Under the Optional Protocol to the International Covenant on Civil and Political Rights

Nell Toussaint
v.
CANADA

Communication No. 2348/2014

LEGAL OPINION

Submitted by:
The International Network for Economic, Social and
Cultural Rights (ESCR-Net)

International Network for Economic, Social & Cultural Rights
Red Internacional para los Derechos Económicos, Sociales y Culturales
Réseau international pour les droits économiques, sociaux et culturels
الشبكة العالمية للحقوق الاقتصادية و الاجتماعية و الثقافية

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INTRODUCTION

1. This legal opinion is presented in response to a request by the Author to provide an expert view on issues raised in Communication No. 2348/2014 that may be of assistance to the Human Rights Committee (Committee).

2. ESCR-Net is the largest global network of organizations, academics and advocates devoted to the realization of human rights, with a particular focus on economic and social rights. ESCR-Net is made up of over 270 organizational and individual members in 70 countries, working collectively to engage with UN treaty monitoring bodies as well as regional human rights mechanisms and processes, for the purpose of facilitating the enjoyment of human rights, *from a perspective of indivisibility*. Since 2006, ESCR-Net has held consultative status with the UN Economic and Social Council.[1]

3. The members of ESCR-Net's Strategic Litigation Working Group which led in the drafting of this opinion were:

   - The Center for Legal and Social Studies (CELS): CELS is a non-governmental organization that has been working since 1979 to promote and protect human rights, and to strengthen the democratic system in Argentina.

   - The Center for Economic and Social Rights (CESR): CESR was founded in 1993 and it seeks to "uphold the universal human rights of every human being to education, health, food, water, housing, work, and other economic, social and cultural rights essential to human dignity." It has supported work of civil society organizations before UN bodies with a focus on economic, social and cultural rights (ESCR), among a range of other projects.

   - The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR): GI-ESCR was founded in 2010 with the mission to "advance the realization of economic, social and cultural rights throughout the world, tackling the endemic problem of global poverty through a human rights lens". It has given support to litigation and directly litigated specific ESCR cases, including before the Committee.

   - The Social Rights Institute of South Africa (SERI): SERI was established in 2010 and, among other aims, it has sought "to develop socio-economic rights jurisprudence through strategic advocacy and litigation." It has led extensive litigation on the right to housing in South Africa, including on the matter of evictions.

   - SECTION27 is a South Africa-based public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights.

4. The joint views of these organizations will be referred to below under the heading of ESCR-Net.

[1] ESCR-Net received ECOSOC accreditation through and with the support of our fiscal sponsor, The Tides Center (a US-based organization that provides fiscal sponsorship to over 200 US-based organizations).

LEGAL OPINION

I. Rights in the ICCPR should not be interpreted narrowly in the service of a false distinction between civil and political rights and economic, social and cultural rights, with which they are interdependent and indivisible. In particular, in the present case the right to life, prohibition on inhuman and degrading treatment or punishment, and right to security of person must be fully protected with respect to access to necessary health care.

5. In its response on the merits dated April, 2, 2015 (Submission), the government of Canada states that Articles 6, 7 and 9(1) of the International Covenant on Civil and Political Rights (ICCPR or Covenant) protect against intentional infliction of harm, but do not impose positive obligations to provide health care. Canada argues on this basis that "the substance of the author's allegations is the right to health, a matter which is inadmissible *ratione materie*." (Govt. Submission, par. 41)

6. In ESCR-Net's view, the narrow characterization by Canada of Articles 6, 7 and 9(1) is incorrect. Instead, each case must be considered in line with international human rights principles and findings, namely that: human rights are interdependent and indivisible; the right to life should not be interpreted narrowly, and will often require States to adopt positive measures; and that situations involving access to necessary health care may engage various human rights under the ICCPR, rather than being solely under the purview of the right to health in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

7. This Committee, as well as the Committee on Economic, Social and Cultural Rights (CESCR), has recognized that obligations under the ICCPR frequently overlap with obligations under other human rights treaties, including the ICESCR. Civil, political, economic, social and cultural rights are indivisible and interdependent. While the Committee and CESCR have very distinct roles, defined by particular rights contained in the two Covenants, the rights in Articles 6, 7 and 9(1) should not be interpreted narrowly as imposing no obligations to provide health care, in order to sustain a formal division of roles between treaty bodies. The paramount consideration in interpreting the scope of the rights must be to ensure that all rights-holders enjoy the full and equal protection of the right, regardless of the types of obligations on States which may be required for the realization of the right.

8. The Committee has confirmed that ICCPR provisions have both negative components and positive components, in that States parties must adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations under the Covenant.[2] As observed by Professor Sarah Joseph, the Committee's evolving approach to the obligations with respect to Article 6 in relation to health extends such obligations "to the taking of such steps to maintain an adequate standard of health."[3] The Committee itself affirmed in its General Comment 6 that "[t]he expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."

[2] Human Rights Committee. General Comment 31, paras 5-7.
[3] Sarah Joseph, Jenny Schultz & Melissa Castan, "*The International Covenant on Civil and Political rights: cases, materials, and commentary*" (Oxford University Press: 2004) at 183.

9. Canada cites *Linder v. Finland* in support of the argument that there can be no positive obligation under Article 6 to ensure access to health care because there is no specific right to health under the Covenant (Govt. Submission, par. 41). The present case should be distinguished from *Linde*r, however, in that the Author has not alleged that her right to health was violated, but rather, that specific rights under the ICCPR have been violated in the context of her attempts to address her health issues. The Committee has recognized that although there is no specific 'right to health' provision within the Covenant, issues of access to health care may be raised under the right to life as well as other Covenant rights and there is no question regarding the State party's obligation to ensure that Covenant rights are enjoyed without discrimination.[4]

10. Indeed, the Committee has affirmed on multiple occasions that access to health care falls under several Covenant rights and that such access must be respected and ensured without discrimination, including on the grounds of immigration status. For instance, in its recent Concluding Observations on Canada, the Committee called on Canada to "ensure that all refugee claimants and irregular migrants have access to essential health care services irrespective of their status."[5] Similarly, in its 2014 Concluding Observations on the United States, the Committee called on the U.S. to "…identify ways to facilitate access to adequate health care, including reproductive health-care services, by undocumented immigrants…"[6] It has clarified that Article 6 requires that States adopt positive measures to address homelessness in circumstances where homelessness leads to serious health consequences and may even cause death.[7] It has recognized that measures which restrict "access to all basic and life-saving services such as food, health, electricity, water and sanitation" are contrary to Article 6.[8] It has expressed concern that Article 6 may be violated by a "lack of measures to deal with food and nutrition situation and lack of measures to address, in cooperation with the international community, causes and consequences of drought and other natural disasters"[9] The Committee has found that disconnections of or otherwise denying access to water supply and destruction of sanitation infrastructure can give rise to a violation of the right to life,[10] and has used interim measures to ensure reconnection of water supplies that had been disconnected.[11] Similarly it has stated that the failure to take steps to prevent the spread of diseases such as tuberculosis may violate Article 6.[12] The Committee has repeatedly emphasized that Article 6 requires states to ensure that all women, in all regions of a country, have access to reproductive health services.[13]

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[4] Human Rights Committee. *Cabal and Pasini v. Australia* (7 August 2003) UN Doc CCPR/C/78/D/1020/2002), at para. 7.7. See also Human Rights Committee. Concluding Observations: Zimbabwe CCPR/C/79/Add.89 (1998), at para 7 and Comments of the Human Rights Committee: Nepal CCPR/C/79/Add. 42 (1995), at para 8.

[5] Human Rights Committee. Concluding Observations: Canada, CCPR/C/CAN/CO/6 (July 2015), at para. 12.

[6] Human Rights Committee, Concluding Observations: United States, CCPR/C/USA/CO/4 (24 April 2014), at para. 15.

[7] Human Rights Committee. Concluding Observations: Canada. 07/04/1999.CCPR/C/79/Add.105, (1999), at para 12.

[8] Human Rights Committee. Concluding Observations: Israel. CCPR/C/ISR/CO/4 (2014), at para. 12.

[9] Human Rights Committee. Concluding Observations: Democratic People's Republic of Korea. CCPR/CO/72/PRK (2001), at para. 12.

[10] Human Rights Committee. Concluding Observations: Israel. CCPR/C/ISR/CO/3 (2010); Human Rights Committee. Concluding Observations: Israel. CCPR/C/ISR/CO/4 (2014).

[11] *See*, Human Rights Committee. *Liliana Assenova Naidenova et al. v. Bulgaria*, Comm No. 2073/2011 (2011).

[12] Human Rights Committee. Concluding Observations: Republic of Moldova. CCPR/CO/75/MDA (2002).

[13] Human Rights Committee. Observaciones finales sobre el tercer informe periódico de Paraguay aprobadas por el Comité en su 107º período de sesiones CCPR/C/PRY/CO/3 (2013), at para 13; Concluding observations of the Human Rights Committee: Mali. CCPR/CO/77/MLI (2003), at para 14; Concluding Observations of the Human Rights Committee: Israel. CCPR/CO/75/GMB (2004), at para 17; CCPR/CO/83/KEN (2005), at para 14; Concluding observations by the Human Rights Committee: Peru. CCPR/C/70/PER (2000) at para 20; Concluding observations of the Human Rights Committee: Tanzania. CCPR/C/79/Add.97 (1998) at para 15; Concluding

11. Other systems of human rights protection have decided in a similar way that States have positive obligations to ensure access to health care in order to protect various human rights, including the right to life. The European Court of Human Rights (ECtHR) regularly considers health-related situations by reference to Articles 2 (right to life), 3 (prohibition on torture and inhuman or degrading treatment), and 8 (right to respect for private and family life, home and correspondence) in particular. Article 2 of the European Convention on Human Rights requires that everyone's right to life be protected by law and that "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." In its interpretation of Article 2, the ECtHR has held that "the first sentence of Article 2 […] requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (citations omitted). Those principles apply in the public-health sphere too."[14]

12. Similarly, the Inter-American Court of Human Rights has interpreted Article 4 of the American Convention on Human Rights, the right of everyone to have his life respected, protected by law and not to be arbitrarily deprived of his life, as including "not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence".[15]

13. In the present case, the domestic courts found that the refusal of benefits under an existing program on the basis of her immigration status put the Author's life at risk and caused potentially irreparable harm to her long term health. Therefore, the issue is not as described by the State party in paragraphs 56 to 62 of its Submission, namely that Canada failed to provide a certain optimal level of health care, but rather the issue is whether the State party, in denying the Author any access at all to a health care program on the basis of her immigration status, violated relevant provisions of the ICCPR.

II. Covenant Obligations extend to all levels of government and the State party must ensure that where the federal government has assumed responsibility for providing necessary health care to migrants who are ineligible for provincial health care, the federal program complies with the Covenant

14. In its Submission, the government of Canada stated "that responsibility for medical care in Canada is primarily borne by the provinces and territories" and described its role in funding particular categories of foreign nationals who are ineligible for provincial health care programs as being on an "*ex gratia*" basis. (Govt. Submission, par. 13).

15. The Canadian government acknowledged that "this nuance is not relevant for the purposes of its obligations under the *Covenant*" (Govt. Submission, par. 13) but argues that the Author has failed

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observations of the Human Rights Committee: Chile CCPR/C/79/Add.104 (1999), at para. 15; Concluding observations of the Human Rights Committee: Venezuela CCPR/CO/71/VEN (2001), at para. 19; Concluding observations of the Human Rights Committee: Poland CCPR/CO/82/POL (2004), at para. 8; Concluding observations of the Human Rights Committee: Guatemala CCPR/CO/72/GTM (2001), at para. 19; Concluding observations of the Human Rights Committee: Nicaragua CCPR/C/NIC/CO/3 (2008), at para. 13; Concluding observations of the Human Rights Committee: Colombia CCPR/CO/80/COL (2004), at para. 13.

[14] European Court of Human Rights. *Vo v. France,* App. No. 53924/00 (08/07/2004), at para. 88 and 89. See also European Court of Human Rights. *Gorgiev v Former Yugoslav Republic of Macedonia*. App. No. 49382/06 (2012), at para. 43.

[15] Inter-American Court of Human Rights. *Case of the Street Children (Villagrán-Morales et al.) v. Guatemala*. Ct. H.R. (ser. C) No. 63 (1999), at para. 144.

to exhaust domestic remedies if she has not challenged her exclusion from the provincial health care plan.

16. ESCR-Net's position is that the exhaustion of domestic remedies should be assessed in the context of the roles different levels of government have assumed, regardless whether these are constitutionally required or "*ex gratia*". States parties have an obligation to ensure that the ICCPR is implemented within the context of different and shared responsibilities of all levels and branches of government, with the national level government carrying particular obligations to ensure that no rights or groups "fall through the cracks" of internal jurisdictional divisions. The ICCPR contains this principle in its Article 50, which states that "[t]he provisions of the present Covenant shall extend to all parts of the federal States without any limitations or exceptions." The Committee reaffirmed this principle in its General Comment No. 31, stating that "[a]ll branches of government (executive, legislative and judicial), and other public or government authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party."

17. In the case of the Covenant obligation to ensure access to health care necessary for life and personal security of foreign nationals, the federal government has chosen to provide health care through a federal program, the Interim Federal Health Program (IFHP). Whether this program is "*ex gratia*" from the standpoint of domestic constitutional division of powers is irrelevant with respect to the requirement of exhaustion of domestic remedies. The State party is obliged under the Covenant to ensure that some level of government provides health care necessary for life and personal security for migrants. In this case, the federal government has assumed that responsibility but denied access to the program to certain categories of migrants. There is no dispute that the federal government has the competence to provide health care to irregular migrants and could extend the IFHP to include irregular migrants if it chose to do so.

18. The Committee has confirmed the purpose of the domestic remedy exhaustion requirement is to "…direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable State parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seized of the matter."[16] In ESCR-Net's view, where the Author has sought effective remedies to her exclusion from the program that exists to provide necessary health care to foreign nationals who are ineligible for provincial health insurance and has placed the alleged violation of Covenant rights in substance before domestic courts, she is not required to bring the same challenge against other levels of government who may also have domestic constitutional authority to provide health care to migrants. Such a requirement would severely limit access to remedies under the Optional Protocol for victims of violations in federal states where remedies may be available through different levels of government.

[16] Human Rights Committee. *T.K. v. France.* Communication No. 220/1987 (admissibility), at para. 8.3.

III. The Author is not, in the abstract, bringing an *actio popularis*, rather, she is an individual harmed by the State's denial of access to necessary health care for irregular migrants. In addition to victim-specific remedies for individualized physical, psychological and moral damages caused by the State party, effective remedies under Article 2(3) in this case require changes in the State Party's laws or practices to avoid recurrence of the type of violation in question.

19. The government of Canada alleged that the Author's communication should be found to be inadmissible as an *actio popularis* (Govt. Submission, par. 16). It also added that "if the Author's personal rights were in any way violated […], she would at most be entitled to a personal remedy. By seeking a remedy that would impose positive obligations on Canada to provide, on a forward-looking basis, a certain level of health care funding to an undefined class of unknown individuals termed "undocumented migrants", the Author's communication passes from the personal to the abstract." (Govt. Submission, par. 17). The State party relies on the Committee's view that "no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant."

20. However, in the present case the Author herself has personally suffered harm on account of the act at issue, namely the State party denying irregular migrants access to necessary health care. Consequently, she has standing to bring this case in line with Article 1 of the Optional Protocol to the ICCPR, as interpreted by the Committee to affirm that "[a] person can only claim to be a victim…if he or she is actually affected."[17]

21. In considering appropriate remedies for ICCPR violations, such remedies should be consistent with the key purpose of the Optional Protocol, namely, "to achieve the purposes of the International Covenant on Civil and Political Rights." In its General Comment No. 31, the Committee noted that States parties are required by Article 2(3) of the ICCPR to make reparation to individuals whose Covenant rights have been violated, which the Committee considers "…generally entails appropriate compensation" and that "…where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices…"[18]

22. Further to findings regarding individual measures, the Committee has confirmed that "…the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices."[19] This approach is even more important in the context of Articles 6 and 7,[20] and is consistent with the practice of other UN treaty monitoring bodies and regional courts.[21]

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[17] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Communication No. 35/1978, CCPR/C/OP/1 (1984), at para. 9.2.

[18] Human Rights Committee. General Comment 31, at para 16.

[19] Ibid, at para 17.

[20] See also, on this regard, the recent views of CEDAW on Communication No. 48/2013, CEDAW/C/60/D/48/2013 (April 2015).

[21] See, for example, Council of Europe. *Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels*, Declaration of the Committee of Ministers, 12 May 2004, regarding general measures at national level in order to address structural or general deficiencies in national law or practice; European Court of Human Rights. *Broniowski v. Poland*, App. No. 31443/96 (22.6.04).

23. Indeed, the denial of access to necessary health care to the Author because she is an undocumented migrant can be described as a systemic violation that has caused individual harm, requiring a systemic remedy, namely ending the policy and practice of denying access to health care to members of this group in order to avoid new, similar violations in the future.

IV. The provision of emergency health care alone does not constitute a sufficient protection of the right to life

24. The Canadian government alleges that "in the province of Ontario where the Author lives, hospitals are prohibited by law from denying emergency medical treatment to anyone, when to do so would endanger their life. Therefore, emergency treatment is provided to everyone, regardless of their immigration status." (Govt. Submission, par. 53) It argues that this is adequate for the protection of the right to life. (Govt. Submission, par. 56) In determining the scope of the State party's positive obligations with respect to the right to life, however, ESCR-Net submits, in line with international and comparative law, that the Committee should consider not simply whether State parties provide for access to emergency care in life-threatening situations, but rather, whether there has been access to health care sufficient to protect life and long term health, and comply with other obligations under the ICCPR.

25. The ECtHR has held that the right to life imposes positive obligations on governments to take measures within the scope of their powers to avoid risks to life.[22] It has also held that States may violate the right to life if they "put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally".[23] The ECtHR has also found that failure to provide access to health care on the basis that a person's health needs do not constitute an emergency may constitute a violation of the prohibition on torture, inhuman or degrading treatment. In this regard, in order to prevent a serious deterioration of health over time constituting inhuman or degrading treatment, the Court has noted the need for: a regular and systematic supervision of health status; the maintenance of a comprehensive record of health conditions and of treatment prescribed and followed; a comprehensive therapeutic strategy to cure diseases or prevent their aggravation; and proper medical supervision.[24] Although such issues were considered in the context of detainees, it is submitted that an irregular migrant denied access to necessary health care by way of government (in)action – in combination with the particular vulnerability of a person in such circumstances – may also be subject over time to a situation which constitutes inhuman or degrading treatment.

26. The particular risks that migrants face to their right to life which stem from lack of access to health care – beyond just emergency care – are well documented. In its 2010 report, the World Health Organization (WHO) noted that "irrespective of the kind of migration, migrants are generally in a relatively vulnerable position in their new environments".[25] It goes on to state that "those who are most vulnerable are becoming even more vulnerable, not only in terms of access to health care services, but also with regard to other determinants of health, including the degree

[22] European Court of Human Rights. *Gorgiev v. Former Yugoslav Republic of Macedonia*, App. No. 49382/06 (2012), at para. 43.
[23] European Court of Human Rights. *Cyprus v. Turkey* [GC], App. No. 25781/94 (2001), at para. 219.
[24] European Court of Human Rights. *Iacov Stanciu v. Romania*, App. No. 35972/05 (2012); *Poghosyan v. Georgia*, App. No. 9870/07 (2009).
[25] World Health Organization. *Health systems financing: the path to universal coverage* (2010), at p.102.

of social exclusion, education, housing and general living conditions, quality of diet, vulnerability to violence".[26]

27. In terms of access to health care services, a study by the European Union Fundamental Rights Agency (FRA) notes that chronic diseases, in particular, are not adequately treated through the provision of emergency care due to "the impact they have on the individuals affected and the high costs of treatment".[27] FRA concluded that migrants in an irregular situation "should, at a minimum, be entitled by law to access necessary healthcare" and that "such healthcare provisions should not be limited to emergency care only, but should also include other forms of essential healthcare, such as the possibility to see a doctor or to receive necessary medicines". It went on to argue that qualifying conditions, such as the need to prove a fixed residence or prolonged stay over a certain period of time, should be reviewed in order to ensure that these do not lead to the exclusion of persons in need of necessary medical care. The UN Special Rapporteur on the Right to Health has similarly found that "in many States, discriminatory laws largely undermine health care for migrant workers, especially irregular migrant workers" and has argued that the "denial of access to health care until an emergency situation arises is incongruent with the right to health and counter-intuitive, as it imposes longer-term health and financial costs for individual migrant workers and society."[28]

V. Immigration status is a prohibited ground of discrimination

28. The Canadian government stated that "the discrimination alleged by the Author does not fall within the scope of Article 26 of the *Covenant*, as it is not based on a prohibited ground" (Govt. Submission, par. 77). In light of relevant international and comparative law, this is incorrect.

29. Immigration status has been widely recognized as a prohibited ground of discrimination. In its General Comment 20, the CESCR confirmed that "[t]he ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation" (par. 30).

30. A number of countries have adapted their domestic laws in order to comply with international human rights standards. The following examples are helpful in showing how States parties to the ICCPR can and should guarantee access to necessary health care without discrimination on the grounds of immigration status.

31. Argentina has ratified the ICCPR and it has recognized it at the same level as its National Constitution. Following international standards,[29] the new Argentinean Law on Migration n° 25.871, approved in 2003 and regulated in 2010, has established that there should be no distinctions between nationals and foreigners in regard to human rights protection. The law

[27] European Union Agency for Fundamental Rights. *Migrants in an irregular situation: access to healthcare in 10 European Union Member States* (2011), at p. 9 and 32.
[28] Human Rights Committee. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover. A/HRC/23/41(2013), at para. 40.
[29] Article 12 of Law 25.871/2003 states that "the State should apply all the norms established by international conventions that establish rights and obligations regarding migrants and that have been ratified."

explicitly forbids distinctions based on migratory status. Article 8 of the law applies this principle to access to health: "Foreigners' access to the rights to health, social assistance and health care cannot be denied or restricted under any circumstances, regardless of their immigration status. Health authorities shall provide guidance regarding the procedures aimed at remedying irregular immigration status".[30] The law requires access to all aspects of necessary health care, not only emergency care.

32. In Uruguay, issues of migration are regulated mainly by the Constitution and the Special Law N° 18.250 (Immigration Law), adopted in 2008. Article 7 of the National Constitution guarantees to all inhabitants the right to be protected in their enjoyment of life, honour, liberty, security, labour and property. Law 18.250 further clarifies this principle, by granting to "all immigrants and their families, in spite of their immigration status, the rights to migrate, to family reunification, to due process, and equality in rights with Uruguayan citizens, without discrimination on the grounds of sex, race, color, language, religion or belief, political opinion, national origin, ethnic, social, nationality, age, economic position, property, marital status, birth or any other condition."[31]

33. Bolivia adopted a new Migration Law N° 370 in May 2013. It is based on the principles of wellbeing, gender equality, reciprocity, transparence, sovereignty and non-discrimination. Its Article 2.2. establishes that "the State guarantees Bolivians and foreigners the enjoyment and access to all of the rights established by the National Constitution, without distinction, exclusion or preference based on gender, color, age, origin, culture, nationality, language, religion, marital status, economical, social or political condition, level of education, disability or other condition aiming to undermine the validity of their human rights and fundamental freedoms recognized by the National Constitution".[32]

34. Finally, the Constitution of the Republic of South Africa (1996) establishes in its section 27 that "everyone has the right to have access to health care services, including reproductive health care […] and the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights." The constitutional right of everyone to access to health care services means that migrants, documented or otherwise, cannot unreasonably be excluded from access to health care services. Migrants' access to health care services is further protected through the equality clause in section 9(2) of the Constitution, which provides that "equality includes the full and equal enjoyment of all rights and freedoms."

[30] In its original wording in Spanish, Article 8 of Law 25.871 establishes that: "No podrá negársele o restringírsele en ningún caso, el acceso al derecho a la salud, la asistencia social o atención sanitaria a todos los extranjeros que lo requieran, cualquiera sea su situación migratoria. Las autoridades de los establecimientos sanitarios deberán brindar orientación y respecto de los trámites correspondientes a los efectos de subsanar la irregularidad migratoria."

[31] The original wording of article 1 of Law 18.250, in Spanish, establishes that: "El Estado uruguayo reconoce como derecho inalienable de las personas migrantes y sus familiares sin perjuicio de su situación migratoria, el derecho a la migración, el derecho a la reunificación familiar, al debido proceso y acceso a la justicia, así como a la igualdad de derechos con los nacionales, sin distinción alguna por motivos de sexo, raza, color, idioma, religión o convicción, opinión política o de otra índole, origen nacional, étnico o social, nacionalidad, edad, situación económica, patrimonio, estado civil, nacimiento o cualquier otra condición."

[32] In its original wording Spanish, Article 2.2 of Law 370/2013 establishes that: "El Estado garantiza a las bolivianas y los bolivianos, extranjeras y extranjeros, el goce y ejercicio de todos los derechos establecidos por la Constitución Política del Estado, sin distinción, exclusión o preferencia fundada en el sexo, color, edad, origen, cultura, nacionalidad, idioma, credo religioso, estado civil, condición económica, social, política, grado de instrucción, discapacidad u otras orientadas a menoscabar la vigencia de sus derechos humanos y libertades fundamentales reconocidos por la Constitución Política del Estado."

VI. Denying irregular migrants access to health care necessary for life is not reasonable

35. The Canadian Government stated in its Submission (Executive Summary) that "there is nothing unreasonable or arbitrary in expecting that undocumented migrants such as the author come forward and regularize their immigration status before claiming the benefits of lawful residence."

36. In ESCR-Net's view, such a policy does not meet any standard of reasonableness under international human rights law – including the standard applied to the obligations of states to progressively realize the right to health according to the maximum of available resources. That reasonableness standard is referenced in recent optional protocols to the ICESCR and the Convention on the Rights of the Child, which state that "the Committee shall consider the reasonableness of the steps taken by the State Party" in accordance with Covenant rights, and that "the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant."

37. The reasonableness standard adopted in these treaties relied significantly on the reasonableness standard developed in South African jurisprudence. The South African Constitutional Court established that, to be reasonable, a public policy or programme should not exclude "a significant segment of society"[33] The Constitutional Court has established that "[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."[34] The Constitutional Court has also stated that to be reasonable, a policy should make "appropriate provision for short, medium and long term needs" and it should be "evaluated in its social, economic and historical context."[35] To be reasonable, a policy must be a coordinated policy and, in the context of South Africa's federal system "must be a comprehensive one determined by all three spheres of government in consultation with each other."[36] "Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations."[37]

38. Prior to the adoption of the Optional Protocol to the ICESCR, the CESCR adopted a statement to clarify how it would interpret the obligation in "article 2(1) "to take steps … to the maximum of its available resources" to achieve progressively the full realization of the rights recognized in the Covenant." The CESCR referred to a standard of reasonableness and reiterated a number of the factors applied by the Constitutional Court of South Africa. In particular, it emphasized that States parties have an immediate obligation to "guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind" (art. 2.2)" and identified as key factors in assessing reasonableness "whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner" and "whether the steps had taken into account the

[33] South African Constitutional Court. *The Government of the Republic of South Africa and others v. Grootboom and others.* Case CCT 11/00, at para. 43.
[34] Ibid, para. 44.
[35] Ibid, para. 43.
[36] Ibid, para. 40.
[37] Ibid, para. 40.

precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk."[38]

39. Excluding migrants in an irregular situation from necessary health care endangers their lives and wellbeing, increases the cost of future emergency treatment and can also potentially pose a health risk to the wider community. As Medicos del Mundo (MdM) explains: providing early and preventive care through primary care is a means of avoiding costly hospital treatment at a later date.[39] Failing to prevent or detect a condition only means it continues to get worse: the patient suffers; they become less able to work, study, and care for their family; their condition becomes more difficult and more expensive to treat; if they have an infectious disease, it can spread to others. Significantly, the availability of health and medical services drives neither migrants' decisions to enter a particular country, nor their decision to leave it, as affirmed in a recent Swedish government inquiry.[40] MdM has similarly stressed that "the preconceived notion of major immigration flows linked to people seeking healthcare does not correspond to what we have observed in the population surveyed".[41] Data collected over a two year period by Project:London, a free clinic operated by MdM in east London "mirrors numerous other studies" that rebut the myth of the "health tourist".[42] Further, laws linking immigration control and health systems perpetuate discrimination and stigma rather than promote social inclusion.[43]

40. ESCR-Net's opinion is therefore that the exclusion of irregular migrants from access to health care necessary for life and bodily integrity is grossly disproportionate to any aim of encouraging migrants to regularize their immigration status or otherwise encouraging compliance with immigration laws. As such, it is not within any range of reasonable options available to states to design and administer health care programs in compliance with international human rights – particularly in so affluent a country as Canada.

[38] Committee on Economic, Social and Cultural Rights. *An evaluation of the obligation to take steps to the "Maximum of available resources" under an optional protocol to the Covenant* (Thirty-eighth session, 2007) U.N. Doc. E/C.12/2007/1, at paras. 7-8.
[39] Medicos del Mundo. *Access to Healthcare in Europe in Times of Crisis and Rising Xenophobia: An overview of the situation of people excluded from healthcare systems* (2013), at p.41.
[40] European Union Agency for Fundamental Rights. *Migrants in an irregular situation: access to healthcare in 10 European Union Member States* (2011), at p. 7.
[41] Medicos del Mundo. *Access to Healthcare in Europe in Times of Crisis and Rising Xenophobia: An overview of the situation of people excluded from healthcare systems* (2013), at p.23.
[42] Medicos del Mundo. *Project:London: Improving Access to Healthcare for the Community 's Most Vulnerable—Report and recommendations* (2007), at p.11-12
[43] U.N.G.A., *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (15 May 2013), U.N. Doc. A/HRC/23/41, at para 5.

Conclusion and Recommendations

41. On the basis of the Committee's own interpretation of the ICCPR, and relevant international and comparative law, ESCR-Net respectfully submits that the Committee ought to consider the present case with reference to the following:

42. Consideration of cases that involve situations of access to health care is not dependent on an explicit right to health, but should be undertaken with reference to all relevant human rights engaged. In this regard, relevant human rights must be understood as interdependent and indivisible, involving the adoption of negative and positive measures as necessary. In particular, the right to life, the prohibition on inhuman and degrading treatment or punishment, the right to security of person, and the right to non-discrimination must be fully protected with respect to situations involving access to necessary health care, especially in regard to the most vulnerable groups in society. Undocumented migrants fall in the latter category.

43. Covenant obligations extend to all levels of government and the State party must ensure that where the federal government has assumed responsibility for providing necessary health care to migrants who are ineligible for provincial health care, the federal program complies with the Covenant. Exhaustion of domestic remedies should not be evaluated in a restrictive sense so as to negate the purpose of the ICCPR and, in the present case, a genuine and comprehensive exhaustion of domestic remedies available to challenge the federal government's position ought to satisfy this requirement.

44. As is the stated position and practice of the Committee, as well as other international and regional human rights decision-making bodies, appropriate remedies for violations of human rights should include, where relevant, not only individual reparation but also guarantees of non-repetition, including changes in laws and practices, to prevent new, similar violations from occurring.

45. Immigration status should be clearly recognized as a prohibited ground of discrimination, following the interpretation of CESCR and with reference to international and comparative law.

46. State policy or practice that imposes regularization of immigration status as a requirement for the protection of the right to life does not meet any standard of reasonableness under international human rights law. On the basis of this standard (as referenced in recent Optional Protocols to the ICESCR and the Convention on the Rights of the Child respectively), and persuasive evidence concerning approaches to the health care of migrants, ESCR-Net submits that State parties ought to consider and apply policies and practices that represent a proportionate response to any legitimate aims that might exist with respect to compliance with immigration laws.

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