
**Joint general comment No. 3 of the Committee on the Protection of
the Rights of All Migrant Workers and Members of Their Families
and No. 21 of the Committee on the Rights of the Child on the Human
Rights of Children in the Context of International Migration**

2nd DRAFT
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I. Introduction

1. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Convention on the Rights of the Child (CRC) contain legally binding obligations that relate both in general and specifically to the protection of the human rights of children and migrants. Both Conventions contain several provisions that establish specific obligations related to the rights of children affected by migration

2. In the context of international migration, children are in a situation of double vulnerability -as children and as children affected by migration in some way, either as migrants themselves, regardless of whether they are alone or with their families, or whether they are born to migrant parents in countries of destination or remain in their country of origin. Additional vulnerabilities could be based on their ethnic origin, gender, religion, disability, , national origin, migration status, citizenship status, age, sexual orientation, economic status and other social conditions.

3. It is by virtue of these overlapping and complementary mandates and shared commitment that the Committee on the Rights of the Child (hereinafter “the CRC Committee”) and The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter “the CMW Committee”) decided to develop this joint general comment. Based as it is on rights enshrined in both directives, it applies to all States Parties of *either* Convention, including those that have not ratified both.

A. Background

4. The present joint general comment builds on the increasing attention that both Committees have given to the human rights of children through a number of initiatives, including:

- In 2005, the CRC Committee, in its General Comment No. 6, developed a set of recommendations on a specific category of migrant children -unaccompanied and separated children outside their country of origin;
- In September 2012 in Geneva, the CRC Committee held a General Discussion Day, entitled “The Human Rights of All Children in the Context of International Migration”, leading to the elaboration of a background paper and a final document with conclusions and recommendations;
- In 2016, the CMW Committee has endorsed the *Recommended Principles to Guide Actions Concerning Children on the Move and Other Children Affected by Migration*. In addition, the CMW Committee is a member of the Inter-Agency Working Group to End Child Immigration Detention;
- During the last years, the CMW and CRC Committees have been making an increasing number of recommendations to States parties to their respective Conventions on a variety of human rights issues that affect children's rights in the context of migration;

5. The present joint general comment was also informed by consultations held by the Committee with representatives of States, the United Nations, non-governmental organizations, children and individual experts through surveys, meetings and regional consultations in Asia, Europe, Latin America and the Caribbean, Africa and Oceania (to be finished according to the Consultations that may take place during 2017).

6. Treaty-Bodies strengthening process

B. Objective and scope of the Joint General Comment

7. The objective of this joint general comment is to clarify the obligations of States parties to CMW and CRC by providing authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the two Conventions to fully protect the rights of migrant children and other children affected by migration. While this Joint General Comment is based on the provisions of both Conventions, it is important to underline that the

standards developed here are directly built on the principles and articles of the CRC. Therefore, the guidelines are applicable to all State Parties to the Convention on the Rights of the Child.

8. The Committees acknowledge that the phenomenon of international migration affects all regions of the world and all people, and increasingly, millions of children. While migration can bring positive outcomes to individuals, families and broader communities in countries of origin, transit and destination/ residence, the root causes of migration –in particular, unsafe migration- are often directly related to severe and massive violations of human rights, including children's rights, recognized in several human rights treaties, especially the Convention on the Rights of the Child.

9. The Joint General Comment addresses the situation of human rights of all the categories of children outside their country of nationality or affected by migration - whether they have migrated with their parents or primary caregivers' (hereafter referred to as parents), are unaccompanied or separated, or born to migrant parents in countries of transit and destination - and regardless of their or their parents' migration status. While additional rights are derived for some groups of children from other laws, the non-discrimination principle of the Convention on the Rights of the Child ensures equal application to all children, whether they are considered, inter alia, regular or irregular migrants, asylum-seekers, refugees, stateless, and/or victims of trafficking, including in situations of return or deportation to the country of origin, irrespective of the child's or the child's parent's or legal guardian's nationality, immigration status or statelessness.¹

10. This joint general comment should be read in conjunction with other relevant General Comments respectively issued by the two Committees, particularly the following general comments by CRC: No. 12 (2009) on the right of the child to be heard; No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment; No. 13 (2011) on the right of the child to freedom from all forms of violence; No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration; No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, No. 20 (2016) on the implementation of the rights of the child during adolescence and general comment by CMW No. 2 on the rights of migrant workers in an irregular situation and members of their families.

II. General Measures of Implementation of CMW and CRC Conventions for the protection of children in the context of migration. The Primacy of Children's Rights within Migration Policies

11. States shall ensure that children in the context of migration are treated first and foremost as children.² States parties to the Conventions have a duty to comply with their obligations to respect, protect and fulfil the rights of children in general, including migrant children regardless of their migratory status, and other categories of children affected by migration, in relation to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of the Child.

12. State obligations under both Conventions apply to each child within the State's territory and to all children subject to its jurisdiction or effective control. These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction or effective control of the State, including in international waters or other transit zones where States put in place migration control mechanisms. Moreover, State obligations under the Conventions apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory.

¹ CRC Committee. General Comment No. 6. *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*. 1 September, 2005, para.12.

² See CRC. *The Rights of All Children in the Context of International Migration*. 2012 Day of General Discussion. Background Paper, p. 37. See CMW Concluding Observations, Turkey (31 May 2016; CMW/C/TUR/CO/1), para. 42.

13. Both Committees stress the primacy of the rights of the child in the context of international migration and therefore the need for the Conventions to be integrated in migration-related frameworks, policies, practices and/or other measures. While children's rights based on the CRC and related human rights instruments should be transversally incorporated in migration policies, migrants and their families' rights should be properly included in child protection and other public policies and programs at local, national and international level.

14. The Committees are of the opinion that the authorities responsible for child protection and children's rights should have a leading role –with clear decision making power- on policies, practices and decisions that impact the rights of children in the context of migration. Comprehensive child protection systems –at national and local level- should mainstream into their programs the situation of the different categories of children in the context of migration, including in countries of origin, transit and destination;

15. States should develop policies aimed at fulfilling the rights of all the categories of children in the context of migration,³ ensuring that the principle of the child's best interest takes precedence over migration management objectives or other administrative considerations. These duties should be carried out in countries of origin, transit and destination of international migration.

16. States should develop a systematic rights-based policy on the collection of qualitative and quantitative disaggregated data on all the categories of children and affected by migration, as the basis for a comprehensive policy aimed at the protection of their rights.⁴ The Committees stress the importance of developing indicators directed to measure the respect and fulfilment of the rights of migrant children and other children affected by migration, including in regards to the drivers of migration.

17. Children's personal data, in particular biometric data, should only be used for child protection purposes, with strict enforcement of appropriate rules on collection, access, use and retention of data. The Committees urge diligence of safeguards in the development and implementation of data systems, and in the sharing of data between authorities and/ or countries. States should prohibit the sharing and use of personal data that was collected for the purposes of protection, remedy, civil registration, and access to services for the purposes of immigration enforcement.

III. Protection under the Conventions in relation to the rights of children in the context of migration

A. Fundamental Principles

18. States Parties to the CRC have a duty to ensure that the treaty's principles and standards are fully reflected and given legal effect in relevant domestic legislation, policies (article 4) and practices. In all actions concerning children, States should be guided by the overarching principles of non-discrimination (article 2); the best interests of the child (article 3); the right to life, survival and development (article 6); and the right of the child to express his or her views in all matters affecting him or her, and to have these views taken into account (article 12). Respecting the key CRC principles outlined below is critical for the protection and fulfillment of the rights of children in the context of migration.

19. The following principles should be applied to the analysis and interpretation of all the themes to be addressed by the joint general comment. In addition, the Committees reaffirm the Principle *Pro Persona* based on articles 81 CMW and 41 CRC, which fully applies to every policy, practice and decision that could affect the rights of every migrant child and other categories of children in the context of migration. Furthermore, the Committees are of the opinion that a dynamic interpretation of

³; CMW Concluding Observations, Honduras (3 October 2016; CMW/C/HND/CO/1), para. 55.

⁴ CMW Committee Concluding Observations: Honduras (3 October 2016; CMW/C/HND/CO/1), para. 55; Nicaragua (10 October 2016; CMW/C/NIC/CO/1), para. 54.

CRC and CMW provisions is paramount in order to ensure their effective implementation and respect, protect and fulfil the rights of all children in the context of the increasing number of challenges that migration poses on the different categories of children.

1. Non-discrimination (arts. 1, 7 CMW; art. 2 CRC)

20. The CRC Committee has already emphasized that the principle of non-discrimination is fundamental and in all its facets, applies in respect to all dealings with migrant children.⁵ All children involved in or affected by international migration are entitled to the enjoyment of their rights, regardless of age, gender, ethnic or national origin, disability, sexual orientation, religion, economic status, and migration/documentation status, statelessness, race, property, marital and family status, health status, among other social conditions, in both voluntary and involuntary migration situations, whether accompanied or unaccompanied, on the move or otherwise settled, documented or undocumented or any other status.⁶

21. The principle of non-discrimination shall be at the centre of all migratory policies and procedures, including border control and other measures within migration policies. Any differential treatment of migrants shall be in lawful pursuit of a legitimate and proportionate aim and in line with the child best interests and international human rights norms and standards.

22. The Committees recommend States to adopt adequate measures to combat discrimination on any grounds and to protect children from multiple and intersecting forms of discrimination throughout their migration journey. In doing so, efforts to combat xenophobia, racism and discrimination and promote the social inclusion and full integration of families affected by migration into society should be strengthened. States should also undertake programmes for improving knowledge and addressing the negative perceptions regarding migrants, with the aim of protecting migrant children, other children affected by migration and their families from violence and discrimination and to fulfil their access to rights.⁷ In doing so, special attention needs to be paid to gender-specific challenges and vulnerabilities.

23. The Committees are of the view that merely addressing de jure discrimination will not ensure de facto equality. Therefore, States parties shall protect the rights under the Conventions for all migrant children and other children affected by migration, by adopting positive measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate de facto discrimination against them. They should systematically record incidences of discrimination and investigate violations as appropriate.

24. Xenophobic attitudes may directly or indirectly impact on policy reform or in practices that restrict children's rights, including their right to development. Therefore, and in line with the Sustainable Development Goals –e.g., SDGs 1, 2, 3, 4, 8 and 10- States should take all appropriate measures directed to revert and reject such practices, prevent misinformation as well as produce and disseminate information. Similarly, they should ensure that that migrant children and their families are integrated to receiving societies through their effective access to human rights and services in equal manner with nationals. Specific initiatives should be developed in partnership with media, education bodies, schools, universities, and civil society, including the participation of children.

2. Best Interest of the child (art 3 CRC)

25. Article 3, paragraph 1, of the Convention places an obligation on both the public and the private spheres, courts of law, administrative authorities and legislative bodies to ensure that the best interests of the child are assessed and taken as a primary consideration in all actions affecting children. The

⁵ See Committee on the Rights of the Child general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para.18.

⁶ See Committee on the Rights of the Child - Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration - The Rights of All Children in the Context of International Migration. para.13.

⁷ Ibid., para.70.

concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.⁸ The right of the child to have his or her best interests taken into account as a primary consideration is a substantive right, an interpretative legal principle and a rule of procedure, and it applies to children both as individuals and as a group.⁹

26. The CRC Committee has elaborated on implementation of the best interests of the child principle in its General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, and this is the key guidance for States Parties. The implementation of the principle in the context of migration requires further clarification. The Committees are concerned that the best interests of the child are largely absent from planning, implementation of migration policies as well as decision-making on individual cases, including granting or refusing applications, decisions regarding detention, deportation and restrictions on access to social rights –by of children and/or their parents’-, as well as decisions regarding family unity, when the best interests of the child should be paramount. This principle must be observed in migration law and in practice, in accordance with the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹⁰

27. In particular, this principle should be explicitly ensured through individual procedures as an integral part of in any administrative or judicial decision concerning the entry, stay or expulsion of a child, or the detention, expulsion or deportation of her or his parents associated with their own migratory status. Closely related to this, is the obligation to respect fully the right of the child to be heard with regard to all the aspects of immigration and other related proceedings, in an appropriate manner, and that her or his views be adequately taken into account. The outcome of the procedure should be considered with due weight and implemented.

28. In order to implement the best interests principle in migration-related procedures or decisions that could affect them, the Committees stress the need for systematically conducting Best Interest Assessments and Determination procedures as part of, or to inform, migration-related decisions. As explained in General Comment No. 14, assessment and determination of the child’s best interests are two steps to be followed when required to make a decision. The “best-interests assessment” consists in evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children. The “best-interests determination” describes the formal process with strict procedural safeguards designed to determine the child’s best interests on the basis of the best-interests assessment.

29. The Committees stress that States should:

- Make clear in their legislation, policy, and practice that the principle of the child’s best interests takes priority over migration and policy or other administrative considerations.
- Ensure that the principle of the best interests of the child is appropriately integrated, consistently interpreted and applied through robust, individualized procedures in all legislative, administrative and judicial proceedings and decisions, as well as in all migration policies and programs that are relevant to and have an impact on children, including consular protection policies and services.
- Implement and conduct Best Interests Assessments and Determinations that give appropriate weight to fulfilling child protection objectives in both the short and long term in decision-making affecting children, meet due process safeguards, and be carried out by actors independent of the migration authorities in a multidisciplinary way, including participation of authorities responsible for child protection and welfare and other relevant actors, such as guardians and legal representatives.
- Develop procedures and define criteria to provide guidance to all relevant persons related with migration procedures on determining the best interests of the child and on giving them due weight as a primary consideration, including in entry, stay and return procedures.
- Conduct assessments and determination of the best interests of the child at the different stages of migration and asylum procedures that could result in the detention of the parents due to

⁸ See general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para.4.

⁹ Ibid., para.6.

¹⁰ See CMW Concluding Observations, Peru (CMW/C/PER/CO/1, 13 May 2015), para. 43.

their migration status, as well as parents' return or deportation.¹¹

- Conduct BIA in a case-by-case basis in order to decide, if needed, the type of protection-nature accommodation (alternative to detention) that could be applied to an unaccompanied or separated child, or children with families.
- Conduct BID in cases that could lead to expulsion of migrant families due to their migration status, in order to evaluate the impact of deportation on children's rights and development, including their mental health.
- Ensure that children are promptly identified in border controls and that anyone claiming to be a child is treated as such, promptly referred to child protection authorities and other relevant services, and appointed a guardian if unaccompanied or separated.
- Provide guidance to all relevant authorities on the operationalization of the principle of the best interests of the child for migrant children in transit.¹²
- Develop and put in practice with regards to unaccompanied children and families with children, a BID directed to identify and apply the most adequate short term comprehensive and durable solutions, including inter alia, integration in the country of current residence, repatriation to the country of origin or resettlement in a third country-¹³ BID Procedures should be guided by child protection authorities within Child Protection Systems, and should ensure due process guarantees, including the right of the child to be heard.
- Promote quality comprehensive solutions, facilitating regular contact/communication between the child and his/her family when in the child's best interests (whether in the country of origin or in the country of destination or third country) and ensuring that the child's views and opinions have been gathered and taken account of in a child-friendly and sensitive manner.

3. Life, survival and development (art. 9, CMW; arts. 6 CRC)

30. Article 6 CRC highlights the States parties' obligation to ensure the survival, growth and development of the child, including the physical, mental, moral, spiritual and social dimensions of their development. At any point during the migratory process, a child's right to life and survival may be at stake, including due to violence of criminal gangs, push-back or interception operations, excessive use of force of border authorities, refusal of vessels to rescue them, extreme conditions of travel and limited access to essential services. Unaccompanied and separated children may face further vulnerabilities and can be more exposed to risks during transit, such as sexual and other forms of violence and trafficking, though children travelling with their families often also witness and experience violence. As well as opportunities, unprotected migration processes pose risks, including physical harm, psychological trauma, marginalization, discrimination, xenophobia and sexual and economic exploitation, family separation, immigration raids and detention.¹⁴ At the same time, the obstacles children may face in accessing education, adequate housing, sufficient safe food and water or health services, can negatively affect the physical, mental, spiritual, moral and social development of migrant children and children of migrants.

31. The Committees acknowledges that the lack of regular and safe channels for children and families to migrate as well as stricter border control and surveillance measures, including arbitrary detention and deportation practices, lack of timely family reunification opportunities, contribute to children taking life threatening and extremely dangerous migration journeys.

32. In view of the Committees, the obligation of States under article 6 CRC and 9 CMW includes to protect and reduce migration-related risks to children, to the maximum extent possible, which would jeopardize a child's right to life, survival and development. States, especially those of transit and destination, should devote special attention to the protection of undocumented, unaccompanied and separated children, as well as to the protection of children seeking asylum and children victims of transnational organized crime, including trafficking in persons, sale of children, child pornography,

¹¹ See Committee on the Rights of the Child - Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration, paras.73-74.

¹² CMW Committee Concluding Observations: Turkey (31 May 2016, CMW7C/TUR/CO/1), para. 42.

¹³ CMW Committee Concluding Observations: Honduras (3 October 2016; CMW/C/HND/CO/1), para. 55.

¹⁴ See general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, para.76

child prostitution and victims of early forced marriage. States should also consider the specific vulnerable circumstances that could face migrant child on the basis of his or her gender as well as other factors, such as ethnicity, disability or religion that may aggravate her vulnerability to sexual abuse, exploitation, violence and rights' abuses throughout the entire migratory process. In addition, States should provide appropriate gender-sensitive protection in order to prevent discrimination, or causing or exacerbating situations of vulnerability. Specific policies and measures, including access to child-friendly, gender-sensitive and safe judicial and non-judicial remedies, should be put in place in order to fully protect and assist them, aiming to facilitate that they resume their lives with their rights as children fully respected.

33. The Committees are also of the opinion that while in their jurisdiction States should ensure that migrant children and other categories of children affected by migration, regardless of their status or their parents', have a standard of living adequate for their physical, mental, spiritual and moral development as articles 4 and 6 are interrelated with article 27 (2) of the Convention of the Rights of the Child.

34. The Committees are concerned that policies or practices that deny or restrict basic rights to adult migrants due to their nationality of immigration status, including labour rights, may directly or indirectly impact children's right to life, survival and development. These policies would also obstruct the design of comprehensive migration policies and the efforts made in order to mainstream migration into development policies. Therefore, States should ensure that children's development, as well their best interest, is fully take into account when it comes to regulate their parents' access to social rights and others -regardless their immigration status-, as well as when they address the situation of migrants in irregular status that reside in their countries, including the establishment of permanent avenues for regularization as a mean to promote integration and prevent exploitation and marginalization of migrant children and their families.

35. The Committees stress that in countries of origin should develop comprehensive policies and inter-institutional coordination mechanisms in order to ensure, in cases of children that return to their countries, the effective reintegration through a rights-based approach, including immediate protection measures and long-term solutions, in particular effective access to education, health, family life, justice and protection against all forms of violence.¹⁵

4. Right to be heard, express his or her view and participation (art. 12 CRC)

36. Article 12 CRC highlights the importance of children's participation, providing for children to express their views and to have such views seriously taken into account, according to age, maturity and the evolving capacity and the agency of the child.¹⁶

37. The CRC Committee in its general comment No. 12 has underlined that adequate measures to guarantee the right to be heard should be implemented in the context of migration as children who come to a country could be in a particularly vulnerable and disadvantaged situation. For this reason it is urgent to fully implement their right to express their views on all aspects affecting their lives, including as an integral part of the immigration and asylum proceedings. Children may have their own migration projects and policies cannot be effective without their participation. It has also emphasized that these children have to be provided with all relevant information, in a timely manner, in a child-sensitive and age appropriate language and format in their own language, on their entitlements, the services available, including means of communication, complaints mechanisms, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings. A legal representative for all children (including families), and trained guardian for unaccompanied and separated children, should be appointed as soon as possible on arrival, free of charge.¹⁷ Accessible complaints mechanisms for children should be ensured.

38. In the view of the Committees, to verify that immigration proceedings are appropriate, States must take all appropriate measures to fully promote and facilitate the participation of children, which includes having the opportunity to be heard in any administrative or judicial proceedings related to

¹⁵ See CMW Concluding Observations: Honduras (3 October 2016; CMW/C/HND/CO/1), para. 55.

¹⁶ See CRC General Comment No. 12 (2009).

¹⁷ Ibid., paras.123-124.

their and their parents' cases. Children should be heard together with and independently from their parents, and the individual circumstances of the child included in consideration of family's cases in which they are involved. Regarding the significant relationship between the right to be heard and the best interest of the child, the CRC Committee has already stated that there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.¹⁸

39. States should take all appropriate measures aimed at ensuring children's right to be heard in immigration procedures of their parents, in particular when the decision could impact children's rights such as the right to not being separated from their parents (article 9 CRC). Specific Best Interests Assessments should be carried out in those procedures and child specific reasons for the migration be taken into account.¹⁹

40. States should adopt measures directed to facilitate the participation of all children in the context of migration in the designing, implementation and evaluation of policies that could affect them, including in the field of migration, social policies and social services, non-discrimination, gender equality, among others. In countries of origin, the participation of children is paramount in processes aimed at addressing drivers of migration of children and/or their parents. In addition, States should ensure that civil society organizations, including children associations, can effectively participate in policy dialogues and processes in regards to children in the context of migration, both at local, national and regional level. In case of absence of those associations, state parties should ensure that convenient societal platform, where legal avenues to form such associations are established and necessary efforts are taken to encourage the participation of society members to develop those associations, is formed.

5. Protection against expulsion: Non-refoulement, prohibition of collective expulsion

41. The Committees are of the opinion that repatriation of any child can only be decided when it is evidenced in a case-by-case basis that this is in their best interests, and after ensuring –within a procedure with proper safeguards- that the child, upon return, will be safe and provided with proper care and custody. In view of the Committees, repatriation is one of possible sustainable solutions for unaccompanied children and children with their families, as well as integration in countries of residence -either temporarily or permanently, according to each case circumstances-, resettlement in a third country –e.g., based on family reunification grounds-, or other solutions that could be identified in a case-by-case basis.

42. States should fully respect non-refoulement obligations deriving from international human rights, humanitarian, refugee law and customary international law, and in particular the obligations codified in article 33 of the 1951 Refugee Convention and in article 3 of CAT.²⁰

43. The Committees are concerned that some States choose to recognize the narrowest definition of the non-refoulement principle. The Committees have already pointed out²¹ that to respond adequately to the needs of migrant children, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the CRC, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and taking all special needs into consideration, and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.

¹⁸ Ibid., para.74.

¹⁹ See CMW Committee Concluding Observations: Honduras (3 October 2016; CMW/C/HND/CO/1), para. 55.

²⁰ See general comment No. 6, para.26.

²¹ Ibid., para.27 and CMW Committee. General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families. CMW/C/GC/2. 28 August 2013, para.50.

44. In view of the Committees, in the case of migrant children the principle of non-refoulement, along with the Best Interests of the Child and other core principles, should be construed as including socio-economic conditions in countries of origin; and family reunification entitlements in countries of origin and destination²² and migrant children and their families should be protected in cases where expulsions would constitute arbitrary interference with the right to family and private life.²³

B. Legal obligations of States parties to protect the right of children in the context of migration in their territory

1. Age

45. The Committees reminds States that the definition of the child under the Convention of the Rights of the Child provides rights and protection until 18 years of age. The Committees are concerned that children between 16 and 18 years tended to be provided much lower levels of protection, and were sometimes considered as adults or left with ambiguous migration status until they reached 18 years of age. States are urged to ensure that equal standards of protection be provided to all children, including those above the age of 16 years and regardless of their migration status. In addition, States should provide adequate follow-up, support and transition measures for children when they reach 18 years of age, particularly those leaving a care context, including by ensuring access to long-term regular migration status and reasonable opportunities for completing education, access to decent jobs and integrating into the society they live in.²⁴

46. Age determination processes should be a measure of last resort. The Committees cautions against age determination methods based on, *inter alia*, bone analysis, that are flawed and inaccurate with wide margins of error. States should refrain from using these methods. The Committees remind States that age determination processes should be a measure of last resort and be carried out in a prompt, child-friendly, gender sensitive, culturally appropriate and multi-disciplinary manner, and be conducted by child protection officials or officials with sufficient and relevant expertise and training. The benefit of the doubt should always be given to the individual being assessed. The right to appeal the decision before an independent body should be ensured.²⁵

2. Right to liberty and non-detention (arts. 16, 17 CMW; art. 37 CRC)

47. The Committee on the Rights of the Child has already stated in 2005 –in relation to unaccompanied and separated children- that children should not, as a general rule, be deprived of liberty and detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.²⁶

48. In its General Comment No. 2, the CMW Committee acknowledged 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.²⁷ Articles 16 & 17 CMW regulates the right to liberty of migrant workers and their families, none of these provisions allow the detention of children due to

²² Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/11/7, May 14, 2009, para.34.

²³ See CMW Committee. General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families, para.50.

²⁴ See Committee on the Rights of the Child - Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration, paras. 68-69.

²⁵ *Ibid.*, para.76.

²⁶ See general comment No. 6, para.40.

²⁷ CMW Committee. General Comment No. 2, para.24.

their immigration status or their parents'. Children should never be detained for immigration purposes.²⁸

49. According Article 37(b) of the Convention of the Rights of the Child a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, this article only addresses situations of children are in the context of juvenile justice, following a criminal offense. Offences concerning the entry or stay in one country (e.g., not having a residence permit, remaining in the country following expiry or invalidation of overstaying a visa or entering a country without proper authorization, or other acts which are necessary for daily life such as working irregularly) cannot, under any circumstances, have similar consequences to those derived from the commission of a crime, therefore the principle of *ultima ratio* is not applicable in immigration proceedings. Article 37 does not apply to immigration-related detention.

50. The CRC Committee has emphasized that children should not be criminalized or subject to punitive measures because of their or their parents' migration status.²⁹ It has also asserted that the detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that States should expeditiously and completely cease the detention of children on the basis of their immigration status.³⁰ Immigration detention is understood by the Committees as any setting in which the child is deprived of their liberty, and unable to move freely, regardless the name given to the action of accommodating a migrant child in a closed facility or the name of the facility where he or she is placed, and irrespectively of the grounds invoked for placing a child there.

51. The Committees reaffirm the duty of States of adopting measures directed to eradicate any kind of policy or practice of child detention in the context of migration policies and procedures. Consequently, the prohibition of child and family detention should be ensured in law and in practice. States should ensure budgetary and other resources directed to ensure the effectiveness of the principle of non-detention and its respect by every competent authority both at national and local level.

52. The Committees emphasize the harm inherent in any deprivation of liberty and also the negative impact that detention can have on children's health and development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families.³¹ According the UN Special Rapporteur on Torture, the deprivation of liberty of children within the context of administrative immigration enforcement and based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.³²

53. In view of the Committees, child protection and welfare actors, rather than immigration agencies should take primary responsibility for migrant children. Unaccompanied children should be placed in the national/local alternative care system, preferably in community and/or family-type care –when such arrangements exist- rather than in institutional care. All children should have access to adequate healthcare and education , including for their sexual and reproductive health, as well as additional services, such as psycho-social and trauma counselling and additional services that could be necessary in each case. These decisions have to be taken within a child-sensitive due process, including their right to be heard and should take into account vulnerabilities and needs of children, including such based on their gender, age or mental health conditions.

²⁸ Ibid., para.26. See Nicaragua (11 October 2016CMW/C/NIC/CO/1), para. 40; Niger (11 October 2016 CMW/C/NER/CO/1), para. 33; Sri Lanka (11 October 2016CMW/C/LKA/CO/2), para 32 (b); Turkey (31 May 2016 CMW/C/TUR/CO/1), para. 48 (b);

²⁹ *The Rights of All Children in the Context of International Migration. 2012 Day of General Discussion Background Paper*. Geneva, September 2012).

³⁰ See CRC Committee's concluding observations: South Africa (27 October 2016, CRC/C/ZAF/CO/2), para.62 (e). ; UK (12 July 2016, CRC/C/GBR/CO/5), para.77 (d); Slovakia (20 July 2016, CRC/C/SVK/CO/3-5), para.53 (a); France (23 February 2016, CRC/C/FRA/CO/5), para.73; Poland (30 October 2015, CRC/C/POL/CO/3-4), paras.44-45; Bangladesh (30 October 2015, CRC/C/BGD/CO/5), para.71 (b-c); Honduras (3 July 2015, CRC/C/HND/CO/4-5), para.75; Mexico (3 July 2015, CRC/C/MEX/CO/4-5), para.60.

³¹ See CRC Committee's concluding observations: Nauru (28 October 2016, CRC/C/NRU/CO/), para.30.

³² UN Special Rapporteur on Torture *Thematic Report on torture and ill-treatment of children deprived of their liberty*, 5 March 2015 (A/HRC/28/68) – para.80.

54. In the case of children who are with family members, they should be housed together unless there are compelling reasons for separation in line with the child's best interests. Keeping the family together does not represent a sufficient reason to legitimate or justify the exceptional admissibility of the deprivation of liberty of children together with their parents, because of the prejudicial effects on their emotional development and physical well-being. To the contrary, when the child's best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.³³ States should ensure –in legislation and in practice- that children can remain with family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved, in accordance with their best interests and with their rights to liberty and family life.³⁴ Alternatives should be engagement based, focusing on case management and resolution. When any limitation to the right to liberty is proved necessary based on individual assessment, the least restrictive measures must be used.

55. The Committees are also concerned by the cases where children are separated from their parents through detention practices. This is particularly the case when there is more than one parent, but there have also been cases of children with only one parent being placed into alternative care while their parent is detained. The Committees urge States to undertake an approach based the child's best interests which require keeping the whole family together (Art 9 CRC) and entails a correlative State obligation to design, adopt and implement alternative measures to detention in order to preserve and maintain the family unit and to promote the protection of the family.³⁵ As the CRC Committee indicated, alternative solutions should also be made available when parents are incarcerated due to criminal cases.³⁶ In addition the CMW Committee stated that adults' migration-related detention could only be an exceptional, last resort measure.³⁷

56. While child migration-related detention constitutes in itself a violation of children's right to liberty, in any instance where a child is nevertheless deprived of liberty, States are urged to impose such measure for the shortest time and in conditions that meet all the standards of detention as set out in human rights law. Highlighting General Comment No.10 (CRC/C/GC/10, 2007) of the CRC Committee, it is reiterated that States have the legal obligation to comply with international standards on detention conditions, including the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) which apply to all forms of detention including administrative or non-criminal detention. This includes ensuring a child-friendly environment; separation from adults who are not the child's parent or guardian (including if the child is above the age of 16 years), child protection safeguards, and independent monitoring.³⁸ Access to quality free legal assistance and case management, as well as other services must have ensured. Child protection authorities and children's rights experts should play a guiding role in these cases.

³³ Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/20/24, 2 April 2012, para.40. and Inter-American Court of Human Rights Advisory Opinion OC-21/14 Rights and Guarantees of Children in the Context of Migration and/ or in Need of International Protection. August 19, 2014, para. 159.

³⁴ See CMW Committee Concluding Observations: Sri Lanka (11 October 2016 CMW/C/LKA/CO/2), para. 33; El Salvador (1 May 2014; CMW/C/SLV/CO/2), para. 49(c); Turkey (31 May 2016 CMW/C/TUR/CO/1), para. 48(b); Nicaragua (10 October 2016; CMW/C/NIC/CO/1), para. 40(b).

³⁵ UN Special Rapporteur on Torture, Thematic Report on torture and ill-treatment of children deprived of their liberty, 5 March 2015 (A/HRC/28/68), para. 80.; Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/11/7, May 14, 2009, para. 62; Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, UN Doc. A/65/222, 3 August 2010, para. 48; and ECHR, Case of Popov v. France, Nos. 39472/07 and 39474/07, Judgment of 19 January 2013, paras. 140, 141 and 147. See also, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, Addendum: Mission to the United States of America, UN Doc. A/HRC/7/12/Add.2, 5 March 2008, para. 125.)

³⁶ CRC Committee, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents", 30 September 2011, para. 30.

³⁷ CMW Committee, General Comment No. 2, para. 26.

³⁸ See Committee on the Rights of the Child - Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration, para.79-80.

3. Due process guarantees and access to justice (arts. 16, 17, 18 CMW; art. 12, 40 CRC)

57. Access to justice is a fundamental right in itself and a prerequisite for the protection and promotion of all other human rights and as such it is of paramount importance that migrant children and other categories of children in the context of migration are empowered to claim their rights. Elements of access to justice include in particular rights to relevant information, an effective remedy, a fair trial, to be heard, as well as to enjoy these rights without discrimination. The responsibility of States Parties requires structural and proactive interventions to ensure fair, effective and prompt access to justice. The CRC Committee held in its GC 5 that an effective remedy requires effective, child-sensitive procedures and outlined what these shall entail. The right to due process of all migrants regardless of their status shall be protected and respected in all areas where the State exercises jurisdiction or effective control. In the case of migrant children their exercise supposes the adoption of certain specific measures in order to ensure administrative and judicial proceedings adapted to their needs and accessible in conditions of equality and to ensure that the best interest of the child is a primary consideration in all the administrative or judicial decisions.

58. The Committees are of the view that States should ensure that their legislation, policies, measures and practices guarantee child-sensitive due process in all migration administrative and judicial proceedings affecting the rights of children and/or those of their parents. All children, including children accompanied by parents or other legal guardians, must be treated as individual rights-holders, their child-specific needs considered equally and individually and their views appropriately heard. They must have access to administrative and judicial remedies against decisions on their own situation or the ones on their parents that affect them to guarantee that all decisions are taken in their best interests.³⁹ Children should be able to bring complaints beyond legal or court procedures at lower levels that are easy accessible to them e.g. in child protection and youth institutions, schools, to ombudsmen etc. and should be able to receive advice by professionals in child-friendly manner when their rights have been violated.

59. The following guarantees of due process, among others in accordance with international human rights law, must govern any immigration and asylum proceedings, whether administrative or judicial, that involve children⁴⁰, and in particular in the context of Best Interest Assessments and within Best Interest Determination Procedures:

- The right to be notified of the existence of a proceeding, of the decision adopted in the context of the immigration proceedings, its implications and possibilities of appeal;
- The right that the immigration proceedings are conducted by a specialized official or judge; and that any interviews are carried out by professionals trained in communicating with children;
- The right to be heard and to take part in the different procedural stages, in line with the principle of autonomy (article 5 CRC);
- The right to be assisted without charge by a translator and/or interpreter
- Effective access to communication with consular officials and consular assistance, and to receive child-sensitive rights-based consular protection;
- The right to be appointed and assisted by free and quality legal representation and to communicate freely with the representative;
- The obligation to appoint a guardian in the case of children who are unaccompanied or separated;⁴¹
- The right that the decision adopted takes into consideration the best interest of the child and is duly reasoned;
- The right for application and procedures involving children to be treated as a priority, in line with the expediency principle, while ensuring ample time to prepare for proceedings and all due process guarantees are fulfilled;
- The right to appeal the decision before a higher court or independent authority, with suspensive effect, and a reasonable time for the duration of the proceedings;
- Allowing the child access to the territory is a prerequisite to access to procedural safeguards

³⁹ Ibid., para.75.

⁴⁰ Inter-American Court of Human Rights Advisory Opinion OC-21/14, paras.108-143.

⁴¹ See CRC Committee, General Comment No. 6, paras.33-38.

and best interest determination.

- The appointment of a competent guardian for unaccompanied and separated children, as expeditiously as possible, serves as a key procedural safeguard to ensure respect for their best interests⁴².

60. The Committees are concerned by the negative impacts on children's well-being of having insecure and precarious migration or residence status, and how the dependency of children's residence status on their parents' status can lead to children losing their residence status and having few possibilities to resolve their status for prolonged period. The Committees therefore recommend States to ensure there are clear and accessible status determination procedures for children to regularize their status on various grounds (such as length of residence).

61. The Committees are of the opinion that a comprehensive interpretation of the CRC with articles 7(a), 23 and 65.2 MWC should imply the development and implementation of effective consular protection policies which include specific measures directed to protect children's rights, such as the following: a) ensuring sufficient human and financial resources; b) recruiting consular staff on the basis of merit and expertise in the rights of migrant workers and members of their families, children's rights, the application of a gender perspective and the protection of women against violence; c) providing ongoing training to consular staff on the MWC, CRC and other human rights instruments; d) developing a standardized tool for the collection of quantitative and qualitative data at consulates, specifically designed to protect the rights of child migrants and/or families, including unaccompanied children, in the context of detention and repatriation procedures that may affect them; e) Promoting protocols on consular protection, including legal assistance, with a view to ensuring that child migrants and migrant families abroad, including their protection against family separation –unless it is on child best interests.⁴³

4. Right to a name, identity, and to a nationality (art. 29 CMW; arts. 7, 8 CRC)

a. Birth registration

62. The Committee on the Rights of the Child already addressed the issue of birth registration in its General Comment No. 7 on Implementing Child Rights in Early Childhood stressing that the lack of registration may impact negatively on a child's sense of personal identity and children may be denied entitlements to health, education and social welfare. Birth registration can also help to protect children from situations of exploitation and violence, such as child marriage and child labor, and achieve convictions against those who have abused a child. Unregistered children are at risk of becoming stateless⁴⁴ particularly when born in an irregular migration situation, due to barriers to acquiring citizenship in the country of origin of the parents, as well as accessing birth registration and citizenship at the place of their birth.

63. The inclusion of birth registration and legal identity within the new Sustainable Development Goals (SDG) underscores the role of birth registration and its importance to development outcomes and a key enabler of the efficacy of many other SDG targets.^{45 46}

64. The Committees urge States parties to take all necessary measures to ensure that all children are registered at birth irrespective of the migration status of their parents and highlighted the importance

⁴² See general comment No. 6. *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, paras. 20-21. See also Committee Concluding Observations: Mexico (3 May 2011; CMW/C/MEX/CO/2), para. 56.

⁴³ CMW Committee, Concluding Observations: Honduras (3 October 2016; CMW/C/HND/CO/1), para. 41.

⁴⁴ A stateless person is "a person who is not considered as a national by any State under the operation of its law" Convention relating to the status of stateless persons (1954) Article 1.

⁴⁵ See Sustainable Development Goals – Target 16.9: By 2030, provide legal identity for all, including birth registration.

⁴⁶ CMW Committee, Concluding Observations: Niger (11 October 2016; CMW/C/NER/CO/1), para. 37; Turkey (31 May 2016; CMW/C/TUR/CO/1), para. 66; Mauritania (31 May 2016; CMW/C/MRT/CO/1), para. 47; Mexico (3 May 2011; CMW/C/MEX/CO/2), para. 40.

of facilitating late registration of birth. Legal and practical obstacles to birth registration should be removed, including through ensuring a prohibition of data sharing between civil registration and immigration enforcement, and not requiring parents to produce documentation. Children who have not been registered should be ensured equal access to health care, protection, education and other social services

b. Protection and prevention of statelessness

65. The right to a nationality was recognized in the Universal Declaration of Human Rights of 1948, and was expanded in the treaties that followed. Article 7 of the Convention on the Rights of the Child places emphasis on the avoidance of statelessness by specifying that States parties should ensure the implementation of these rights, in particular where the child would otherwise be stateless. The same right is enshrined for all children of migrant workers in article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁴⁷

66. The primary purpose of protecting the right of every child to acquire a nationality is to prevent a child from being afforded less protection because he or she is stateless. While States are not obliged to grant their nationality to every child born in their territory, they are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he or she is born. One such measure is the conferral of nationality to a child born on the territory of the State if the child would otherwise be stateless.⁴⁸ Nationality laws that discriminate transmission or acquisition of nationality on the basis of prohibited grounds, including gender and migration status, should be repealed.

67. States should strengthen measures to grant citizenship to children born in their territory in situations where a child would otherwise be stateless,⁴⁹

5. Right to family life (arts. 14, 17, 44, CMW; arts. 9, 10, 11, 20, 21, 22, CRC)

68. The Committees underline that member states must comply with their international legal obligations in terms of maintaining family unity and preventing separation which should be a primary focus. Protection of the right to family unity frequently requires that States not only refrain from actions which could result in family separation or other arbitrary interference on the right to family life. States should also take positive measures to maintain the family unit, including the reunion of separated family members.

69. As stated in the Committee's general comment No. 14 (2013), the term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for migrants' local customs and individual circumstances.

⁴⁷ See Article 5(d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination and article 9 of the Convention on the Elimination of All Forms of Discrimination against Women state that the right to nationality is to be enjoyed without any discrimination on the basis of race, colour, descent, national or ethnic origin, or sex. The International Covenant on Civil and Political Rights also states, in article 24(3), that every child has the right to acquire a nationality. These norms are complemented by the Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons. The Convention on the Reduction of Statelessness is of particular importance with regard to the right of every child to acquire a nationality, given that it sets out concrete and detailed obligations for States parties to the Convention in its articles 1 to 4 on ensuring the avoidance of childhood statelessness.

⁴⁸ UN Human Rights Council, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, *inter alia*, of the country in which they are born, if they otherwise would be stateless, 16 December 2015, A/HRC/31/29, para. 10.

⁴⁹ See Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration. See CRC Committee's concluding observations: South Africa (27 October 2016, CRC/C/ZAF/CO/2), para.32 (b); Surinam (9 November 2016, CRC/C/SUR/CO/3-4), para.17; Pakistan (11 July 2016, CRC/C/PAK/CO/5), paras.65- 66; Chile (30 October 2015, CRC/C/CHL/CO/4-5), paras.30-33; Israel (13 July 2015, CRC/C/OPSC/ISR/CO/1), paras.24-25.

70. The Committees acknowledge that the right to family unity for migrants may intersect with States' legitimate interests in making decisions on the entry or stay of non-nationals in their territory. However, migrant children and families should not be subjected to arbitrary or unlawful interference with their privacy and family life.⁵⁰ Separating a family by deporting or removing a family member from a State party's territory, or otherwise refusing to allow a family member to remain, may amount to arbitrary or unlawful interference with the right to family life.⁵¹

71. The Committees are of the view that the rupture of the family unit by the expulsion of one or both parents solely based on the breach of immigration laws related to entry or permanence is disproportionate because the sacrifice inherent in the restriction of the right to family life and impact on the life and development of the child in relation to the advantages obtained by forcing the parent to leave the territory because of an administrative offense.⁵² The Committees recommend States to provide regularization avenues for migrants in an irregular situation residing with their children, particularly when the child has been born or has lived in the country of destination for an extended period of time, or when return to the parent's country of origin would be against the child's best interest.

72. The Committees are concerned by cases where children are separated from parents and placed in alternative care by child protection systems when there are no concerns related to abuse and neglect. Challenges related to poverty alone cannot justify separation of children from their parents— necessary basic social assistance should be provided to parents to care for their children when in their best interests. Children and families in an irregular migration must be ensured due process in custody and other family law matters, when the best interests of the child shall be the paramount consideration.

73. The Committees are also of the opinion that based on article 18 of the CRC, a comprehensive approach to children's right to family life in the context of migration should contemplate measures directed to facilitate parents' to fulfil their duties in regards to child development. Considering that irregular migration status of children and/or their parents' may obstruct such goals, States should make available regular and non-discriminatory migration channels, as well as provide permanent and accessible mechanisms for children and their families to access long-term regular migration status or residence permits based on grounds such as family unit, labour relations, and social integration.⁵³ The Committees are of the view that addressing the situation of child migrants in irregular situation or children of undocumented parents would contribute to the achievement by States of the SDGs.

a. Family Reunification (art.10 CRC)

74. Under Article 10 of the Convention on the Rights of the Child, State parties are to ensure that applications for family reunification are dealt with in a positive, humane and expeditious manner. This includes positive obligations to facilitate the reunification of children with their parents. When the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.⁵⁴

75. In the case of unaccompanied or separated children, efforts to find sustainable, rights-based solutions for them should be initiated and implemented without delay and analyzing the possibility of family reunification. If the child has family in the country, the country of origin or a third country, child protection and welfare authorities in countries of transit or destination should commence tracing

⁵⁰ Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, para.9.

⁵¹ See Human Rights Committee, Francesco Madafferi and Anna Immacolata Madafferi v. Australia, CCPR/C/81/D/1011/2001, 26 August 2004, paragraph 9; Human Rights Committee, Jonny Rubin Byahuranga v. Denmark, CCPR/C/82/D/1222/2003, 9 December 2003, paragraph 11; Human Rights Committee, Ali Aqsar and Roqaiha Bakhtiyari v Australia, CCPR/C/79/D/1069/2002, Communication No. 1069/2002, 6 November 2003, paragraph 11; Human Rights Committee, Canepa v Canada, CCPR/C/59/D/558/1993, 06 November 2003, paragraph 14;

⁵² See Inter-American Court of Human Rights Advisory Opinion OC-21/14, para.280.

⁵³ See CRC Committee, Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration, para. 91. See also article 69 MWC.

⁵⁴ See CRC Committee, General Comment No. 14, para.66.

family members as soon as possible. The decision of whether a child should be reunified with their family in their country of origin and/or destination should be made while based on a robust assessment of upholding the child's best interests as a primary consideration, considering family reunification as one aspect (not the sole aspect) and with a sustainable reintegration plan and after guaranteeing the child to participate in the process. A firewall must be ensured so that if family tracing finds parents are residing irregularly in the country or a third country, this shall not be communicated to immigration authorities. Unaccompanied and separated children should not be returned without ensuring that proper care and custodial arrangements are in place and that family members have been informed and contacted in the country of return.

76. The CRC Committee has already pointed out⁵⁵ that family reunification in the country of origin should not be pursued where there is a "reasonable risk" that such a return would lead to the violation of human rights of the child. The Committees caution States that non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations regarding return of children to their country of origin. When family reunification in the country of origin is not in the best interests of the child or not possible due to legal or other obstacles to return, the obligations under article 9 and 10 of the Convention come into effect and should govern the State's decisions on family reunification therein.⁵⁶ Possibilities for parents to reunify with their children and/ or regularize their status on the basis their children's best interests should be put in place.

77. The Committees are aware that children that remain in countries of origin may end up migrating irregularly and unsafely seeking to be reunited with their parents in destination countries. The Committees are of the opinion that States should develop effective and accessible family reunification procedures that would allow children to migrate in a regular manner and policies that enable regular migrants to be accompanied with their families to avoid separation. Procedures should seek to facilitate family life; and any restrictions necessary, legitimate and proportionate. While this duty is primarily for receiving countries, States of origin should also take measures to facilitate family reunification.⁵⁷

78. Countries should facilitate the family unification procedures to complete them in expeditious manner in line with the best interest of the child. Considering the definition of the "family" term mentioned in the Article 68 CRC, when it is not possible to evidence the kinship between the child and caregiver(s) through the legal avenues (i. e DNA test), state parties are recommended to apply best interest determination procedures for finalizing family reunification.

79. The Committees are aware that economic resources often hinder the right to family reunification and that the lack of adequate family income can constitute a barrier for reunion procedures. State Parties shall guarantee adequate support to those children and their parent(s) and/or siblings who lack means to implement their right to reunification.

6. Protection from all forms of violence and abuse, including exploitation, child labour and abduction, sale or traffic in children (art. 11, 27 CMW; art. 19, 26, 32, 34, 35, 36 CRC)

80. Migrant children, in particular, those who are unaccompanied or separated from their family and who are away from their country of origin are particularly vulnerable to different forms of violence and abuse, including trafficking and exploitation, child labour, sexual exploitation or the involvement in criminal and illegal activities in the transit country but also at their destination countries. Particularly when travelling or residing in an irregular manner, children are at risk of experiencing violence by State or non-State actors or witnessing violence against their parents or others.

81. It is essential that States take all necessary measures to prevent and combat the illicit transfer and non-return of children, as well as the worst forms of child labour, namely, all forms of slavery, commercial sexual exploitation, the use of children for illicit activities and hazardous work; and protect them from violence, economic exploitation. . The Committees recognize that children face

⁵⁵ See CRC Committee, General Comment No. 6, paras.82-84.

⁵⁶ Ibid., paras.82-84.

⁵⁷ CMW Committee Concluding Observations: El Salvador (1 May 2014; CMW/C/SLV/CO/2), para. 49.

gender specific risks and vulnerabilities, which should be identified and specifically addressed. In many contexts, girls may be even more vulnerable to trafficking especially for purposes of sexual exploitation. Additional measures shall be taken to address the particular vulnerability of girls and boys, inclusive of those who might identify as transgender or intersex, to trafficking for the purposes of sexual exploitation and abuse.

82. The Committees acknowledge that undocumented migrants children and parents on dependent residence or work permits, who can easily be made undocumented by their sponsor, and undocumented migrant children their families face risks of being reported to the immigration authorities by public service providers or other officials, or by private individuals, which limits their access to human rights, including protection and access to justice, and makes them more vulnerable to violence, labour and other types of exploitation and abuse.⁵⁸ This is the result of policies prioritizing the detection of migrants over their protection from violence, abuse and exploitation, making children more vulnerable to experiencing violence or witnessing violence against a parent.

83. The Committees are of the opinion that States should adopt the following measures:

- Adopt proactive measures to protect migrant children based on the best interest of the child and in line with international humanitarian, human rights and refugee law, when indications of child trafficking or risk of child trafficking are identified;
- Establish identification measures as well as referral mechanism to detect potential victims of trafficking and abuse.
- Grant migrant child victims of trafficking residence status and assistance, not to be made conditional on the initiation of criminal proceedings or their cooperation with law enforcement authorities;
- When there are different migratory statuses available for the migrant children, who are victims of human trafficking, the most protective status (i. e international protection, humanitarian residence) should be determined and applied by the officials and all relevant professionals on a case-by-case basis in accordance with the best interest of the child.
- Take effective measures to ensure that child migrants are protected from any form of slavery, commercial sexual exploitation, from being used for illicit activities or from any work that would jeopardize their health, safety or morals;
- Protect child migrants from violence and ensure their access to services, including their right to free compulsory education, leisure and health;
- Put in place protective measures to ensure that occupations dominated by migrant workers, especially women migrant workers, including girls, such as domestic work and some forms of entertainment, agriculture, textile, mining are subject to periodic inspections and regulations;
- Recognize the specific vulnerability of girls and boys as potential victims of trafficking for sexual and labour exploitation and take measures to reduce their vulnerabilities;
- Ensure comprehensive protection, support services and access to redress mechanisms for migrant children and their families reporting cases of violence, abuse or exploitation to police or other relevant authorities regardless of the migratory status. Children and parents must be able to safely report to police or other authorities as victims or witnesses, without any risks of immigration enforcement as a result;

84. The marital status of children should not have any significance in the consideration of their need for protection. The married child who is without his/her parents/legal guardian will be treated as an unaccompanied child and be subject to the care by child protection services like any other child, including the offer of a separate place of residence from his/her adult spouse. The best interest of the child and the right to be heard and to participate (art. 12 CRC) should be a primary consideration when decisions regarding the child's place of residence take place. Unaccompanied children are to get their applications considered separately from the spouses. The adult spouse is never to be considered the caretaker or legal guardian of the child.

⁵⁸ See CMW Committee. General Comment No. 2, para.2

7. Right to work and employment conditions and social security for those of legal working age (art. 25, 27, 52, 53, 54 and 55 CMW; art. 26, 32 CRC)

85. The Committees acknowledge that, with due respect to the regulations related to the minimum age for admission to employment and the prohibition and elimination of the worst forms of child labour,⁵⁹ not all work carried out by migrant children is exploitative or undertaken in hazardous environments and reminds States that migrant workers, irrespective of their status, should enjoy equal treatment to that of nationals in respect of remuneration, other conditions of work and terms of employment

86. Therefore, the Committees recommend States to take all appropriate legislative and administrative measures, including a gender-dimension, to regulate migrant children of legal working age's employment in order to ensure that they:

- Enjoy the same labour and rights protections of nationals.
- Enjoy fair terms of employment as well as decent working conditions, including the type of work to be performed, pay, hours of work, weekly rest periods, provisions for food and accommodation if relevant, annual leave, terms and conditions related to the ending of employment, and terms of repatriation.
- Enjoy specific protective measures regulating the hours and conditions under which children can work and instituting penalties and sanctions to enforce these standards
- Have a right to freedom of association and peaceful assembly to protect their interests, including the right to join a union.
- Have access to justice in case of violation of their rights by public or private actors including through ensuring effective complaints mechanisms and a firewall between labour rights and immigration enforcement.

87. The Committees acknowledge the situation of migrant children under the care of child protection authorities who are reaching the age of majority and recommend States to provide adequate follow-up, support and transition measures for children when they reach 18 years of age, particularly those leaving a care context, including by ensuring access to long-term regular migration status and reasonable opportunities for completing education and integrating into the labour market.⁶⁰

88. With respect to social security migrant children and their families shall have the right to the same treatment granted to nationals, insofar as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The Committees consider that in cases of necessity, States should provide emergency social assistance to migrant children and their families regardless of their migratory status, without any discrimination.⁶¹ The Committee 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.⁶²

89. In cases of migrant families, including with children born to migrant parents, the Committees stress the interdependence between parents' responsibilities regarding children's rights under article 18 CRC and CMW provisions on labour rights for migrant workers. Therefore, States should comprehensively take measures in order to ensure that migrants' rights at work, including those in irregular situation, are fully respected. In addition, the Committees are of the opinion that this approach is in line with a number of Sustainable Development Goals to be achieved, including SDGs 1.1, 5.1, 5.4, 8.7, 8.8, 10.2, among others.

90. State parties are also recommended to put special emphasis on the policies and related regulations about prevention of discriminatory practices towards the migrant children with disabilities

⁵⁹ See ILO Convention No. 138 (1973) concerning Minimum Age for Admission to Employment and ILO Convention No. 182 (2000) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

⁶⁰ See Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration, para.69.

⁶¹ See CMW Committee Concluding Observations: Argentina (2 November 2011, CMW/C/ARG/CO/1), para. 30.

⁶² See CMW Committee. General Comment No. 2, para.71.

and implementation of necessary practices for ensuring full enjoyment of all human rights and fundamental freedoms of the migrant children with disabilities on equal basis with other migrant children and children who are nationals of the state parties.

8. Right to an adequate standard of living (art. 45 CMW, art. 27 CRC)

91. States should ensure that migrant children have a standard of living adequate for their physical, mental, spiritual and moral development. As provided in article 27 (2) of the CRC, States shall provide material assistance and support programs to assist parents and others responsible for the child to implement this right particularly with regard to nutrition, clothing and housing.

92. States shall not interfere with children's right to housing through measures which prevent irregular migrants from the renting properties or the rental of properties to irregular migrants. States should protect tenants' rights and support access to justice in disputes and cases of exploitation.

93. States shall take measures to ensure an adequate standard of living in temporary locations, such as reception facilities, and formal and informal camps, and ensuring that these are accessible to children and their parents or legal guardians, including for persons with disabilities, older persons and pregnant, new and breastfeeding mothers. Ensure that residential facilities do not restrict children's day-to-day movements unnecessarily, including de-facto restriction of movement, due to fear of sexual, gender-based or other violence or other harms inside or outside the facility.

94. Develop procedures and standards to establish clear and binding firewalls between public or private service providers as well as public or private housing providers, and immigration enforcement authorities. Ensure that irregular migrants are not criminalised for exercising their right to an adequate standard of living, and that private actors –such as landlords and civil society organisations– who facilitate their exercise of this right are also not criminalised. Ensure that migrants, regardless of their status, are able to access homelessness shelters.

95. The Convention on the rights of the child holds that all children in the context of migration have equal rights as national children to economic, social, and cultural rights and requires that the basic services needed to enjoy those rights are provided in a non-discriminatory manner, regardless of the child or their parent's migration status. Therefore, States are encouraged to expeditiously reform legislation, policies and practices that prevent or discriminate against children affected by migration and their families, in particular those in an irregular situation, from effectively accessing services and benefits such as long-term social security and social assistance, among others.^{63 64}

9. Right to health (arts. 28, 45 CMW; art. 23, 24,39 CRC);

96. The Committees acknowledge that children's health can be affected by a variety of factors including structural determinants, such as poverty, unemployment, migration and population displacements, discrimination and marginalization.

97. The CRC Committee has already established that every migrant child is entitled to the same health care as nationals regardless of their migration status.⁶⁵ This includes all health services, whether preventative or curative, mental, physical or psychosocial, and provided in the community or in health care institutions. The Committees remind States that they have an obligation to ensure that children's health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability and that attention should also be given to any other forms of discrimination that might undermine children's health, and the implications of multiple forms of discrimination should also be

⁶³ See CRC Committee - Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration, para. 86.

⁶⁴ France (23 February 2016, CRC/C/FRA/CO/5), para. 74; Oman (14 March, 2016, CRC/C/OMN/CO/3-4), para.54. Argentina (2 November 2011 CMW/C/ARG/CO/1), para 30 (b).

⁶⁵ See general comment No. 6, paras.82-84.

addressed.⁶⁶ Attention should be paid to addressing the gender-specific impacts of reduced access to services, such as sexual and reproductive health rights and security from violence.⁶⁷

98. The Committees strongly urge States to expeditiously reform regulations and practices requiring migrants to present a residence permit in order to have access to health services⁶⁸ and prohibit the sharing of patients' data between health institutions and immigration authorities as well as immigration enforcement operations on or near public health premises, as these effectively limit or deprive migrant children in an irregular situation of their right to health.⁶⁹

99. Additional attention should be paid to resolving complicated health services requiring prompt and extensive response such as transplantation in which discriminatory approaches may severely affect the migrant children's health and significantly delay their treatment and recovery period."

100. The Committees are of the opinion that restrictions on adult migrants' right to health due to nationality or immigration status could also affect their children's right to health, life and development. Therefore, a comprehensively approach to children's rights, as well as to SDG 3, should include measures directed to ensuring the right to health to all migrant workers and their families, regardless their migration status.

10. Right to education and professional training (arts. 30, 43, 45 CMW; arts. 28, 29, 30 CRC)

101. Both Committees have already reiterated⁷⁰ that of all migrant children irrespective of status, shall have full access to all levels and all aspects of education (including non-compulsory education, early childhood education and care/ preschool, post-secondary and vocational training)) on the basis of equality of treatment with nationals of the State concerned.⁷¹ This obligation implies that whenever children who are nationals have access to education and programs to alleviate the adverse impact of direct (school fees) and indirect costs (e.g. uniforms, transport, meals, etc.) of schooling, including scholarships, States parties must ensure equal access to quality education by every children of migrant workers, irrespective of their migration status. Migrant children shall participate fully in examinations and receive certification of their studies.

102. The Committees strongly urge States to expeditiously reform regulations and practices that prevent migrant children, in particular undocumented/ irregularly residing children from registering at educational institutions and prohibit the sharing of students' data between educational institutions and immigration authorities as well as immigration enforcement operations on or near school premises, as these effectively limit or deprive migrant children in an irregular situation of their right to education. To respect children's right to education, States are also encouraged to avoid disruption during migration-related procedures, avoiding that children have to move during the school year if it possible, as well as supporting them to complete any compulsory and ongoing education courses when they reach the age of majority. A non-discriminatory approach would also enable access to upper level education on equal terms as nationals.

⁶⁶ See general comment No. 15 (2013), on the right of the child to the enjoyment of the highest attainable standard of health, paras.5, 8.

⁶⁷ CRC Committee, Report of the 2012 Day of General Discussion the Rights of all Children in the Context of International Migration, para. 86.

⁶⁸ See general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, para.76. Also, see France (23 February 2016, CRC/C/FRA/CO/5), paras.61 (e), 62 (e); Chile (30 October 2015, CRC/C/CHL/CO/4-5), para. 77; South Africa (27 October 2016, CRC/C/ZAF/CO/2), para. 31 (d).

⁶⁹ See CMW Committee. General Comment No. 2, para.74; Turkey (31 May 2016 CMW/C/TUR/CO/1), para. 54

⁷⁰ See general comment No. 6, paras.41-43; CMW Committee. General Comment No. 2, para.75-79.

⁷¹ See Bangladesh (30 October 2015, CRC/C/BGD/CO/5), para. 71 (a); Chile (30 October 2015, CRC/C/CHL/CO/4-5), para.77; Kazakhstan (30 October 2015, CRC/C/KAZ/CO/4), para. 53; France (23 February 2016, CRC/C/FRA/CO/5), para. 74; Mexico (3 July 2015, CRC/C/MEX/CO/4-5), para. 59 (f); Pakistan (11 July 2016, CRC/C/PAK/CO/5), para 66 (c); UK (12 July 2016, CRC/C/GBR/CO/5), para. 76 (f), 77 (f); Slovakia (20 July 2016, CRC/C/SVK/CO/3-5), para. 53 (b). Niger (11 October 2016 CMW/C/NER/CO/1), para. 39; Turkey (31 May 2016 CMW/C/TUR/CO/1), para. 68

103. State Parties shall put in place adequate measures to recognize the child's former education through the equivalence of previously obtained school certificates and/or the emission of new certification based on the child's capacities and capabilities. Recognition and inclusion of skills acquired by the child during the migration journey in the evaluation of the child's educational level is encouraged to avoid creating stigmatization or penalization.

104. The principle of equality of treatment requires States parties to both eliminate any discrimination against migrant children and also to adopt appropriate and gender-sensitive provisions to overcome barriers. This means that where necessary, targeted measures are needed, including additional language education (art. 45 MWC), including additional staff, and other inter-cultural support.

105. States should develop concrete measures in order to foster intercultural dialogue between migrant and host communities and to prevent xenophobia and related intolerance against migrant children. In addition, integrating human rights education, including on non-discrimination and equality, as well as mainstreaming migration and migrants' rights within education curricula would contribute to prevent in the long term xenophobic attitudes that could affect migrants' integration, including children's rights.

IV. International cooperation

106. The Committees stress that a comprehensive interpretation of the CRC and the CMW -in particular, Part VI- should lead States to develop bilateral, regional and global cooperation in order to ensure the rights of all children in the context of migration, taking into consideration the guidelines developed in this Joint General Comment.

107. The Committees recognizes the importance of coordinating efforts among countries of origin, transit and destination, while also recognizing their roles and their responsibilities to address the migration of children and to safeguard their human rights, with due consideration for the protection of the best interest of the child.

108. The Committees reaffirm that in all international, regional or bilateral cooperation, the impacts on children's rights should be duly considered, and adaptations made as necessary to uphold the rights of the child. The Committees are concerned by the increase in bilateral or multilateral cooperation agreements that focus on restricting migration, which have demonstrably negative impacts on children's rights, and urge rather cooperation that facilitates safe, orderly and regular migration with full respect for human rights. Therefore, the Committees reaffirms the need to address international migration through international, regional or bilateral cooperation and dialogue and through a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of migrant children, so as to ensure safe, orderly and regular migration, with full respect for human rights and avoiding approaches that might aggravate their vulnerability.⁷²

V. Dissemination and use of the Joint General Comment and reporting

109. States parties should widely disseminate the present joint general comment to parliaments, governments, including child protection and migration authorities and personnel, and the judiciary, nationally and locally. It should also be made known to children and all relevant professionals and stakeholders, including those working for and with children (i.e., judges, lawyers, police and other law enforcement entities, teachers, guardians, social workers, staff of public or private welfare institutions and shelters, health care providers), the media and civil society at large.

110. This joint general comment should be translated into relevant languages; child-friendly/appropriate versions and formats accessible to persons with disabilities should be made available. Conferences, seminars, workshops and other events should be held to share good practices

⁷² See CMW Committee Concluding Observations: Honduras (3 October 2016; CMW/C/HND/CO/1), para. 55; El Salvador, para. 49; Niger (11 October 2016 CMW/C/NER/CO/1), para. 43

on how best to implement the joint general comment. It should also be incorporated into the formal pre- and in-service training of all concerned professionals and technical staff –in particular, child protection and migration authorities and personnel-, and should be made available to all national and local human rights institutions, and other human rights non-governmental organizations.

111. States parties should include in their reports under CMW and CRC information about the measures guided by this joint general comments that they have implemented and their outcomes.

VI. Treaty ratification or accession and reservations

112. States parties are encouraged to ratify:

Optional Protocol to the CRC on a communications procedure (2011).

CMW

CMW, articles 76 and 77

States parties should review and modify or withdraw reservations to