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I. Introduction

The present report is submitted pursuant to the request from the Office of the United Nations High Commissioner on Human Rights (OHCHR) regarding the forthcoming joint general comment by the Committee on the Rights of the Child and Committee on Migrant Workers. IOM welcomes this important initiative and hopes that it will provide needed clarification and guidance to States in their dealings with migrant children and their families. In preparation for this submission, the international migration law unit at IOM has requested colleagues in IOM field and regional offices to highlight which areas they would like to see more guidance on from the Committees. The suggested themes are thus based on issues in practice regarding children's rights that IOM observes around the world.

II. General considerations

As the ICRMW explicitly excludes refugees and stateless persons it would be necessary to clarify whether or not this joint general comment will apply to refugee and stateless children as CRC does not exclude these two categories. IOM would welcome an inclusion of these two categories within the scope of the joint general comment as these children are generally at risk of having their rights violated and the situation and protection of stateless children have unfortunately not received sufficient attention in the international community.

Another issue concerns the term "dependent" children from ICRWM. What exactly constitutes a dependent child, and would any children under the age of 18 be considered as an independent child? In that case what is the applicability of the ICRMW for these children?

III. Suggested themes

Age assessment

CRC's General Comment No 6 on the "Treatment of unaccompanied and separated children outside their country of origin" (GC No 6) is quite elaborative on this issue in relation to



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unaccompanied minors. Nevertheless, it would be useful to receive further clarification regarding children who are not unaccompanied or separated and whether or not the same standards apply when a child is accompanied by their family. What measures should states refrain from when assessing the child's age? How much weight should be given to the testimony of other family members?

The lack of information related to the process of conducting an age assessment for accompanied children has been noted in the case of *A. N. & ors v. Minister for Justice and Anor (Ireland)*.¹ There, a Nigerian woman applied for asylum in Ireland with her two children and confirmation of the minor's age was provided by the mother. The Court recognized that the ECHR Handbook, as well as the UNHCR Handbook, did not contain guidance on age assessments of accompanied children. The Court thus extrapolated how to provide for accompanied minors, by referencing the legal points for age assessments of unaccompanied minors and applied them to accompanied children. In the light of this it would be useful to receive input from the Committees regarding age assessments of accompanied minors.

Initial assessment at a border

GC 6 states that "allowing the child access to the territory is a prerequisite to this initial assessment process." Regarding this point, it would be helpful to receive clarification if this only applies to unaccompanied and separated children or if the same prerequisite applies to children accompanied with their families or other relatives. If it applies equally to all children, unaccompanied or accompanied, would this impose any obligations on States to allow families with children to enter the territory in order to make an initial assessment or would States enjoy a wider margin of discretion when the child is with his or her family?

Children who have not crossed a border (art. 29 CMW; arts. 7, 8 CRC)

As GC 6 only applies "to children who have crossed an international border" it would be important to clarify what standards apply to children who are born in the country of destination but have not yet acquired the nationality of that country. For some countries this will not be an issue, as nationality is granted *jus soli*, but, as several countries grant their nationality based on *jus sanguinis*, there are many children who are not nationals of the country in which they were born and raised but also have no connections to the countries of their parents. Would these children be granted a more extensive set of rights than those who were born outside of this country? Which State has the main responsibility for these children? How would returns be dealt with, in particular if the child has been abandoned or separated from its parents?

¹ *A. N. & others v. Minister for Justice & another*, [2007] IESC 44, Ireland: Supreme Court, 18 October 2007.



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Another issue on which further clarification would be appreciated is where children have received the nationality of the country of destination but the parents have not. In the case of *AN. O. and Others v. Minister for Justice, Equality and Law Reform*,² the Irish High Court addressed this issue when parent non-citizens and their Irish-born citizen children applied to quash a motion for deportation. The Court noted that ‘leave to remain on humanitarian grounds’ may be granted to non-citizen parents when their children are citizens of the given country, intending to preserve family unity. Nevertheless we have also seen cases where children have been returned together with their parents to countries with which they have no ties and other cases where parents have been returned without their children. How would these issues be dealt with in light of the best interests of the child as well as Art. 9 of the CRC?

Legal representation (arts. 16, 17, 18 CMW; art. 12, 40 CRC)

The issues surrounding access to legal representation are evident in countries of origin, transit, and destination. The challenges with legal representation in the country of origin appear when children are left with their relatives who may or may not have formal guardianship responsibilities. For children during transit and in the country of destination, legal representation will be essential to access their right to justice. It would be good to clarify all States’ obligations regarding legal representation, when it has to be provided, and when it has to be free. Are the standards different based on if the child is unaccompanied or not? For example, the Council of Europe states in their paper on *Access to justice for migrants and asylum-seekers in Europe*³ that “There appear to be a number of good practices within member states which, subject to the need to clarify how they actually operate and their suitability for transplantation, could usefully be copied to ensure better access for justice. They include:

.....

- the provision of legal aid to children whatever their status;
- the provision of guardians for all unaccompanied children who are migrants;
- arrangements to ensure child-friendly justice at all stages.....”

Right to work (art 11 CMW; art. 32, 34, 35, 36 CRC)

On the subject of migrant children and employment, it would be beneficial to address this topic from two various aspects:

² AN. O. and Others v. Minister for Justice, Equality and Law Reform, [2009] IEHC 448, Ireland: High Court, 19 October 2009.

³ This document is available at https://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/CPEJ_McBride.pdf



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1. Protection from forced labour, dangerous work, trafficking and exploitation, and;
2. Access to employment and rights at work.

Regarding the first category, it would be useful to examine the obligations of all States (origin, transit, and destination) to protect children against forced labour, dangerous work, trafficking and exploitation, etc. Many migrant children will end up being exploited throughout their journey, often when they are trying to reach the country of destination or once they have arrived there. This can often be the situation for unaccompanied children but also for children who are accompanied by their families. They are often entrusted to provide for the rest of the family and have to seek out dangerous exploitative work in the informal sector. The risk of forced labour or trafficking can also be a reason why many children leave the country of origin in the first place.

Concerning the second aspect of this right, it is often the case that many migrant children are not formally employed but still work in order to survive. This is often the case for refugees as well as irregular migrant children. They are allowed to attend school and receive tertiary education but, in general, are not allowed to work. Because they are often hired informally, there are incidents of child labour. In many cases when parents travel with children for work, children also remain with their parents at their work place. This is particularly relevant to agricultural seasonal workers. Children informally help their parents, often working similar working hours and doing the same type of job. The living conditions are quite poor. Children have to share premises with other workers. Often the remoteness of work does not allow children to attend school or have access to regular medical care.

Right to life (art. 9 CMW; art 6 CRC)

The correlation between the child's right to life and trafficking in persons was already made in GC No 6. Due to the migration patterns the last few years, it would be important to clarify States' obligations regarding migrant children's right to life during transit. What are the specific obligations concerning rescue in transit or at the border. To what extent can we apply State obligations to protect children and families from having to place their lives in the hands of smugglers in order to reach safety, even if this means dying along the way?

Both trafficking and smuggling are widespread at the main transitory routes and there is evidence of young children vanishing while migrating for work. As regards to refugee children, traffickers and smugglers are often operating within the camps. Many children are kidnapped, tortured, and raped. Only when their families have paid ransom, their journey continues, often to be kidnapped again during transit. It is important to highlight the State obligations regarding children with or without families in camps as their displacement makes them more vulnerable and in need of more attention to protect them.



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Right to Health (arts. 28, 45 CMW; art. 24 CRC)

Concerning the right to health, it would be beneficial if the General Comment could clarify State obligations to grant access to primary health care for children. The ICRMW refers to urgent medical care for irregular migrants and Article 24 of the CRC is quite extensive, but it would be important to clarify if irregular migrant children enjoy more than urgent medical care and to what extent this service has to be free for children.

It would thus be recommended to mention that children need to receive access to preventive (e.g. vaccination) and curative health services throughout their journey. As needed, children should have access to specialized health services adequate for their age. Continuity of care should be provided upon arrival in the community of destination, regardless of their own or their parents' legal status. Mental health and psychosocial support (MHPSS) should also be provided, particularly at transit and destination countries, to assist children in coping with and adapting to the changes in their life. Special attention to formal guardianship matters are required in cases where a child is unaccompanied and the parent's consent to medical interventions cannot be provided.

Adequate housing (art. 45 CMW; art 27 CRC)

GC 6 provides extensive guidance surrounding care and accommodation arrangements for UMC but it would be important to clarify what measures States have to take in relation to families with children. Do States have an obligation to provide adequate housing for families with children? Does this apply to irregular migrants? Art. 27(3) of the CRC states that "State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." It would be beneficial to receive guidance as to how this obligation applies to migrant families and what the requirements surrounding appropriate housing are.

Furthermore, it would be important to clarify what measures a State has to take where a migrant family with children is homeless in order to respect the best interest of the child as well as art. 9 of the CRC. Would it in certain cases be justifiable by the State to separate the child from the family in order to provide adequate housing, for example with a foster family?

Integration (art. 45 CMW)

More guidance is needed regarding UMC but also for children with families. What measures should be taken by States in order to facilitate integration of children and their families in the



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country of origin? Are there any obligations of States to do so? Should States actively pursue integration of children into the society even if this is not the wish of the parents?

Non-criminalization of children

This particular point has been elaborated on in the CMW General Comment No 2 on the rights of migrant workers in an irregular situation and members of their families, nevertheless it would be important to restate that in the context of trafficking in children when the exploitation is forced criminal activity (such as transporting drugs) and the child should be recognized as a VoT and not treated as a criminal.

Non-detention of children and alternatives to detention (arts. 16, 17 CMW; art. 37 CRC)

CMW General Comment No 2 is clearly stating that detention of families should be avoided and States should seek alternatives where possible. It would be beneficial if the joint general comment could provide guidance as to what these alternatives could be but also highlight the fact that it is alternatives to, and not of, detention as many migrant families with children around the world are housed in apartments or shelters, which they are not allowed to leave. Thus a restriction of their liberty is still imposed. It would also be important to highlight that legal safeguards and procedural rights also apply to alternatives of detention.

Children in their CoO

Children left in their country of origin or returned to their country is a group which has up to now not received much attention in the migration debate and IOM is very pleased to see that the protection of these two categories of children will receive particular consideration in this General Comment.

Children left in the countries of origin often remain under the guardianship of relatives or grandparents. State authorities normally are not authorizing any formal guardianship. While in many cases this works well, in others this leads to lack of attention from the side of the relatives and may even end up with early school dropouts or early marriage for girls. While the situation may be complicated by the fact of unofficial or irregular employment of parents abroad, or the seasonal nature of their employment still some guidance or a position on this would be helpful. In particular it would be beneficial to receive guidance as to what the State obligations in relation to these children are.

Right of access to education for irregular migrant children (arts. 30, 43, 45 CMW; arts . 28, 29 CRC)



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Both CRC GC No 6 and CMW GC No 2 provide excellent guidance as to the obligation of States in with regards to migrant children irrespective of their status. Nevertheless, it would be good to restate that reporting requirements to the immigration authorities could violate children's' right to education as many parents will be reluctant to let their children go to school. Another issue observed by IOM is that although several States do not exclude migrant children with irregular status from attending schools, they may in practice not be admitted to receive education without a study permit or a national birth certificate. In this regard, access to education is used as an immigration management tool. Affected by those measures are: unaccompanied migrant children; children of irregular migrants; children of rejected asylum seekers; orphans of irregular migrants. In addition, the right to education also shall envisage equal access for children to learning materials on equal footing with national children.

Use of indicators

It would be beneficial if the joint general comment could explicitly urge States to gather data and statistics (in line with confidentiality) on migrant children and their families, in particular those with an irregular status. From this data it would be useful if States could draw baselines on the implementation of particular rights to which they could set a target and measure any improvement.