



**International Convention on the
Protection of the Rights of
All Migrant Workers and
Members of Their Families**

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**Committee on the Protection of the Rights of All Migrant Workers
and Members of Their Families**

**General comment No. 2 on the rights of migrant
workers in an irregular situation and members of
their families**

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I. Introduction

1. International sources estimate that between 10 and 15 per cent of the world's international migrants are in an irregular situation,¹ although the very nature of irregular migration makes it difficult to find reliable data on the scale of this phenomenon. While the economies of developing countries cannot absorb the large numbers of young men and, increasingly, women, seeking employment, population decline and ageing have reduced the labour force in developed countries, thereby generating a demand for low and middle-skilled migrant workers in many sectors of the economy. However, that demand has not been matched by a corresponding increase in regular migration channels. As a result, employers often resort to migrant workers in an irregular situation to fill the gaps.

2. As a deterrent for migrant workers and members of their families in an irregular situation to enter or stay on their territory, States increasingly resort to repressive measures, such as criminalization of irregular migration, administrative detention and expulsion. Criminalization of irregular migration fosters and promotes public perceptions that migrant workers and members of their families in an irregular situation are “illegal”, second-class individuals, or unfair competitors for jobs and social benefits, thereby fuelling anti-immigration public discourses, discrimination and xenophobia. Moreover, migrant workers and members of their families in an irregular situation generally live in fear of being reported to the immigration authorities by public service providers or other officials, or by private individuals, which limits their access to fundamental human rights, as well as their access to justice, and makes them more vulnerable to labour and other types of exploitation and abuse.

3. The term “migrant workers in an irregular situation” is defined in article 5 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Convention), which specifies that migrant workers or members of their families are considered as non-documented or in an irregular situation if they are not authorized to enter, to stay or to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which it is a party.

4. The Committee is of the view that the term “in an irregular situation” or “non-documented” is the proper terminology when referring to their status. The use of the term “illegal” to describe migrant workers in an irregular situation is inappropriate and should be avoided as it tends to stigmatize them by associating them with criminality.²

5. The situation of migrant workers may be irregular either because they have entered the State of employment in an unauthorized way and are thus not authorized to stay, reside or work in that State, or because they overstay the period or otherwise violate the conditions of their authorized stay. Regular migrants may also lose their status through no fault of their own due to illness or other unforeseen circumstances affecting them or family members. The Committee emphasizes that whatever the modalities of their stay, migrant workers can never be deprived of their fundamental rights, as protected under Part III of the Convention, by virtue of their irregular situation.

¹ International Labour Office, *International Labour Migration: A rights-based approach* (2010), p. 32.

² See General Assembly resolution 3449, para. 2.

II. The normative framework for the protection of the rights of migrant workers in an irregular situation and members of their families

A. Part III of the Convention

6. Part III of the Convention protects the rights of all migrant workers and members of their families, including those in an irregular situation. Most of the rights protected in Part III are common to a host of international human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Among the civil and political rights protected in Part III, the right of migrant workers to liberty and security of person (art. 16) and the right of migrant workers deprived of their liberty to be treated with humanity (art. 17) have been contextualized, taking into account the situation of this group of rights-holders. Specific rights of migrant workers that are either not explicitly protected in other human rights treaties include their protection against unauthorized confiscation or destruction of personal documents (art. 21), procedural safeguards in individual expulsion proceedings (art. 22) and the right to have recourse to consular or diplomatic protection and assistance (art. 23). Among the economic, social and cultural rights of all migrant workers, the right to respect for their cultural identity (art. 31) and the right to transfer their earnings and savings upon termination of their stay in the State of employment (art. 32) are Convention-specific. In addition, Part III provides for information rights (art. 33) and affirms the obligation of all migrant workers and members of their families to comply with the laws of the State of employment or transit (art. 34).

B. Other international legal instruments

7. The Committee notes that the Convention provides only for a minimum standard of protection. Article 81, paragraph 1, states that nothing shall prevent States parties from granting more favourable rights or freedoms than those set out in the Convention to migrant workers and members of their families, including those in an irregular situation, by virtue of the law and practice of, or any bilateral or multilateral treaty in force for, the State party concerned. The Committee is of the view that a State's obligation under the Convention must be read with respect to the core human rights treaties and other relevant international instruments to which it is a party. Although separate and freestanding, these treaties are complementary and mutually reinforcing.

8. The rights guaranteed to migrants in an irregular situation in other international human rights treaties often have a wider scope than their counterparts in Part III of the Convention. These treaties also contain additional rights. The rights guaranteed in those treaties generally apply to everyone, including migrants and other non-nationals, 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, including immigration status.

9. For example, the International Covenant on Civil and Political Rights provides for a wider scope of protection regarding the right of peaceful assembly, the right to freely enter marriage and to equality of rights and responsibilities of spouses, the right of every child to special protection, the right to equality before the law and equal protection of the law, and minority rights. In addition, other rights enshrined in the Covenant apply to all migrant workers, whether in a regular or an irregular situation, such as the right to form associations and trade unions and the right to protection of the family, whereas the Convention makes a distinction between migrant workers in a regular situation and those in an irregular situation. Both the Covenant and the Convention protect the right to freedom of movement

and to free choice of residence of migrants insofar as they are lawfully within the territory of a State party.

10. Similarly, the International Covenant on Economic, Social and Cultural Rights also provides for a broader range of rights, including the right to strike, the right to freely enter marriage, the right to maternity protection, the right to special protection of children and adolescents, the right to an adequate standard of living including adequate food and clothing, and certain cultural rights. The Convention does not provide for such rights only in relation to migrant workers in a regular situation. In addition, the Covenant recognizes the rights to work, to vocational guidance and training, to form trade unions, to protection of the family, to housing, and to participate in cultural life. The Convention recognizes these rights in relation to migrant workers in a regular situation and members of their families. In addition, most of the economic, social and cultural rights in Part III of the Convention have a narrower scope than their counterparts in the Covenant.

Regional human rights treaties

11. Regional human rights treaties protect all migrants against refoulement³ and collective expulsion.⁴ However, the procedural safeguards in individual expulsion proceedings in regional human rights treaties apply only to migrants who are lawfully within the territory of a State party.⁵ The rights protected in the European Social Charter apply to “foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned”, or to migrant workers and their families “lawfully within their territories”.⁶ The opinions of the European Committee of Social Rights, however, have held that the European Social Charter also applies to vulnerable categories of undocumented migrant children. Moreover, the right to education is guaranteed to all migrant children, regardless of their migration status, in all regional human rights systems.⁷

International Labour Organization

12. International labour standards adopted by the International Labour Conference of the International Labour Organization (ILO) apply to migrant workers, including those in an irregular situation, unless otherwise stated. The fundamental principles and rights at work set out in the eight fundamental ILO Conventions⁸ apply to all migrant workers,

³ See European Convention on Human Rights (ECHR), art. 3; American Convention on Human Rights (ACHR), art. 22, para. 8; and African Charter on Human and Peoples’ Rights (ACHPR), art. 5.

⁴ See Protocol No. 4 to ECHR, art. 4; ACHR, art. 22(9); ACHPR, art. 12(5); and Arab Charter on Human Rights (Arab Charter), art. 26(1).

⁵ See Protocol No. 7 to ECHR, art. 1; ACHR, art. 22(6); ACHPR, art. 12(4); and the Arab Charter, art. 26(2).

⁶ European Social Charter, arts. 19(4-9), and the appendix.

⁷ See Protocol No. 1 to ECHR, art. 2 (read in conjunction with art. 14 of ECHR); ACHPR, art. 17(1); and African Charter on the Rights and Welfare of the Child, art. 11. See also the case law of the European Committee of Social Rights on art. 17(2) of the revised European Social Charter and the jurisprudence of the Inter-American Court of Human Rights on art. 19 of ACHR.

⁸ Conventions No. 29 (1930) concerning Forced Labour; No. 105 (1957) concerning the Abolition of Forced Labour; No. 138 (1973), concerning Minimum Age for Admission to Employment; No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; No. 87 (1948) concerning the Freedom of Association and Protection of the Right to Organize; No. 98 (1949) concerning the Right to Organize and Collective Bargaining; No. 100 (1951) concerning Equal Remuneration; and No. 111 (1958) concerning Discrimination (Employment and Occupation).

irrespective of their nationality and migration status. The 1998 ILO Declaration on fundamental principles and rights at work and its follow-up requires all ILO member States to promote and realize the principles concerning the fundamental rights enshrined in these Conventions. A number of other ILO standards of general application and those containing specific provisions on migrant workers in the areas of employment, labour inspection, social security, protection of wages, occupational safety and health, as well as in such sectors as agriculture, construction, hotels and restaurants, and domestic work, are of particular importance to migrant workers in an irregular situation.⁹ Lastly, in formulating national laws and policies concerning labour migration and the protection of migrant workers in an irregular situation, States are also guided by ILO Convention No. 97 (1949) concerning Migration for Employment (Revised),¹⁰ Convention No. 143 (1975) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Supplementary Provisions), and the accompanying Recommendations Nos. 86 and 151.

III. Protection of the Convention in relation to the rights of migrant workers and members of their families in an irregular situation

A. Basic principles

1. Power to regulate entry and stay

13. The Convention strikes a balance between the sovereign power of States parties to control their borders and to regulate the entry and stay of migrants workers and members of their families, on the one hand, and the protection of the rights, under Part III of the Convention, of all migrant workers and members of their families, including those in an irregular situation, on the other. This balance is reflected in article 79 of the Convention.

2. Duty to comply with the laws and regulations

14. Article 34 of the Convention states that nothing in Part III of the Convention shall have the effect of relieving migrant workers and members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of those States. The obligation to comply with the laws and regulations of the State of employment or any State of transit comprises a duty to refrain from any hostile act directed against national security, public order (*ordre public*) or the rights and freedom of others.

3. Regularization

15. Article 35 of the Convention clarifies that the fact that Part III protects the rights of all migrant workers and members of their families, irrespective of their migration status, cannot be interpreted as implying the regularization of the situation of migrant workers or members of their families in an irregular situation or any right to such regularization. While States parties have no obligation to regularize the situation of migrant workers or members of their families, they shall take appropriate measures, whenever migrant workers or

⁹ For example, ILO Conventions Nos. 19, 81, 95, 110, 121, 129, 131, 155, 167, 172, 181, 184, 189, 200 and 201.

¹⁰ While Convention No. 97 in principle only applies to migrant workers lawfully within the territory of a State, it contains certain provisions requiring States parties to take measures that have the effect of preventing migrant workers from falling into an irregular situation.

members of their families within their territory are in an irregular situation, to ensure that such a situation does not persist (art. 69, para. 1). States parties shall therefore consider the possibility of regularizing the situation of such persons in each individual case, in accordance with applicable national legislation and bilateral or multilateral agreements, taking into account the circumstances of their entry, the duration of their stay and other relevant considerations, in particular those relating to their family situation (art. 69, para. 2). When States parties provide for the regularization of migrant workers in their national legislation, they must ensure that all migrant workers and members of their families in an irregular situation have non-discriminatory and effective access to such regularization procedures and that those procedures are not applied in an arbitrary manner (arts. 7 and 69).

16. The Committee recalls that regularization is the most effective measure to address the extreme vulnerability of migrant workers and members of their families in an irregular situation.¹¹ States parties should therefore consider policies, including regularization programmes, for avoiding or resolving situations whereby migrant workers and members of their families are in, or are at risk of falling into, an irregular situation (art. 69, para. 1).

4. International cooperation (Part VI)

17. States parties shall cooperate in promoting sound, equitable, humane and lawful conditions for international migration (art. 64, para. 1). Coordinated policies, which ensure that migrant workers and members of their families have access to regular channels for migration, based on actual or projected labour market needs – at all skills levels – and resources (art. 64, para. 2), are an important element of such cooperation. By making regular channels of migration available, States parties also contribute to the aim of preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation (art. 68).

B. Non-discrimination (Part II)

18. The principle of non-discrimination is central to all international human rights instruments and to the Charter of the United Nations. Article 7 of the Convention explicitly includes nationality among the prohibited grounds of discrimination. Treaty bodies have also interpreted the prohibition of discrimination to include non-nationals, such as migrant workers, regardless of legal status and documentation.¹² The rights in Part III of the Convention also apply to all migrant workers and members of their families, including those in an irregular situation. Therefore, any differential treatment based on nationality or migration status amounts to discrimination unless the reasons for such differentiation are prescribed by law, pursue a legitimate aim under the Convention, are necessary in the specific circumstances, and proportionate to the legitimate aim pursued.¹³

19. Article 7 requires States parties “to respect and to ensure” to all migrant workers and members of their families without discrimination the rights provided for in the Convention. Article 7 does not provide an autonomous right. Its application is limited to those rights of migrant workers and members of their families in an irregular situation that are protected in

¹¹ Committee’s general comment No. 1 (2011) on migrant domestic workers, para. 52.

¹² Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 30.

¹³ See Human Rights Committee, general comment No. 18 (1989) on non-discrimination, para. 13; and Committee on Economic, Social and Cultural Rights, general comment No. 20 on the right to education, para. 13.

the Convention, and in particular Part III. Article 7 covers both de jure and de facto discrimination. In this context, de jure refers to discrimination that exists in the law, and de facto refers to discrimination that exists in fact or has an effect even though not formally or legally recognized. States parties shall respect the prohibition of discrimination by ensuring that their laws, regulations and administrative practices do not discriminate against migrant workers and members of their families. The Committee is of the view that merely addressing de jure discrimination will not ensure de facto equality. Therefore, States parties shall protect the rights under the Convention for all migrant workers by adopting positive measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate de facto discrimination against them.

20. Article 7 prohibits both direct and indirect discrimination against migrant workers. In line with the jurisprudence of other international human rights mechanisms, indirect discrimination against migrant workers occurs when a law, policy or practice appears neutral at face value, but has a disproportionate impact on their rights. For example, requiring birth certificates for school enrolment may disproportionately affect migrant workers in an irregular situation, who often do not possess, or have been denied, such certificates.

C. Protection of civil and political rights (Part III)

1. Protection against violence

21. Migrant workers in an irregular situation, particularly women, are at increased risk of ill-treatment and other forms of violence at the hands of both private actors, including employers, and State officials which includes sexual violence, beatings, threats, psychological abuse, and denial of access to medical care, for example. Under article 16, paragraph 2, States parties have an obligation to protect all migrant workers and members of their families against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions. This obligation requires States parties to:

- (a) Adopt and implement legislation prohibiting such acts;
- (b) Effectively investigate cases of abuse and violence;
- (c) Prosecute and punish those responsible with appropriate punishments;
- (d) Provide adequate reparation to victims and members of their families;
- (e) Provide human rights training for public officials; and
- (f) Effectively monitor the conduct of State agents, and regulate that of private persons and entities, with a view to preventing such acts.

22. States parties are also required to take effective measures to fight all manifestations of racism, xenophobia or related intolerance against migrant workers and members of their families, especially those in an irregular situation, such as hate crimes, incitement to hatred and hate speech, including by politicians and in the media, and to raise public awareness about the criminal nature of such acts as well as to promote respect for migrant workers' human rights.

2. Protection against arbitrary arrest and detention

23. Article 16 protects the right of migrant workers and members of their families to liberty and security of person (para. 1), and provides that identity controls of migrant workers must comply with the procedure established by law (para. 3). Article 16, paragraph

4, complements article 9, paragraph 1, of the International Covenant on Civil and Political Rights, adding that migrant workers and members of their families shall not be subjected “individually or collectively” to arbitrary arrest or detention. In order not to be arbitrary, arrest and detention of migrant workers and members of their families, including those in an irregular situation, must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances and proportionate to the legitimate aim pursued.

24. The Committee considers that crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.¹⁴

25. Although article 16, paragraph 4, does not define the permissible grounds for detention, it states that migrant workers and members of their families shall not be deprived of their liberty, except on such grounds and in accordance with such procedures as are established by law. Furthermore detention must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances, and proportionate to the legitimate aim pursued.

26. In the Committee’s view, any custodial or non-custodial measure restricting the right to liberty must be exceptional and always based on a detailed and individualized assessment. Such assessment should consider the necessity and appropriateness of any restriction of liberty, including whether it is proportional to the objective to be achieved. The principle of proportionality requires States parties to detain migrant workers only as a last resort, and to give preference to less coercive measures, especially non-custodial measures, whenever such measures suffice to achieve the objective pursued. In all such cases, the least intrusive and restrictive measure possible in each individual case should be applied.

27. Administrative detention of migrants that is initially lawful and non-arbitrary may become arbitrary if it continues beyond the period for which a State party can provide proper justification. To prevent such a situation from occurring, a maximum period of administrative detention shall be established by law, upon expiry of which a detainee must be automatically released in the absence of such justification. Administrative detention must never be unlimited or of excessive length. The justification for keeping a migrant worker detained shall be reviewed periodically to prevent prolonged and unjustified detention, which would be considered arbitrary. Preventive detention of migrant workers often leads to prolonged detention based on vague criteria. Therefore, such detention should be imposed only following an individual assessment in each case and for the shortest time possible, in compliance with all procedural safeguards provided for in article 16 of the Convention. In cases where an expulsion order cannot be executed for reasons beyond the detained migrant worker’s control, he or she shall be released in order to avoid potentially indefinite detention.

28. Article 16, paragraph 5, requires States parties to inform migrant workers and members of their families who are arrested of the reasons for their arrest at the time of arrest and, as far as possible, in a language they understand. Moreover, they must be

¹⁴ See report of the Special Rapporteur on the human rights of migrants to the Human Rights Council (A/HRC/20/24), para. 13.

promptly informed of the charges against them in a language they understand. In order to comply with this obligation, States parties should consider preparing standard notification forms, containing, *inter alia*, information on available remedies, in the languages that are most frequently used or understood by migrant workers in an irregular situation in the State party concerned. Such standard notification forms, however, should be complementary to the issuance of a detention order containing factual information and the legal grounds pertaining to the arrest.

29. Under article 16, paragraph 6, the guarantees of certain rights of migrant workers and members of their families in custody and pretrial detention are applicable to anyone suspected of committing or having committed a crime.

30. Article 16, paragraph 7, provides for the right of migrant workers who are deprived of their liberty to communicate with the consular or diplomatic authorities of their State of origin or those of a State representing the interests thereof. It also requires State parties to:

- (a) Inform the said authorities without delay of the arrest or detention of the migrant worker concerned, if he or she so requests;
- (b) Facilitate any communication between the person concerned and the said authorities;
- (c) Inform the person concerned without delay of this right as well as of rights under other applicable treaties; and
- (d) Correspond and meet with representatives of the said authorities and make arrangements with them for his or her legal representation.

31. In order to enable detained migrant workers to avail themselves effectively of the rights under (c) above, States parties shall provide the relevant information without delay, that is, upon or shortly after admission to the facility where they are deprived of their liberty and preferably in a language they understand. In relation to (a) above, the Committee emphasizes that the detaining State shall only contact the said authorities if this is explicitly requested by the detained migrant worker. In particular, migrant workers with potential protection needs shall not be brought to the attention of the said authorities without their knowledge and consent.

32. Article 16, paragraph 8, provides for the right of all migrant workers and members of their families who are deprived of their liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention. If the court finds that the detention is unlawful, it must order the release of the detained migrant worker. The Committee considers that mandatory detention of migrant workers and members of their families in an irregular situation is incompatible with article 16, paragraph 8, if the possibility of judicial review is confined to a formal assessment of whether the migrant worker concerned entered the State party without a valid entry permit, without the possibility of release if the detention is incompatible with article 16, paragraph 4.

33. The Committee considers that anyone arrested and detained solely for immigration purposes should be brought promptly before a judge or other officer authorized by law to exercise judicial power to review the lawfulness of the arrest and/or detention and the continued necessity of such arrest or detention; and to order unconditional release and/or less coercive measures, if warranted. Further reviews of the continued necessity and lawfulness of the detention should be carried out at regular intervals by a judge or other officer authorized by law to exercise judicial power. The burden of proof must rest on the detaining authorities to demonstrate that the presumption in favour of liberty should be displaced. The migrant worker must have access to legal representation and advice, if

necessary free of charge, to challenge the lawfulness of detention. Children, and in particular unaccompanied or separated children, should never be detained solely for immigration purposes.

34. Article 16, paragraph 8, of the Convention provides for the right of migrant workers attending such proceedings to an interpreter, if necessary, without cost to them, if they cannot understand or speak the language used. In the Committee's view, States parties should take effective measures to ensure that all migrant workers held in migration detention centres, including those who opt for voluntary repatriation, are properly informed of their rights in a language they understand, especially with regard to their rights to consular assistance, to challenge the lawfulness of their detention and/or to release, to request asylum and to receive information about protection measures available to victims or witnesses of trafficking in persons.

35. Article 16, paragraph 9, provides for an enforceable right to compensation for migrant workers and members of their families who have been victims of unlawful arrest or detention. This right does not depend on a violation of article 16. It is sufficient that the arrest or detention be found unlawful under national or international law. States parties shall ensure that the right to compensation can be effectively enforced before the competent domestic authority. States parties must also ensure that migrant workers and members of their families are not expelled while their claim is being considered.

3. Protection against inhumane treatment

36. In accordance with article 17, paragraph 1, of the Convention, States parties have an obligation to treat migrant workers and members of their families who are deprived of their liberty with humanity, and with respect for their inherent dignity and cultural identity. In order to respect the inherent dignity of migrant workers and members of their families who are deprived of their liberty, States parties are obliged to ensure adequate conditions in line with applicable international standards, including the provision of adequate sanitary, bathing and shower facilities; adequate food (including appropriate food for those observing religious dietary laws) and drinking water; the right to communicate with relatives and friends; access to qualified medical personnel, and adequate opportunities to practise their faith, for example. It also requires States parties to ensure that they are not subjected to any form of inhumane treatment, including sexual violence and abuse, by guards or other detainees or inmates. States parties must therefore:

- (a) Train supervisory and other staff;
- (b) Enable regular and independent monitoring of places where migrant workers are or may be deprived of their liberty;
- (c) Ensure that they have access to effective and independent complaint mechanisms, including access to legal counsel and interpreters;
- (d) Investigate complaints of torture and other forms of ill-treatment in places where migrant workers or members of their families are deprived of their liberty; and
- (e) Bring those responsible to justice.

37. Article 17, paragraph 2, of the Convention provides that accused migrant workers and members of their families shall be separated from convicted persons and shall be subjected to a regime appropriate to their status as persons who have not been convicted of a crime. In addition, accused juveniles shall be separated from adults and brought as speedily as possible for adjudication.

38. Article 17, paragraph 3, underlines the non-punitive nature of administrative detention. It provides for migrant workers or members of their families who are detained for violation of provisions relating to migration to be held, insofar as is practicable, separately from convicted persons or pretrial detainees. Given that such detention can last for an extended period, migrant detainees should be kept in special facilities that are specifically designed for that purpose. Moreover, migrant workers and members of their families should not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. The Committee is of the view that States parties should look for alternatives to administrative detention and that administrative detention should only be used as a last resort.

39. The Committee considers that administrative detention of migrant workers should, as a rule, take place in public establishments. Privately run migrant detention centres pose particular difficulties in terms of monitoring. States parties cannot absolve themselves of their human rights obligations by contracting out the detention of persons to private commercial enterprises. If States parties delegate such functions to private companies, they must ensure respect for the rights of detained migrant workers, as provided for under article 17 of the Convention. States parties must ensure that detention centre personnel are trained in human rights, cultural sensitivity, and age and gender considerations.

40. Article 17, paragraph 4, underscores the essential aim of the criminal justice system, which is to reform and rehabilitate offenders. Juvenile offenders must be separated from adults and treated appropriately for their age and legal status, and pursuant to international standards, including the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

41. Article 17, paragraph 5, guarantees detained and imprisoned migrant workers and members of their families the same rights as nationals with regard to visits by their family members. If the law of a State party grants certain visitation rights, such as direct contact with visiting family members, to nationals who are deprived of their liberty, it must ensure equal rights for detained or imprisoned migrant workers, including those in an irregular situation. States parties shall eliminate de facto discrimination against detained migrant workers by removing practical barriers to their equal enjoyment of visitation rights, such as detention in a remote location, making access difficult for family members.

42. Article 17, paragraph 6, requires States parties to pay attention to the problems that deprivation of liberty may pose for family members, in particular spouses and minor children. In such cases, the Committee is of the view that States parties should seek alternatives to administrative detention, as administrative detention often has dire consequences, both economically and psychologically, for spouses and children.

43. Article 17, paragraph 7, contains a specific non-discrimination clause providing for detained or imprisoned migrant workers and members of their families to enjoy the same rights as nationals of the State of employment or transit who are in the same situation. This provision has the effect of extending additional procedural safeguards, over and above those contained in article 17, to detained migrant workers, such as the right to communicate with the outside, including by telephone, access to health professionals and to education, if also provided to nationals.

44. This provision also raises the issue of family detention. As a general rule, children and families with children should not be detained and States parties should always give priority to alternatives to detention where children and families are concerned. When family detention is unavoidable, detention of children shall be used “only as a measure of last resort and for the shortest appropriate period of time”, in accordance with article 37, paragraph (b), of the Convention on the Rights of the Child. Moreover, the primary

consideration in all actions concerning children shall be the best interest of the child standard, as laid down in article 3, paragraph 1, of the Convention on the Rights of the Child. States parties shall ensure that children in detention are treated with humanity and respect for the inherent dignity of the human person and in an age-appropriate manner and are provided with all legal safeguards (Convention on the Rights of the Child, art. 37). States parties shall therefore provide living quarters that are suitable for children and provide adequate access to education, play and leisure facilities, and, in the case of children detained with their parents, in special family units. Children should not be separated from their parents against their will except when such separation is necessary for the best interests of the child (Convention on the Rights of the Child, art. 9, para. 1). Unaccompanied children should be appointed a legal guardian who should be entrusted with the duty to care for the child outside of detention facilities.

45. States parties must also take into consideration the special situation of women migrant workers in detention. States parties must ensure separate facilities for men and women, ensure the provision of gender-specific health care services, and also provide for the specific needs of pregnant women, breastfeeding mothers and mothers with young children. States should avoid detaining women migrant workers in the final months of pregnancy or if they are nursing. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) provide useful guidelines for States in these situations.

46. Detention can be particularly damaging to vulnerable categories of migrant workers, impacting negatively on their physical and mental health. These migrant workers and members of their families may include victims of torture, unaccompanied older persons, persons with disabilities and persons living with HIV/AIDS. Special measures should be taken to protect vulnerable people deprived of their liberty, including access to adequate health services, medication and counselling. Moreover, migrant workers with disabilities and members of their families with disabilities should be provided with “reasonable accommodation”¹⁵ to ensure their right to enjoy their human rights and fundamental freedoms on an equal basis with others.

47. With regard to article 17, paragraph 8, the Committee considers that detention “for the purpose of verifying any infraction of provisions related to migration” covers the entire duration of administrative detention, and that, consequently, migrant workers and members of their families subjected to administrative detention shall not bear any costs arising therefrom.

48. Considering that migrant workers deprived of their liberty are in a particularly vulnerable situation due to their predicament and the uncertainty of the circumstances, the Committee is convinced of the importance of independent monitoring in preventing torture and other forms of ill-treatment and abuse. National human rights institutions, relevant civil society actors, the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross and the Office of the High Commissioner for Human Rights should have broad access to all places of detention where migrants are or may be detained.

4. Protection in expulsion proceedings

49. Article 22 of the Convention prohibits collective expulsion and provides procedural safeguards in individual expulsion proceedings with respect to both regular and irregular

¹⁵ Convention on the Rights of Persons with Disabilities, art. 2.

migrant workers and members of their families. While article 22 regulates only the procedure and not the substantive grounds of expulsion, its purpose is to prevent arbitrary expulsions and to provide substantive protection against expulsions in certain situations. Article 22 applies to all procedures aimed at the obligatory departure of migrant workers whether described in national law as expulsion or otherwise.

Substantive protection against expulsion: non-refoulement

50. The principle of non-refoulement, as contained in international and regional human rights and refugee law, is the prohibition on forcibly removing anyone, in any manner whatsoever, to a country or territory where they would be at real risk of persecution or serious human rights violations or abuses. In the view of the Committee, this principle covers the risk of torture and cruel, inhuman or degrading treatment or punishment, including inhumane and degrading conditions of detention for migrants or lack of necessary medical treatment in the country of return, as well as the risk to the right to life (arts. 9 and 10 of the Convention). It also applies to situations where individuals would not be protected from onward refoulement. The Committee is of the view that migrants and members of their families should be protected in cases where expulsions would constitute arbitrary interference with the right to family and private life. Migrants and members of their families in an irregular situation with international protection needs should also be protected against expulsion.

Prohibition of collective expulsion

51. Article 22, paragraph 1, of the Convention explicitly prohibits collective expulsion and requires that each case of expulsion be examined and decided individually. States parties have an obligation to ensure that their expulsion procedures provide sufficient guarantees to ensure that the personal circumstances of each migrant worker are genuinely and individually taken into account. This obligation extends to all spaces over which a State party exercises effective control, which may include vessels on the high seas.¹⁶

Procedural safeguards in individual expulsion proceedings

52. Article 22, paragraph 2, seeks to prevent arbitrary expulsions by allowing only those carried out “in pursuance of a decision taken by the competent authority in accordance with law.” Article 22, paragraph 3, provides for the decision on expulsion to be communicated to the migrant worker concerned in a language he or she understands and, upon his or her request where not otherwise mandatory, in writing and with reasons, save in exceptional circumstances on grounds of national security. These rights are important to ensure due process, by enabling migrant workers to prepare their arguments with regard to such a decision. The right of the persons concerned to be informed of these rights before, or, at the latest, at the time the decision is rendered, serves the same purpose.

53. The right of a person to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority (art. 22, para. 4), includes the right to seek a stay of the decision of expulsion pending review of the said decision. While a stay of decision does not regularize the status of the person concerned for the time of the proceedings, it prevents the State party from expelling him or her before a final decision is rendered. In accordance with article 83 of the Convention, States parties are obliged to provide an effective remedy, including the right to review by a competent authority for

¹⁶ See European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09 (23 February 2012).

migrant workers and their family members, whose rights and freedoms as recognized in the Convention have been violated. The Committee notes that migrant workers and members of their families must be given adequate time and facilities to pursue such a remedy against expulsion so as to ensure the effectiveness of their right to review. Such facilities should include the right to legal assistance and the assistance of an interpreter, if necessary, and be free of charge, if the circumstances of the case so require. The competent authority reviewing the decision of expulsion should ideally be a court. The right to appeal expulsion under article 22, paragraph 4, of the Convention may only be restricted for “compelling reasons of national security”.

54. Article 22, paragraph 5, states that if an expulsion decision that has already been executed is subsequently annulled, the person concerned has the right to seek compensation according to law. The expelling State shall ensure that the expelled person has the necessary facilities to pursue his or her compensation claim from abroad, for example, by appointing a legal representative. Furthermore, the expelling State may not invoke the earlier (annulled) decision to deny the person concerned re-entry into its territory.

55. Article 22, paragraph 6, provides for the person concerned by an expulsion decision to have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities. This provision echoes article 9, paragraph 1, of ILO Convention No. 143 (1975) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Supplementary Provisions). The opportunity to settle claims, wages and other benefits must be effective in practice. Migrant workers often encounter problems pursuing legal claims in the State of employment once they have returned to their State of origin, including high litigation costs or difficulties providing evidence. Therefore, States parties should, whenever possible, grant migrant workers and their family members a reasonable period of time prior to their expulsion to claim wages and benefits. States parties should also consider time-bound or expedited legal proceedings to address such claims by migrant workers. In addition, States parties should conclude bilateral agreements so that migrant workers who return to their State of origin may have access to justice in the State of employment to file complaints about abuse and to claim unpaid wages and benefits.

56. Article 22, paragraph 7, provides for migrant workers and members of their families who are subject to an expulsion decision to seek entry into a State other than their State of origin, without prejudice to the execution of the expulsion decision. The exercise of this choice on the part of the migrant worker and family members is subject to the consent of the third State.

57. Article 22, paragraph 8, provides that migrant workers and members of their families shall be exempt from bearing the costs of their expulsion. The expelling State may require that they pay their own travel costs, but migrant workers must not be required to pay the costs of the legal proceedings leading to their expulsion or the costs of their administrative detention (see also art. 17, para. 8). However, the Committee notes that migrant workers who are in an irregular situation not of their own making, for example, redundancy before expiry of a contract or where an employer failed to complete the necessary formalities, should not be responsible for the costs of expulsion, including travel costs.

58. Article 22, paragraph 9, complements article 22, paragraph 6, and article 25, paragraph 3, stating that migrant workers and family members should not be deprived of their acquired rights, such as the right to receive wages and “other entitlements,” including social security benefits or reimbursement of contributions made with respect to such benefits. States parties should therefore ensure that migrant workers and members of their

families have access to information on the amount of their accrued social security benefits prior to their expulsion.

Consular protection

59. Article 23 of the Convention provides for migrant workers and members of their families subject to an expulsion decision to be informed without delay of their right, and to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin. It also requires the authorities of the expelling State to facilitate the exercise of this right. Accordingly, the expelling State shall inform the person concerned without delay of this right, that is, at the time of or shortly after notifying the person of the expulsion decision and preferably in a language he or she understands. It shall facilitate any communication between the person concerned and the consular or diplomatic authorities of the State of origin.

D. Protection of economic, social and cultural rights (Part III)

1. Protection against labour exploitation

Protection against forced and compulsory labour and child labour

60. Article 11 of the Convention requires States parties to take effective measures against all forms of forced or compulsory labour by migrant workers.¹⁷ This includes debt bondage, passport retention, and illegal confinement, for example. Article 21 obliges States parties to ensure that employers and recruiters do not confiscate or destroy travel or identity documents belonging to migrant workers.¹⁸ States parties should provide training to law enforcement officers, and ensure that occupations dominated by migrant workers, especially women migrant workers, such as domestic work¹⁹ and some forms of entertainment, are protected by labour laws and subject to inspections.²⁰

61. Article 25, paragraph 1 (b), of the Convention provides that laws and regulations on the minimum age of employment shall equally apply to migrant children. The minimum age shall not be less than 15 years, in accordance with article 2 of ILO Convention No. 138 (1973) concerning Minimum Age for Admission to Employment. Furthermore, in accordance with article 11 of the Convention, States parties are obliged to ensure that child migrant workers shall be protected from any form of slavery, prostitution or work that would jeopardize their education, safety, morals and health, such as long hours of work.²¹ States parties must protect child migrant workers from violence and ensure their rights to education, leisure and occupational health.

Equal treatment

62. Article 25, paragraph 1, provides for migrant workers, irrespective of their status, to enjoy equal treatment to that of nationals in respect of remuneration, other conditions of work and terms of employment.²² While States parties may refuse migrant workers who do not have work permits access to their labour markets, once an employment relationship has

¹⁷ ILO Convention No. 29 (see Note 8 above).

¹⁸ See Committee's general comment No. 1 (2011) on migrant domestic workers, para. 39.

¹⁹ ILO Convention No. 189 (2011) concerning Decent Work for Domestic Workers.

²⁰ See Committee's general comment No. 1 (2011) on migrant domestic workers, para. 41.

²¹ ILO Convention No. 182 (see Note 8 above).

²² ILO Convention No. 111 (1958) concerning Discrimination (Employment and Occupation).

been initiated and until it is terminated, all migrant workers, including those in an irregular situation, are entitled to equal conditions of work and terms of employment. The conditions of work and terms of employment listed in article 25, paragraph 1(a) and (b), are non-exhaustive examples. The equal treatment principle also covers any other matter that, according to national law and practice, is considered a working condition or term of employment, such as maternity protection.

63. States parties should require employers to explicitly state in contracts that are free, fair and fully consented to, the terms of employment for migrant workers, including those in an irregular situation, in a language they understand, outlining their specific duties, hours of work, remuneration, days of rest and other conditions of work.²³ They should take effective measures against non-payment of wages, delay in payment until departure, transfer of wages into accounts that are inaccessible to migrant workers, or payment of lower wages to migrant workers, especially those in an irregular situation, than to nationals. States parties should also step up inspections of places where migrant workers are routinely employed and instruct labour inspectorates not to share data concerning the migration status of migrant workers with immigration authorities,²⁴ as their primary duty is to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, in accordance with article 3, paragraph 1 (a), of ILO Convention No. 81 (1947) concerning Labour Inspection in Industry and Commerce.

Horizontal effect and enforcement of equal labour rights

64. Article 25 provides for equality in treatment regarding remuneration and other conditions of work between nationals and migrants and also guarantees this right in private employment contracts, notwithstanding the status of the migrant worker. Article 25, paragraph 3, states that employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of any irregularity in the stay or employment of migrant workers. States parties shall provide for appropriate sanctions for employers who derogate from the principle of equality of treatment in private employment contracts with migrant workers in an irregular situation, and ensure that those migrant workers have access to labour courts or other judicial remedies when their rights are violated and without fear of being deported (art. 83).²⁵ To give effect to this provision, the Committee is of the view that States parties shall also put in place an effective monitoring system for workplaces, especially in industries known to be employing migrant workers in an irregular situation.

Right to join trade unions

65. The right to organize and to engage in collective bargaining is essential for migrant workers to express their needs and defend their rights, in particular through trade unions.²⁶ Article 26 of the Convention sets out the right of all migrant workers to join trade unions and other associations protecting their interests. Article 26 does not provide for protection of the right to form trade unions. This provision, however, read together with other international human rights instruments, may create broader obligations for States parties to both instruments. For example, article 2 of ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Rights to Organise, and article 22, paragraph 1, of the International Covenant on Civil and Political Rights, both apply to migrant

²³ See Committee's general comment No. 1 (2011) on migrant domestic workers, paras. 38 and 40.

²⁴ Ibid, paras. 41 and 49-50.

²⁵ Ibid., paras. 49-50.

²⁶ Ibid, para. 45.

workers in an irregular situation. Article 26 also protects their right to participate in meetings and activities, and to seek the assistance, of trade unions and any other associations established in accordance with law. States parties shall ensure these rights, including the right to collective bargaining, encourage self-organization among migrant workers, irrespective of their migration status, and provide them with information about relevant associations that can provide assistance.²⁷

66. With regard to article 26, paragraph 2, the Committee notes that similar limitations can be found in article 8, paragraph 1(a), of the International Covenant on Economic, Social and Cultural Rights and in article 22, paragraph 2, of the International Covenant on Civil and Political Rights. It refers to the jurisprudence of the relevant treaty bodies for the purposes of interpreting what constitute permissible restrictions under article 26, paragraph 2, of the Convention.

2. Right to social security

67. With respect to social security, article 27, paragraph 1, of the Convention provides that all migrant workers and members of their families shall have the right to the same treatment granted to nationals of the State of employment, insofar as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. When a State party enacts legislation providing for the payment of a social benefit, whether conditional or not on the prior payment of contributions, and if the migrant worker concerned fulfils the requirements provided for in such legislation, it cannot arbitrarily exclude him or her from that benefit or limit his or her access to such benefit, as the prohibition of discrimination applies to the right to social security. Accordingly, any distinction based on nationality or migration status must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances, and be proportionate to the legitimate aim pursued.²⁸ While States parties enjoy a certain margin of discretion in assessing whether and to what extent differences in otherwise similar situations justify different treatment, they must explain how such different treatment, based exclusively on nationality or migration status, is compatible with articles 7 and 27.²⁹

68. Article 27, paragraph 1, provides that migrant workers' right to social security is subject to the applicable bilateral and multilateral treaties and that 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 the application of this benefit. As recommended in the ILO Multilateral Framework on Labour Migration, States parties should consider entering into bilateral, regional or multilateral agreements to provide social security coverage and benefits, as well as portability of social security entitlements, to migrant workers, including, as appropriate, to those in an irregular situation.³⁰ However, article 27, paragraph 1, cannot be interpreted as depriving migrant workers of benefits to which they would otherwise be entitled under the applicable legislation of the State of employment, merely because that State has not signed a reciprocity agreement with their State of origin.³¹

²⁷ Ibid, paras. 46-47.

²⁸ See note 19 above, *Koua Poirrez v. France*, Application No. 40892/98 (30 December 2003), para. 39.

²⁹ Ibid., *Gaygusuz v. Austria*, Application No. 17371/90 (16 September 1996), para. 42.

³⁰ ILO, "ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration", (Geneva, 2006), guideline 9.9.

³¹ See note 19 above, *Koua Poirrez v. France*, para. 39.

69. Article 27, paragraph 2, states that where the applicable legislation does not allow migrant workers and members of their families a benefit, the State party concerned shall examine the possibility of reimbursing them the amount of contributions made by them with respect to that benefit on the basis of equality of treatment with nationals. In this respect, States parties shall provide objective reasons in each case in which the reimbursement of the said contributions is deemed impossible. A decision not to reimburse contributions made by a migrant worker or family member must not discriminate on the basis of his or her nationality or migration status. Furthermore, the Committee considers that a migrant worker's entitlement to social security benefits should not be affected by a change in workplace.

70. The reference to "contributions" in article 27, paragraph 2, does not imply that "social security," under article 27, paragraph 1, refers only to contributory social security schemes. Such a narrow reading would be contrary to article 9 of the International Covenant on Economic, Social and Cultural Rights, which recognizes "social security" as "including social insurance." Recalling that article 9 of the Covenant applies to all migrant workers, regardless of their legal status and documentation, the Committee considers that "social security" in article 27 of the Convention also covers existing non-contributory social benefits, and that migrant workers in an irregular situation shall have access to such benefits on a non-discriminatory basis, to the extent that the applicable legislation of the State party concerned provides for such an entitlement.

71. The Committee considers that in cases of extreme poverty and vulnerability, States parties should provide emergency social assistance to migrant workers in an irregular situation and members of their families, including emergency services for persons with disabilities, for as long as they might require it. It recalls that even if many migrant workers in an irregular situation do not participate in contributory schemes, they contribute to financing social protection schemes and programmes by paying indirect taxes.³²

3. Right to urgent medical care

72. Article 28 of the Convention provides for migrant workers and members of their families to 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. Article 28, however, read together with other international human rights instruments, may create broader obligations for States parties to both instruments. Article 12 of the International Covenant on Economic, Social and Cultural Rights provides for the right to the highest attainable standard of health for all persons. States parties are therefore obliged to ensure that all persons, irrespective of their migration status, have effective access to at least a minimum level of health care on a non-discriminatory basis. The Committee on Economic, Social and Cultural Rights considers this to encompass primary health care, as well as preventive, curative and palliative health services. The Committee on the Rights of the Child holds that every migrant child is entitled to the same health care as nationals under article 24 of the Convention on the Rights of the Child. To that effect, States parties shall ensure, inter alia, that all migrant workers and members of their families have access to essential medicines and that migrant children are provided with immunization against the major infectious diseases. They shall ensure that migrant women have access to appropriate prenatal and postnatal health care, safe reproductive health services, and to emergency obstetric care.

³² See report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (E/2010/89), para. 46.

73. The Committee considers that access to urgent medical care must be ensured to all migrant workers on the basis of equality of treatment with nationals and thus on a non-discriminatory basis. Although medical care need not necessarily be free of charge, equality of treatment requires that the same rules for payment of fees or exemption from payment apply to migrant workers and members of their families as to nationals. States parties should prohibit the charging of excessive fees from migrant workers in an irregular situation or requiring immediate payment or proof of payment before the service is delivered. Urgent medical care should never be withheld due to the inability to pay. States parties should also ensure that migrant workers and members of their families are provided with information on the medical care provided and information about their health rights. States parties should also ensure that doctors and health professionals are provided with culturally sensitive training regarding health care for migrant workers and members of their families.

74. Article 28 prohibits the refusal of such medical care to migrant workers because of an irregularity with regard to their stay and employment. States parties should not use health care as an instrument of immigration control, which would effectively prevent migrant workers in an irregular situation from contacting public health care providers out of fear of deportation. Toward this end, States parties shall not require public health institutions to report or otherwise share data on the migration status of a patient to immigration authorities, and health care providers should also not be required to do so.³³ Moreover, States parties shall not conduct immigration enforcement operations on or near facilities providing medical care, as this would limit migrant workers and members of their families from accessing such care.

4. Right to education

75. Article 30 of the Convention protects the “basic right of access to education” of all children of migrant workers “on the basis of equality of treatment with nationals of the State concerned.” Article 30 also provides that access to public preschool educational institutions or schools shall be without prejudice to the migration status of the child concerned or parents of the child. The Committee, in accordance with article 13 of the International Covenant on Economic, Social and Cultural Rights, is of the view that States parties must provide free and compulsory primary education for all, including children of migrant workers, regardless of their migration status. As such, States parties have an obligation to eliminate all direct costs of schooling, such as school fees, as well as alleviate the adverse impact of indirect costs, such as expenses for school materials and uniforms. Access to secondary education by children of migrant workers must be ensured on the basis of equality of treatment with nationals. Accordingly, whenever children who are nationals have access to free secondary education, States parties must ensure equal access by children of migrant workers, irrespective of their migration status. Similarly, when States parties provide different forms of secondary education, including vocational education, they should also make them accessible to children of migrant workers. The same principle applies to free preschool education or to scholarship schemes. Therefore, whenever children who are nationals have access to free preschool education or scholarships, States parties must ensure equal access by children of migrant workers, irrespective of their migration status.

76. The Committee notes that migrant children may suffer from multiple forms of discrimination due to race, ethnicity, gender, and disability, for example. The principle of equality of treatment requires States parties to eliminate any discrimination against migrant

³³ See note 12 above, para. 43.

children in their educational systems. States parties must therefore avoid segregated schooling and the application of different standards of treatment to children of migrant workers as well as eliminate any forms of discrimination against children of migrant workers in classrooms. States parties also need to ensure that effective programmes, policies and mechanisms are in place to prevent discrimination against these children.

77. To ensure access to education, the Committee is also of the view that States parties shall not require schools to report or share data on the regular or irregular status of pupils or their parents to immigration authorities or conduct immigration enforcement operations on or near school premises, as this would limit access to education by children of migrant workers. States parties should also clearly inform school administrators, teachers and parents that they are not required to do so either and provide them with training on the educational rights of children of migrant workers.

78. While noting that the obligation of the State of employment to endeavour to facilitate the teaching of the mother tongue and culture is explicitly accorded to the children of migrant workers in a regular situation pursuant to article 45, paragraph 3, of the Convention, the Committee emphasizes that the right to respect for one's cultural identity (art. 31) belongs to all migrant workers and members of their families, including children. Considering these two provisions together, along with article 29, paragraph 1 (c), of the Convention on the Rights of the Child, which applies to all children, the Committee is of the view that States parties should also ensure access for children of migrant workers in an irregular situation to mother-tongue instruction if already available to children of migrant workers who are documented as having the same mother tongue.

79. Legal identity is often a prerequisite for access to a number of fundamental rights. Children of migrants in an irregular situation, particularly those born in a host State that does not recognize their existence, are vulnerable throughout their lives. States parties are obliged to ensure that children of migrant workers are registered soon after birth, irrespective of the migration status of their parents, and provided with birth certificates and other identity documents (art. 29). States parties shall not require migrant workers to present a residence permit in order to register a child, as this would effectively deprive migrant children in an irregular situation of their right to birth registration, which can also deny them access to education, health services, employment and other rights. Non-compliance by migrant workers with the obligation to register their children following birth should never justify their exclusion from education.
