these reasons, it is appropriate to focus on several positive effects that these regularization mechanisms can have for migrants, states, and the societies of both origin and destination countries.

(a) **Benefits for migrants:** the family unit is ensured and family reunification is permitted, migrant workers are entitled to work and improve their families’ socio-economic conditions; children may not face risks and limitations at schools, and adolescents can apply for education, training, and employment opportunities under equal conditions; migrants are in a better position to challenge abuses; it becomes easier to integrate migrants into society; migrants can access public services, including services to protect children at risk; migrants also can obtain fair wages.

(b) **Benefits for host societies:** governments are able to better record the number and circumstances of migrants in their territory; they can better promote formal, protected employment and prevent exploitation and human trafficking; they can meet public security goals; they can improve tax revenues and fiscal gains; they can benefit through the increased contribution of migrants to human and economic development; they can strengthen family protection and migrants’ integration, reducing attrition rates within the education system; they can benefit from qualified adolescents and their contribution to future generations; they can improve salaries and labour conditions through migrants’ empowerment and the exercise of labour and union rights.

(c) **Benefits to countries of origin** include: regularized migrants can increase their remittances positively affecting their families’ living conditions and hence their consumption levels and contributions to society; similarly, migrants’ willingness and capability to contribute to the development of their country of origin will improve; family reunification will be facilitated and family ties and communication maintained; conditions will be promoted for migrants to return to their country with new, improved skills (UNICEF-UNLa, 2011).

### 4.5. Children’s rights and the duties of countries of origin

The countries of origin should be responsible for different types of necessary action in ensuring children’s human rights in the context of migration. This section will briefly point out some measures that these states should develop or strengthen.
First, of course, countries of origin have an essential role to play in guaranteeing the rights of the child in order to prevent migration arising from necessity, the deprivation of basic rights, or the absence of public policies for children. The social programmes that protect the rights of children (either directly, or by ensuring parents’ rights through facilitating and monitoring compliance of parental obligations) require a series of public policies; for instance, the state must be the primary guarantor of the rights of the persons within its jurisdiction, regardless of the obligations of other more developed states or the international community in general, as was seen in the analysis of the root causes of migration.

Regarding the children left behind, the countries of origin should, on the one hand, design public policies that take into account their needs and vulnerabilities that are direct consequences of the migration of their parents. On the other hand, these states should adopt measures to facilitate – if that is the wish of the family and/or in the best interests of the child – the regularization of the entire family or eventually familial reunification in the destination country. Unquestionably, the latter requires bilateral, regional, and global foreign policy initiatives.

In transit and destination countries, countries of origin must comply with the pivotal duty of consular assistance, which, like all public policy must have a human rights-based focus, including a children’s rights perspective; this requires having a legal framework, budget, and personnel trained in children’s rights. Consular assistance is also a strategic tool for enabling origin countries to compile and systematize the information necessary for constructing public policies that address children’s rights in the context of migration. Key information about the causes of migration emerges from consular protections and their link to child migrants (accompanied or not), especially with regard to abuses in the origin, transit, or destination country, human trafficking networks, policy shortcomings in the destination country, etc.

It is important to note that consular protection may be necessary for avoiding the arbitrary detention and deportation of unaccompanied children or migrant families, or familial separation as a consequence of the deportation of the parents. As such, it performs a central function in the BID Procedure. In effect, in order to ensure the rights of unaccompanied children within these procedures, origin countries should not only guarantee consular assistance, but also design policies and practices that allow the compiling of necessary information in every case, so that agencies in the destination countries are able to determine best interests in light of all possible factors, thereby avoiding risks and securing the adoption of appropriate short- and long-term decisions.

Finally, though this is by no means an exhaustive list, the obligation of designing policies ensuring the return of unaccompanied children must be mentioned. This should be the beginning of a process of social reintegration within a context of effective exercise of rights, one that allows children to enjoy the right to development and an adequate standard of living.23

5. Final thoughts and issues for discussion

The situation of children in the context of migration has been increasingly included in the agenda of a number of key stakeholders: states, international organizations, civil society, academic institutions and media, among others. This chapter has sought to analyse some of the

23 Regarding the deficiencies of reintegration processes, such as the shortcomings of current policies of consular protection in some Central American countries, see Ceriani Cernadas (2013) and Casa Alianza Honduras (2012).
basic characteristics of the children and migration nexus, paying special attention to how children’s rights should be taken into account in migration, childhood and other related policies that affect the life and rights of migrants and their families. Some of the main challenges and threats to the effective exercise of these rights have been pointed out.

There is a paramount challenge on how to address the different aspects of the current situation of children affected by migration. A comprehensive and rights-based approach is critical for properly coping with such challenges in the short and long term. Introducing the human rights of children to the field of migration policy entails a paradigm shift, which, among other factors, replaces the traditional machinery of the immigration agencies with children’s protection bodies and services, complemented by other social policies aimed at ensuring human rights to all individuals.

There are many social, economic, cultural and political challenges to achieving this paradigm change; it requires the creation of opportunities for dialogue and debate among the different sectors: states, civil organisms, academic factions, international agencies, and, of course, the participation of children. It also needs the adoption of policies and measures at local, national, regional and global level by the countries of origin, transit and destination. Addressing the root causes of migration is essential not only regarding poverty, unemployment and other causes in origin countries, but also in host countries, such as demographic necessities and the increasing demand of informal, unprotected sectors of the labour market. Inequalities within and between countries must also be addressed in depth.

In destination countries, public policies should fulfil human rights to every person regardless of their nationality and residence status. These duties would imply a shift of the paradigm that reigns in the field of migration policies. In this regard, a comprehensive approach should lead to reducing the migration control focus and replace it by a rights-based lens, including a children’s rights perspective.

Questions for debate and discussion

• What could or would be the implications of an age approach or child rights-based approach to migration? In your view, would it lead to a paradigm shift in migration policies, as this chapter has argued?

• Does the children’s rights framework contain all the necessary elements (principles, standards, mechanisms) to provoke a paradigm change in migration policies? Are there gaps, if any, in the children’s rights framework, or in the CRC in particular?

• Which principles or standards of the children’s rights framework hold most potential to lead to a paradigm shift in migration policies? How could a plea for regularization policies be underpinned by a children’s rights argument?

• Which image of childhood prevails in a children’s rights approach to migration policies? Do you see a need for changing that? Why or why not?

• Should children and adults be treated differently in migration? Should different human rights principles and norms apply to both groups?

References


CPT (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) (2009), *20 years of combating torture*, 19th General Report, 1 August 2008–31 July 2009.

CRC Committee (UN Committee on the Rights of the Child) (2013), General comment No. 14, *On the right of the child to have his or her best interests taken as a primary consideration* (Art. 3, para. 1), CRC/C/GC/14, 29 May.


CRC Committee (UN Committee on the Rights of the Child) (2005), General Comment No. 6, *Treatment of Unaccompanied or Separated Children outside their Country of Origin*, CRC/GC/2005/6, 1 September.


UNICEF-UNLa (2010), Estudio sobre los estándares jurídicos básicos aplicables a niños y niñas migrantes en
situación migratoria irregular en América Latina y el Caribe. Estándares jurídicos básicos y líneas de acción para su protección, Panamá.