

# Every “i” Dotted and Every “t” Crossed? : Reflections on The Joint General Comments on The Human Rights of Children in The Context of International Migration, and Their Application in The Horn of Africa

**Benyam Dawit Mezmur**

## **1 INTRODUCTION**

The child migrant and refugee crisis is almost a global one. In 2017, there were more than 258 million migrants globally,<sup>1</sup> of whom 14% were under 20 years of age.<sup>2</sup> Safe and regular pathways are critical, *inter alia*, to reduce the instances of the heartbreaking image of the tiny corpse of Alan Kurdi washed up on the Turkish beach in 2015 that at least made headlines, though it seems that the world is becoming far too immune to such tragedies.

The UN Committee on the Rights of the Child (CRC Committee) has engaged with State Parties on child migration issues since its early days, and has provided continuous guidance on the nature of State Parties obligations.<sup>3</sup> In 2017, the CRC Committee further consolidated its guidance to State Parties by adopting, together with the Committee on Migrant Workers (CMW Committee), two joint General Comments (JGCs) – on children in the context of international migration.<sup>4</sup>

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\*Associate Professor of Law, Dullah Omar Institute for Constitutional Law, Governance and Human Rights, Faculty of Law, University of the Western Cape. The views contained in this article are that of the author only, and do not necessarily represent the views of any organization that the writer is affiliated with.

<sup>1</sup> United Nations “International Migration Report 2017” (ST/ESA/SER.A/403) (December 2017) available at <http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017.pdf> 1.

<sup>2</sup> United Nations, *Ibid* 10.

<sup>3</sup> It adopted General Comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin.

<sup>4</sup> The first one is Joint General Comment (JGC) No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child is entitled “general principles regarding the human rights of children in the context of international migration” while the second one is joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child entitled “State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return”. The CMW Committee monitors the implementation of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)

Arguably, the process and adoption of the JGCs was significantly informed or influenced by the migration crisis in Europe. It might even be intimated that the orientation of the JGCs and the issues emphasized therein are slanted towards issues with which State Parties that are countries of destination often grapple.

The first JGC focused on general principles, while the second one emphasized States Parties' obligations in respect of children in the context of international migration. The JGCs contain the rich and up-to-date jurisprudence of the CRC Committee in respect of children in the context of international migration.

Even though child migration occurs all over the world, each region has its own particular patterns and context. In the Horn of Africa (namely Djibouti, Ethiopia, Eritrea, and Somalia) where all four are State Parties to the CRC and not the CMW, children on the move are a growing concern, where trafficking/smuggling, violence against migrant children, and forced and involuntary returns are all part of the identified trends.

This article, after the introduction, provides a brief background to the JGCs. Thereafter some specific thematic issues that are contentious or unclear are identified for discussion. These issues are: the concept of a "joint" General Comment;<sup>5</sup> age determination; best interests; firewalls; non-refoulement; right to family life; child marriage and migration; and immigration detention. Given the fact that it has been over 18 months since the adoption of the JGCs in October 2017, the manner in which they have proved to be relevant and are being used in the Concluding Observations (COBs) of the CRC Committee will be identified and assessed. Even though none of the COBs discussed in this section are on State Parties in the Horn of Africa, as these State Parties have not yet been reviewed since the adoption of the JGCs, the objective of the discussion here is also to assist to decipher and tentatively assess the relevance of the JGCs in respect of some of the

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<sup>5</sup> For example, the Australian Government offered its views on the draft JGCs under four headings and 10 sub-headings. It challenged the concept of a "joint" General Comment. Submission of Australian Government: Draft 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 (August 2017) available at: [https://www.ohchr.org/Documents/HRBodies/CMW/JointGC\\_CRC\\_CMW/Add/AustralianGovernment.pdf](https://www.ohchr.org/Documents/HRBodies/CMW/JointGC_CRC_CMW/Add/AustralianGovernment.pdf)

issues that would arise in the context of the Horn of Africa countries. Then, with the rights of migrant children in the Horn of Africa as a backdrop, the article proffers some tentative thoughts on the advantages, and potential shortcomings of the applications of the JGCs in the sub-region. A conclusion sums up the discussion.

## 2 Background to the Joint General Comments

Between 2015-2017, the CRC Committee together with the CMW, drafted and adopted two JGCs on children in the context of international migration.<sup>6</sup> The Committees received a number of written contributions,<sup>7</sup> and the drafting process also included a series of global and regional consultations held between May and July 2017 in Bangkok, Beirut, Berlin, Dakar, Geneva, Madrid and Mexico City.<sup>8</sup> The JGCs were part of the same drafting and adoption process. In this respect, both JGCs contain a footnote that underscores that each should be read in conjunction with the other.<sup>9</sup> While a legitimate question may be posed stating why the two JGCs were not made one document, the answer may lie in the word count for a General Comment as contained in Resolution 68/268, which limits it to 10 700 words.<sup>10</sup>

In an unusual departure from previous General Comments, which refer to “the rights of the child”, or “children’s rights”, the title of the JGCs refers to the “human rights of children”- probably without any significant substantive implications.<sup>11</sup> Furthermore, with regard to the title, it would be remiss not to underscore the fact that the JGCs cover the full gamut of countries of origin, transit, destination, as well as return.<sup>12</sup>

The JGCs are limited to international, and not applicable to internal, migration. Nonetheless, the scope of the JGCs is broad. As explicitly

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<sup>6</sup> See JGCs *supra*.

<sup>7</sup> It is to be recalled that, according to para 14 of Resolution 68/268, the General Assembly “[e]ncourages the human rights treaty bodies to develop an aligned consultation process for the elaboration of general comments that provides for consultation with States parties in particular and bears in mind the views of other stakeholders during the elaboration of new general comments.”

<sup>8</sup> JGC No 22 *supra*, para 1.

<sup>9</sup> See the second “\*” footnote in JGC No 22, and first “\*” footnote in JGC No 23.

<sup>10</sup> See General Assembly Resolution “Strengthening and enhancing the effective functioning of the human rights treaty body system” (A/RES/68/268) (21 April 2014).

<sup>11</sup> This is the same wording used during the 2012 Day of General Discussion organized by the CRC Committee.

<sup>12</sup> As explicitly included in the title of JGC No 23.

provided in JGC No 22, it “addresses the human rights of all children in the context of international migration”.<sup>13</sup> This covers accompanied, unaccompanied, and separated; children as well as those who “have returned to their country of origin” or “were born to migrant parents in countries of transit or destination”.<sup>14</sup> Based on experience with a number of countries, (some Eastern European countries where parents leave children behind to travel and work in Russia come to mind<sup>15</sup>), the JGCs also apply to children who “remained in their country of origin while one or both parents migrated to another country, and regardless of their or their parents’ migration or residence status (migration status)”.<sup>16</sup>

True to form, the JGCs do not make recommendations about preventing migration. In fact, the JGCs explicitly recognize that “migration can bring positive outcomes to individuals, families and broader communities in countries of origin, transit, destination and return...”.<sup>17</sup> This is done without losing sight of the fact that some forms of migration, for instance, unsafe and/or irregular migration, are riddled with risks for violation of the rights of the child.<sup>18</sup> Also, as a child-rights based approach would demand, the JGCs acknowledge the agency of children, and do not see every migrant child through a blanket “victim lens”.<sup>19</sup> Furthermore, while the causes of migration are diverse, if any, they receive little mention in the JGCs.

The JGCs proceed in two systemic strands. The first one, JGC 22, as the title “on the general principles regarding the human rights of children in the context of international migration” indicates, covers: general

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<sup>13</sup> JGC No 22 *supra*, para 9.

<sup>14</sup> *Ibid.*

<sup>15</sup> Examples of this phenomenon have been noted in Moldova, Bulgaria, and Ukraine to name a few. See L Yanovich ‘Children Left Behind: The Impact of Labor Migration in Moldova and Ukraine’ Migration Policy Institute 23 January 2015 accessed at <https://www.migrationpolicy.org/article/children-left-behind-impact-labor-migration-moldova-and-ukraine> on 25 April 2018. Also see UNICEF ‘Children at Risk in Central and Eastern Europe: Perils and Promises’ accessed at <https://www.unicef-irc.org/publications/pdf/monee4sume.pdf> on 23 April 2018.

<sup>16</sup> JGC No 22 *supra*, para 9.

<sup>17</sup> JGC No 22 *supra*, para 8.

<sup>18</sup> *Ibid.*

<sup>19</sup> See, for instance, paras 34-39 on right to be heard, express his or her views and participation (art. 12 of the CRC).

measures of implementation (such as data); non-discrimination; best interests of the child; the right to be heard; the right to life, survival and development; non-refoulement; and prohibition of collective expulsion. Issues revolving around international cooperation as well as the dissemination and use of the JGCs are also covered.

JGC 23, which is focused on "...States parties' obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return" covers age; right to liberty; due process guarantees and access to justice; right to a name, identity, and a nationality; family life; right to an adequate standard of living; right to health; and the right to education and professional training. In addition, while the criteria for categorization is not apparent in the JGC, issues related to violence against children feature under two separate headings: protection from all forms of violence and abuse, including exploitation, child labour and abduction, and sale of or trafficking in children; and the right to protection from economic exploitation, including, underage and hazardous work, employment conditions, and social security.

### **3 Analysis of Select Thematic Issues**

A number of contentious or unclear issues in the JGCs need a close consideration. In particular, these issues are: the concept of a "joint" General Comment, age determination; best interests; firewalls; non-refoulement; right to family life; child marriage and migration; and immigration detention.

#### **3.1 The Concept of A "Joint" General Comment**

The first ever JGC - "Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices"<sup>20</sup> [JGR/GC] was adopted by the CRC Committee and the Committee on the Elimination of Discrimination against Women (CEDAW Committee). Worthy of note in this respect is the fact that, while, strictly speaking, the overlapping personal

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<sup>20</sup> (14 November 2014) (CEDAW/C/GC/31-CRC/C/GC/18).

scope that the two Committees have in common is the girl child, the JGC went beyond this narrow shared personal scope.<sup>21</sup>

Why then would the concept of a “joint” General Comment become a contentious issue, as expressed by a number of States during the consultation process as well as submissions, in relation to migration? This is so because of the relatively low number of ratifications that the Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (ICRMW)<sup>22</sup> enjoys: at the time of the adoption of the JGCs it stood at 51 State Parties.<sup>23</sup> Unfortunately, a closer look at the regions of the world from which the majority of the State Parties to the Convention come shows that the Convention mostly enjoys the support of countries in the “south”.<sup>24</sup> In fact, the ICRMW has the singular status of being the only UN core human rights instrument not yet signed or ratified by any of the 28 European Union (EU) Member States.<sup>25</sup> As a result, there was concern that the concept of a “joint” General Comment would impose obligations on non-State Parties to the ICRMW.

The CRC Committee addressed this concern by ensuring that the largest majority of obligations in the JGCs are based on the Convention on the Rights of the Child (CRC) provisions. On the few occasions that a specific obligation emanated from the ICRMW only, the JGCs explicitly acknowledged this fact.<sup>26</sup>

### 3.2 Best Interests

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<sup>21</sup> *Ibid* para 4.

<sup>22</sup> Adopted 18 December 1990 and came into force on 1 July 2003.

<sup>23</sup> Subsequent to the adoption of the JGC, three countries, namely, Benin, The Gambia and Guinea Bissau, have ratified the Convention, bringing the ratification number to a modest 54.

<sup>24</sup> Albania and Bosnia and Herzegovina are the only two European countries that have ratified the Convention. There are only three more countries from Europe that have signed but not ratified it – namely Armenia, Montenegro, and Serbia.

<sup>25</sup> A. Desmond “A vexed relationship: The ICRMW vis-à-vis the EU and its member states” 296 in A. Desmond [ed.] *Shining new light on the UN Migrant Workers Convention*, Pretoria University Law Publishing (2018).

<sup>26</sup> A good example in this respect is the obligation in respect of the prohibition of collective expulsion. In this regard para 45 of JGC 22 states that “[t]he Committees recall that article 22 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and other international and regional human rights instruments forbid collective expulsions...”.

Article 3 of the CRC, which is the umbrella provision on the best interests of the child, provides in part that "...the best interests of the child shall be a primary consideration".<sup>27</sup> Therefore, the Convention does not say that children's best interests should be *the primary* consideration. This was debated, and ultimately the drafters settled for *a primary consideration*.<sup>28</sup> Juxtaposing this with immigration law and policy would mean that best interests do not at all times override all other considerations, including migration management and border security. In the meantime, the right of the child to have his or her best interests regarded as a primary consideration means that the child's interests is a *high priority* and not just one of several considerations.<sup>29</sup>

Especially in respect of unaccompanied and separated children, the CRC Committee is of the view that:

A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process.<sup>30</sup>

In addition, seemingly subsidiary matters, "such as the appointment of a competent guardian as expeditiously as possible", are considered to serve "as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child".<sup>31</sup>

The JGCs give best interests a prominent role<sup>32</sup> as having a "high priority" and that "larger weight must be attached to what serves the child best" to ensure the full and effective enjoyment of rights.<sup>33</sup> Further, and, rightly so, best interests is not an issue that should occupy only child protection authorities, but is relevant for any

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<sup>27</sup> Art. 3(1) of the CRC.

<sup>28</sup> *Ibid.*

<sup>29</sup> GC No 6 *supra*, para 14.

<sup>30</sup> *Ibid.*, para. 20.

<sup>31</sup> *Ibid.* para. 21. The UNHCR has developed Guidelines on the best interests of the child in the context of unaccompanied and separated children.

<sup>32</sup> JGC No 22 *supra*, paras 27 – 33.

<sup>33</sup> *Ibid.*, para 28

migration policies, immigration laws, planning, implementation and decision-making.<sup>34</sup>

The best interests may, and perhaps should, inform the interpretation of a State's protection obligations under the Refugee Convention.<sup>35</sup> This does not mean that it would "change ...the refugee definition in determining substantive eligibility but it informs the interpretation of a particular element of the Refugee Convention definition".<sup>36</sup> It is also argued, and incorporated in the JGC, as well as evidenced in State practice that best interests can serve as an "independent basis for protection" outside the traditional refugee protection regime. Therefore, apart from circumstances that meet the high threshold of non-refoulement, there may be human rights protection reasons that require the non-return of a child. This is of particular importance for those who do not qualify for asylum seeker/refugee status, but still have serious protection needs. Arguably, it is a missed opportunity that the JGCs do not explicitly provide that the principle should be an independent source of protection status.<sup>37</sup>

There is State practice that supports this approach. For example, Costa Rica's immigration law prohibits the return of an unaccompanied person whose age cannot be determined with certainty.<sup>38</sup> Peru offers similar protection through non-return if the migrant does not qualify for international protection, but still faces life-threatening or great vulnerability if they were to leave the country.<sup>39</sup> Italy, too, has a legislative framework that prohibits the return of pregnant women and those that care for an infant under the age of six months.<sup>40</sup>

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<sup>34</sup> JGC No 22 supra, para 29. See too R Brittle "International Migration: Shared Commitment to Children's Rights and Protection" (10 January 2018) EJIL Talk available <https://www.ejiltalk.org/international-migration-shared-commitment-to-childrens-rights-and-protection/>

<sup>35</sup> See generally J.M. Pobjoy 'The Best Interests of the Child Principle as an Independent Source of International Protection' *International and Comparative Law Quarterly* 2015 64(2) 327-363; J.M. Pobjoy 'A child rights framework for assessing the status of refugee children' in S. Juss and C. Harvey (eds) *Contemporary Issues in Refugee Law*, Cheltenham/Northampton: Edward Elgar Publishing, (2013); M. Kalverboer, *et al* 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' 2017 25(1) *The International Journal of Children's Rights* 114-139.

<sup>36</sup> See Pobjoy 2015 *Ibid*.

<sup>37</sup> *Ibid*.

<sup>38</sup> See Migration Law No. 8764, art. 65.

<sup>39</sup> Legislative Decree No. 1350 of 2017.

<sup>40</sup> Italy, Legislative Decree 286/1998, art. 19(1).



### 3.3 Age Determination

The issue of age determination is central to child migration cases, as many migrants do not possess documentation that identifies their age. In many jurisdictions, the decision that a person is not a child can have significant implications for legal processes.<sup>41</sup> It can affect the determination of issues that relate to: whether one can apply as part of a family; the capacity to submit an asylum application in one's own right; consent for age assessment procedures as an unaccompanied child; accommodation in non-specialized facilities along with adults; the age at which fingerprinting of children is allowed under asylum law; as well as the age when a child can be a sponsor or beneficiary of family reunification procedures.

Unfortunately, mechanisms for age determination are matters of contention,<sup>42</sup> for instance, in Europe,<sup>43</sup> where medical tests to determine age are notoriously inaccurate.<sup>44</sup> As a result, the JGCs recommend a "comprehensive assessment of the child's physical and psychological development, conducted by specialist pediatricians or other professionals who are skilled in combining different aspects of development".<sup>45</sup> It is further recommended that "[s]uch assessments should be carried out in a prompt, child-friendly, gender sensitive and culturally appropriate manner, including interviews of children and,

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<sup>41</sup> For more details on the guidelines, policies and practice on age determination see Department of Immigration and Border Protection, available at: <https://www.homeaffairs.gov.au/AccessandAccountability/Documents/FOI/FA140800200.PDF>.

<sup>42</sup> Reliance on hand/wrist, dental, and collarbone X-rays, as well as dental and sexual maturation observations have a large margin for error. Legal questions around best interests, informed consent, presumption of minority, the use of the least invasive method, availability of an appeal or judicial review of decisions on age determination, the availability of qualified professionals, appointment of guardians /representatives for unaccompanied minors, as well as regulations on exposure to ionization for non-medical purposes may arise. See discussion in Doctors of the World "Age assessment for unaccompanied minors" (2015) available at: <https://mdmeuroblog.files.wordpress.com/2014/01/age-determination-def.pdf> 10-11.

<sup>43</sup> The largest majority of cases under OPIC submitted to the CRC Committee are on age determination against European countries prominent among which is Spain.

<sup>44</sup> See Royal College of Pediatrics and Child Health "The health of refugee children- Guidelines for pediatricians" (1999). See discussion in Doctors of the World "Age assessment for unaccompanied minors" (2015) <available at <https://mdmeuroblog.files.wordpress.com/2014/01/age-determination-def.pdf>> 15-16. The difficulty is exacerbated because of differences in socio-demographic, health and ethnicity of the unaccompanied children.

<sup>45</sup> See JGC No 23 *supra*, para 4.

as appropriate, accompanying adults, in a language the child understands".<sup>46</sup>

Despite this guidance, there is still uncertainty around many issues, such as, the basic qualifications required to become an Age Determination Officer, and how Age Determination Officers should always adhere to the benefit of doubt test. Furthermore, at which stage of the age determination process a person should be entitled to legal assistance is unclear.<sup>47</sup>

### 3.4 Non-Refoulement

In a conscious departure from previous General Comments that only addressed the so-called general principles of the Convention,<sup>48</sup> the JGCs added an additional principle[s]- non-refoulement and prohibition of collective expulsion.<sup>49</sup> Non-refoulement is an obligation that originally emanated from international refugee law,<sup>50</sup> but has further been developed in international human rights law.<sup>51</sup> It prohibits States, in the words of the JGC, "... from removing individuals, regardless of migration, nationality, asylum or other status, from their jurisdiction when they would be at risk of irreparable harm upon return...".<sup>52</sup>

JGC No 22 attempts to clarify three critical issues in respect of non-refoulement. First, the adoption of a very narrow definition of the principle by some States<sup>53</sup> to the extent that the principle would not be applicable to a child if the authorities rejected the child at the border but before entering into the country, is dismissed.<sup>54</sup> Secondly, the substantial grounds for believing that a person is at a real risk of

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<sup>46</sup> *Ibid.*

<sup>47</sup> An asylum seeker also often has very limited rights to review an adverse age determination- for instance in Australia.

<sup>48</sup> Namely arts. 2, 3, 6 and 12 of the CRC.

<sup>49</sup> It is to be noted that this addition is done under a heading titled "Fundamental principles of the Conventions with regard to the rights of children in the context of international migration". If the discussion under this heading only focused on the four general principles of the Convention, past practice suggests that the heading would have only been "General Principles".

<sup>50</sup> Art. 33 of the 1951 Convention relating to the Status of Refugees.

<sup>51</sup> See, for example, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>52</sup> JGC No 22 *supra*, para 45.

<sup>53</sup> Some States express a very restricted view on the application of non-refoulement.

<sup>54</sup> JGC No 22 *supra*, para 46.

irreparable harm need not come from State authorities only, but can also emanate from non-State actors.<sup>55</sup>

Thirdly, questions have been raised about the application of non-refoulement in respect of a real risk of a violation of socio-economic rights. The earlier draft of the JGCs circulated for public consultation had read "...in the case of migrant children the principle of non-refoulement, should be construed as including socio-economic conditions in countries of origin".<sup>56</sup> While this line is completely removed from the final draft of the JGCs, the Committees still seem to have left the possibility open, at least in exceptional circumstances, so that socio-economic conditions in countries of origin or transit could be sufficient to warrant the application of the non-refoulement principle. This argument seems to be supported by the wording used when describing examples of real risk of irreparable harm: "...those contemplated under articles 6 (1) (on the inherent right to life) and 37 (on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) of the Convention on the Rights of the Child" which is preceded by the qualifier with the wording "such as, but by no means limited to..." (Insertions mine). The jurisprudence of the Human Rights Committee has underscored that, save for very strict exceptions, difficulty in accessing social services or poor living conditions do not suffice as grounds for protection against torture and the *non-refoulement*, which are absolute in nature. Such exceptions will need to render the plight of the individual concerned and the difficulty faced exceptionally harsh and irreparable in nature – such as in the *Jasin v Denmark* case where a single mother of three young children, who herself experienced health complication (asthma), extreme poverty, hardship and destitution and lack of medical care when she was in Italy as first country of asylum- and the Human Rights Committee indicated that the failure by Denmark:

...to devote sufficient analysis to the author's personal experience and to the foreseeable consequences of forcibly returning her to Italy.... also failed to seek proper assurance from the Italian authorities that the author and her three minor children would be received in conditions compatible with their status as asylum seekers ... and the

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<sup>55</sup> *Ibid.*

<sup>56</sup> Para 43 of the April 2017 draft [before the draft JGC was split into two JGCs].

guarantees under article 7 of the Covenant.<sup>57</sup>

### 3.5 Family Life

Neither the CRC nor the ICRMW contain an explicit “right to family life”. However, a long list of provisions of the CRC,<sup>58</sup> including its preamble, emphasize the importance of the family unit. At the center of the notion of “family life” is what constitutes a family, including, for the purposes of non-separation, family reunification, family tracing, etc in the context of migration. The JGCs attempt to provide guidance on how the term “parents” should be interpreted, by relying on an earlier General Comment of the CRC Committee,<sup>59</sup> and argue that it should be broad “to include biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom”.<sup>60</sup>

Such a definition, while often important for children’s best interests, is likely to face resistance from a number of countries that are predominantly countries of destination. Within the EU, for instance, family reunification beyond the nuclear family<sup>61</sup> is often left to the discretion of the Member State. This is so despite the evidence that the jurisprudence of the European Court of Human Rights supports a broad interpretation of “family” which goes beyond blood ties on a case-by-case basis. So, for instance, family reunification for first-degree

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<sup>57</sup> *Jasin v Denmark* (Communication no. 2360/2014) at para 8.9. Other jurisprudence of the Human Rights Committee and of the European Court of Human Rights also seems to support this position. See UN Human Rights Committee (HRC), *Raziyeh Rezaifar v. Denmark*, 10 April 2017, CCPR/C/119/D/2512/2014, available at: <https://www.refworld.org/docid/592c0b134.html> accessed on 24 April 2019; *K.I. v. Russia*, 58182/14, Council of Europe: European Court of Human Rights, 7 November 2017, available at: <https://www.refworld.org/cases,ECHR,5a02db0b4.html> on 22 April 2019; *T.M. and Others v. Russia*, 31189/15 and 5 others, Council of Europe: European court of Human Rights, 7 November 2017, available at: <https://www.refworld.org/cases,ECHR,5a02d58a4.html> accessed 25 April 2019; The CRC Committee has also upheld the foregoing principles. See for instance *D.D. v. Spain*, CRC/C/80/D/4/2016 accessed on 26 April 2019.

<sup>58</sup> Arts. 9, 10, 11, 16, 18, 19, 20 and 27 (4) of the CRC.

<sup>59</sup> GC No 14 *supra*, para 6.

<sup>60</sup> JGC No 23 *supra*, para 27. Such as definition of “parents” may find some legislative basis, among others, in art. 5 of the CRC.

<sup>61</sup> Understood as spouse and biological/adopted children of the couple below 18 and unmarried and if above 18 with prove that they are unmarried and dependent on the parents.

ascendants in the direct line is either not allowed by some EU Member States<sup>62</sup> or allowed by a few in instances where the ascendants are without support in the country of origin.<sup>63</sup>

One of the negative effects of highly restrictive family reunification processes is to contribute to the exposure of children to trafficking and other harms because of irregular entry with a view to reunite with family members,<sup>64</sup> an issue the JGCs acknowledge and attempt to address.<sup>65</sup> The JGCs also provide that “reasonable risk” should be assessed carefully before a child is reunited with his/her family in the country of origin;<sup>66</sup> attempt to restrict the time limits and discretionary powers of States in dealing with family reunification of unaccompanied migrant children;<sup>67</sup> and require that detailed information which is child friendly and age appropriate be provided to a child in the instances when a country of destination denies family reunification.<sup>68</sup>

### 3.6 Child Marriage and Migration

Even though the CRC does not explicitly prohibit child marriage,<sup>69</sup> a number of its provisions have been interpreted as prohibiting the practice.<sup>70</sup> In the Joint General Recommendation No. 31 (2014) of the Committee on the Elimination of Discrimination against Women / General Comment No.18 of the Committee on the Rights of the Child

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<sup>62</sup> France and Belgium are examples.

<sup>63</sup> *Ibid.*

<sup>64</sup> CRC Committee, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, 28 September 2012, available at <https://www.refworld.org/docid/51efb6a4.html> accessed on 27 April 2019.

<sup>65</sup> See, JGC No 23 *supra*, para 37.

<sup>66</sup> *Ibid* para 34.

<sup>67</sup> *Ibid* para 33.

<sup>68</sup> *Ibid* para 36.

<sup>69</sup> The CEDAW on the other hand explicitly prohibits the practice of early marriages under Article 16(2), though it does not provide the minimum age for marriage.

<sup>70</sup> These provisions include Article 24(3) which requires states to “take ... measures with a view to abolishing traditional practices ...” and Article 2(1) that prohibits discrimination on the basis of sex. Child marriage is also closely linked with the definition of a child. See S. Detrick, *A commentary on the United Convention of the Rights of the Child* (1999), 58-59; G. Van Bueren, *The international law on the rights of the child* (1995), 36-37.

(2014) on harmful practices (JGR/GC),<sup>71</sup> the possibility is provided for children below 18 but above 16 years of age being allowed to marry based “on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition”.<sup>72</sup>

Despite this exception, most, if not all, of the recommendations of the CRC Committee adopted after the adoption of the JGR/GC in 2014 do not allow for an exception.<sup>73</sup> Often, in relation to African countries, recommendations have been made to States to remove exceptions that allow marriages below the age of 18 not only on the basis of the CRC, but also based on the provisions of the African Children’s Charter.<sup>74</sup>

The link between migration and child marriage is recognized by the JGCs. The notion of so-called “temporary” or “tourist marriages”<sup>75</sup> that often operate outside of the formal legal system, and at times in the context of migration, is one such example.<sup>76</sup> However, of more interest in respect of migration are a number of unsettled questions pertaining to child marriage. For instance: how should child brides who arrive in a country of transit or destination be treated when the new country’s laws prohibit marriage below the age of 18? Should the child bride be placed with child protection services? What if the child bride has an infant? Should the older partner [usually the husband] be investigated for sexual abuse? The story of a 14 year-old asylum seeker girl from Syria in Norway who had an 18-months-old child and was again pregnant, and the decision by the Norwegian authorities to investigate filing charges against her adult husband triggered

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<sup>71</sup> See CEDAW/C/GC/31-CRC/C/GC/18) adopted on 14 November 2014.

<sup>72</sup> *Ibid.*, para 20. The reason why such an exception is allowed appears to be for the purpose of “respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life”.

<sup>73</sup> More recently, in the context of Bahrain, the Committee has raised serious concerns that “the sharia court may grant permission for girls under the age of 16 years to marry”. CRC Committee, COBs: Bahrain, (CRC/C/BHR/CO/4-6) (February 2019) para 15.

<sup>74</sup> In the context of Guinea, despite the prohibition of child marriages in its Penal Code (2016), the Committee asked the State Party “to expeditiously amend its legislation to remove all exceptions that allow marriage under the age of 18 years, in line with the Convention and the ... Charter ...”.CRC Committee, COBs: Guinea, (CRC/C/GIN/CO/3-6) (February 2019) para 16.

<sup>75</sup> See Joint GC/GR *supra*, para 24.

<sup>76</sup> In the context of Egypt, the Committee has expressed its deep concern “at ‘tourist’/‘temporary’ marriages ...”. CRC Committee, COBs: Egypt, (CRC/C/EGY/CO/3-4) (July 2011) para 70.

debate.<sup>77</sup> Calls have been made to develop guidelines on how to handle individual cases of migrant/asylum seeking brides and their adult husbands.<sup>78</sup>

### 3.7 Firewalls

Firewalls, in the context of migration, by definition, are, “the separation of immigration enforcement activities from public service provision”.<sup>79</sup> At the centre of establishing firewalls is the need to uphold the rights of irregular migrants, and to put the enforcement of immigration rules subsidiary to the rights of migrants. The objections to firewalls by States seem to emphasize the underlying assumption of the importance of considering the enforcement of immigration rules - which could lead to the risk of being reported, detained and deported - as a priority.<sup>80</sup>

In the JGCs the issue of firewalls is covered in five places- in respect of violence; economic exploitation; the right to an adequate standard of living; and the rights to health and education. States are requested to establish that “effective firewalls between child protection services and immigration enforcement should be ensured”<sup>81</sup>, and to ensure “access to justice in case of violation of their rights by public or private actors, including by ensuring effective complaints mechanisms and a firewall between labour rights and immigration enforcement”.<sup>82</sup> Also, there is an emphasis on the obligation to “... establish firewalls between public or private service providers, including public or private housing providers, and immigration enforcement authorities”.<sup>83</sup> In respect of health, a similar call is made to provide

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<sup>77</sup> See News in English Norway “Child brides pose new challenge in ongoing refugee crisis” (04 December 2015) available at: <https://www.newsinenglish.no/2015/12/04/child-brides-pose-new-challenge-in-ongoing-refugee-crisis/>

<sup>78</sup> See E. Batha ‘Norway to ban child marriages as it seeks to set a global example’ *Reuters*, 22 May 2018, <<https://www.reuters.com/article/us-norway-childmarriage-lawmaking/norway-to-ban-child-marriage-as-it-seeks-to-set-a-global-example-idUSKCN1IN29D>>.

<sup>79</sup> F. Crépeau and B. Hastie “The Case for ‘Firewall’ Protections for Irregular Migrants: Safeguarding Fundamental Rights” (2015) 17 *European Journal of Migration and Law* 182.

<sup>80</sup> *Ibid*, 157–183.

<sup>81</sup> JGC No 23 *supra*, para 42.

<sup>82</sup> *Ibid* para 46.

<sup>83</sup> *Ibid* para 52.

“[e]ffective firewalls ... in order to ensure ... right to health”.<sup>84</sup> If going to the doctor, which is often a necessity - could lead to personal data landing in the hands of immigration authorities, the question could reasonably be posed what the principle of best interests dictates in this respect.

The JGCs provide a more detailed guidance in respect of firewalls and education. Apart from establishing effective firewalls between education institutions and immigration authorities, States are prohibited from sharing of students’ data. Moreover, immigration enforcement operations in or around school premises are prohibited.<sup>85</sup>

There are some good examples of State practices on the application of firewalls in respect of migrant children. For instance, in Spain, there was a policy and practice that allowed irregular migrants full access to education and health care.<sup>86</sup> The only requirement to access these services, at least until 2012, was to register at a local registry. Subsequently, however, with the passing of the Royal Degree Act 16/20129 (which amended the earlier Foreigners Act) restrictions were introduced that limited access to health care only in the case of emergencies, save for children and pregnant women.<sup>87</sup>

### 3.8 Immigration Detention

Immigration detention of children is, if not most contentious, a highly disputed element of the JGCs. Compliance with Article 9 of the International Covenant on Civil and Political Rights (ICCPR), and Article 37 of the CRC, requires that, in general, before detention is resorted to, it should be shown through an individualized assessment that less invasive measures would be ineffective to achieve the same ends - such as to deter the child from absconding, or prevent self-harm, or ensure the prevention of family separation. A system that

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<sup>84</sup> *Ibid* para 56.

<sup>85</sup> *Ibid* para 60.

<sup>86</sup> S. Carrera and J. Parkin (2011), *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Brussels: Centre for European Policy Studies, available online at <http://cor.europa.eu/>, at 20.

<sup>87</sup> See I. Benitez, ‘Health Care for Immigrants Crumbling in Spain’, *Inter Press Service News Agency* (24 May 2013), available online at <http://www.ipsnews.net/>; picum (2012), *Spain: A step backward in the right to health care for all*, available online at <http://picum.org/> as cited in Crépeau and Hastie *supra* 179



allows automatic detention upon arrival, including for unaccompanied or separated children, does indeed fall short of compliance. In other words, let alone for children, even for adults, a detention that includes elements of "inappropriateness, injustice, and lack of predictability"<sup>88</sup> has been defined as "arbitrary detention".

The JGCs adopted the position that "children should never be detained for reasons related to their or their parents' migration status...".<sup>89</sup> This position, and its definition can, for instance, be contrasted with the agreed text in the Global Compact for Safe, Orderly and Regular Migration where States pledge to work "to end the practice of child detention ..." [my emphasis].<sup>90</sup> In the past confusion had reigned on the legal position of the immigration detention of children. Questions as to whether it was at all permissible, or if it is permissible subject to the *ultima ratio* (last resort) principle remained unanswered.<sup>91</sup>

Some States have even held the view that immigration detention of children is a permissible practice in the perceived situation that it is the only means of maintaining family unity – thereby promoting children's best interests. However, as a result of the JGCs, immigration detention of children has categorically been declared to "conflict with the principle of the best interests of the child and the right to development".<sup>92</sup> Hence, States Parties are required to develop law, policy and practice "that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved ... as well as before return",<sup>93</sup> and that "resources dedicated to detention should be diverted to non-custodial solutions".<sup>94</sup>

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<sup>88</sup> *Van Alphen v. Netherlands*, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990). See also Goodwin-Gill Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, detention, and protection 122 (2001), available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bcfdf> (affirming the principle that "arbitrary embraces not only what is illegal, but also what is unjust").

<sup>89</sup> JGC No 23 *supra*, para 5.

<sup>90</sup> Objective 13(h), of the Global Compact for Safe, Orderly and Regular Migration, adopted at an intergovernmental conference on 11 December 2018 (A/CONF.231/3).

<sup>91</sup> For a closer scrutiny of the position of the JGC on immigration detention of children as well as the evolution of the position in human rights law, see C M Smyth "Towards a Complete Prohibition on the Immigration Detention of Children (2019) 19 *Human Rights Law Review* 1–36

<sup>92</sup> JGC No 23 *supra* para 10.

<sup>93</sup> *Ibid* para 11.

<sup>94</sup> *Ibid* para 12.

#### 4 Application of the JGCs By The CRC Committee

Since the adoption of the JGCs, the CRC Committee has held four sessions, and reviewed 23 CRC State Parties representing single or multiple status as countries of origin, transit, destination, and return.<sup>95</sup> The State Parties are: Guatemala, Marshal Islands, Palau, Panama, Seychelles, Solomon Islands, Spain, and Sri Lanka <sup>96</sup> ; Angola, Argentina, Lesotho, Montenegro, and Norway;<sup>97</sup> El Salvador, Lao People's Democratic Republic, Mauritania, and Niger;<sup>98</sup> and Bahrain, Belgium, Guinea, Italy, Japan, and Syrian Arab Republic.<sup>99</sup> As a result, it is appropriate to assess the extent to which the issues covered by the JGCs are relevant to a diverse group of States under the Convention.<sup>100</sup>

The CRC Committee has made reference to the JGCs in all of the COBs except in four instances namely Angola, Lesotho, Marshall Islands, and Seychelles. The fact that the three occasions where the JGCs are not mentioned are in respect of African countries could be a cause for concern, as it could also feed into the perception that the JGCs are drafted predominantly with countries of destination in the north in mind.<sup>101</sup>

One of the opportune occasions that coincided with the drafting of the JGCs is the process to adopt the Global Compact for Safe, Orderly and Regular Migration (Global Compact on Migration) by the United Nations (UN). A number of concerted efforts were undertaken to inform this process through the JGCs.<sup>102</sup> Italy was one of the nine EU Member States that did not support the Global Compact during its adoption,<sup>103</sup> as it abstained. Therefore, in respect of Italy, the CRC

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<sup>95</sup> Often as transit and destination countries.

<sup>96</sup> During the 77<sup>th</sup> Session in January/February 2018.

<sup>97</sup> During the 78<sup>th</sup> session in May/June 2018.

<sup>98</sup> During the 79<sup>th</sup> session in September/October 2018.

<sup>99</sup> During the 80<sup>th</sup> session in January/February 2019.

<sup>100</sup> The topics covered in respect of children in the context of international migration are wide. They include data collection; dissemination, training and awareness raising; civil society organizations; non-discrimination; best interests; family environment; standard of living; mental health; education; detention, and to a limited extent, violence against children.

<sup>101</sup> However, the titles, and more importantly, the content of the JGCs is proof that this is not the case.

<sup>102</sup> An initiative by child focused CSOs has been running for a little over two years now.

<sup>103</sup> A total of 152 countries voted in favour of the Global Compact a meeting in Morocco. Three voted against, five abstained, and one [namely Slovakia] did not vote. Nine EU members stay away

Committee recommended that the State Party “considers signing the Global Compact ...”<sup>104</sup> Notably, Belgium, whose government coalition collapsed dramatically over the signing of the Global Compact on Migration, leading to the resignation of the Prime Minister, did not get explicit credit in the COBs for signing it.<sup>105</sup>

Discrimination, including xenophobia, is a serious child rights violation prevalent in all corners of the world. In respect of Belgium, for instance, concern was raised at “the ... hatred of children with a migrant background witnessed, particularly since the terrorist attacks in 2014 and 2016”.<sup>106</sup> In Italy, “[s]trengthening ... preventive activities against discrimination and, if necessary, taking affirmative action for the benefit of children and in particular children in marginalized and disadvantaged situations, such as asylum-seeking, refugee and migrant children” was recommended.<sup>107</sup> Japan was commended for passing the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behaviour against Persons Originating from Outside Japan (2016).<sup>108</sup> But it still received a recommendation to reduce and prevent discrimination against, among others, “children of non-Japanese origin, such as Korean, children of migrant workers...”<sup>109</sup> Disparities in the provision of social services for those in disadvantaged situations have also been identified as having a discriminatory angle,<sup>110</sup> and the need to strengthen awareness raising to address negative social attitudes towards migrants has also been highlighted.<sup>111</sup>

The discrimination faced by children with an immigrant background especially in the school setting, and the lack of adequate training of teaching staff to adequately address these difficulties, have featured as

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from UN migration pact By Georgi Gotev, EURACTIV.com with AFP 20 December 2018 available at: <https://www.euractiv.com/section/global-europe/news/nine-eu-members-stay-away-from-un-migration-pact/>

<sup>104</sup> CRC/C/ITA/CO/5-6 para 36(l).

<sup>105</sup> See DW News “Belgian government coalition collapses over migration” 10 December 2018 available at: <https://www.dw.com/en/belgian-government-coalition-collapses-over-migration/av-46661304>.

<sup>106</sup> CRC Committee, COBs: Belgium, (CRC/C/BEL/CO/5-6) (February 2019) para 16.

<sup>107</sup> CRC Committee, COBs: Italy, (CRC/C/ITA/CO/5-6) (February 2019) para 15.

<sup>108</sup> CRC Committee, COBs: Japan, (March 2019) para 17.

<sup>109</sup> *Ibid* para 18(c).

<sup>110</sup> CRC Committee, COBs: Niger (CRC/C/NER/CO/3-5) (November 2018) para 11.

<sup>111</sup> CRC Committee, COBs: Argentina (CRC/C/ARG/CO/5-6) (October 2018) paras 14, and 14(a).

concerns.<sup>112</sup> In this respect, in an uncommon move for the CRC Committee, Norway has been requested to include in its next periodic report “the results of the ongoing survey on the living conditions of Norwegian-born children of immigrant parents”.<sup>113</sup>

In Guatemala, as a result of structural discrimination, including against migrant children, the need to make children’s rights issues an integral part of the training for the relevant public authorities has been noted.<sup>114</sup> *De facto* discrimination against migrant children appears to be a serious concern in a number of State Parties. Spain,<sup>115</sup> Norway, and Argentina are good examples of this category, and the need to enforce laws against discrimination, as well as strengthen public education campaigns to combat discrimination are emphasized. The need to adopt, among others, affirmative social actions to eliminate discrimination against children of migrant workers abroad, is a peculiar issue addressed in the context of Sri Lanka.<sup>116</sup>

In respect of best interests, in the context of Belgium, a recommendation was made to “[s]trengthen its efforts to ensure that the principle ... is consistently interpreted and applied in decisions concerning migrant and refugee children...”.<sup>117</sup> In a subsequent comment, the Committee raised a concern that the principle is “not given due consideration in the context of asylum procedures and family reunification”.<sup>118</sup> Arguably, the poor choice of wording which makes reference to “due consideration” is lamentable, as the CRC states that “the best interests of the child shall be a primary consideration”.<sup>119</sup> Similar comments have been made in respect of Italy,<sup>120</sup> Spain,<sup>121</sup> and Japan.<sup>122</sup> In the context of El Salvador, the need to integrate best interests in all policies and programs, especially in

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<sup>112</sup> CRC Committee, COBs: Norway (CRC/C/NOR/CO/5-6) (July 2018) para 11(b).

<sup>113</sup> *Ibid*, para 12(b).

<sup>114</sup> CRC Committee, COBs: Guatemala (February 2018) (CRC/C/GTM/CO/5-6) paras 10, and 13(c).

<sup>115</sup> CRC Committee, COBs: Spain, (CRC/C/ESP/CO/5-6) (March 2018) paras 14 and 15.

<sup>116</sup> CRC Committee, COBs: Sri Lanka, (CRC/C/LKA/CO/5-6) (March 2018) para 16(b).

<sup>117</sup> COBs: Belgium *supra*, para 17(a).

<sup>118</sup> *Ibid*, para 43(b).

<sup>119</sup> However, it is notable that the recommendation part of the COBs, in para 44(b) states that “[t]o ensure that the best interests of the child are a primary consideration, including in matters relating to asylum and family reunification”. See COBs: Belgium *supra*.

<sup>120</sup> See COBs: Italy, *supra*, para 36(a).

<sup>121</sup> See COBs: Spain, *supra*, para 45(a).

<sup>122</sup> See COBs: Japan, *supra*, para 42(a).

“the areas of public security and migration”, which are the two areas that often attract the state sovereignty defense, is underscored. The importance of the involvement of child protection officers in best interests determination is also emphasized.<sup>123</sup> Given the fact that Niger is predominantly a country of transit and origin, and one of the focus countries in respect of agreements for returns with the EU, the importance of making sure that best interests forms part of “agreements in relation to the transfer of any asylum-seeking, refugee or migrant children” is indeed a fitting recommendation.

The link between birth registration, nationality, and migration status is well documented. The JGCs further consolidate this synergy,<sup>124</sup> including the importance of reviewing nationality laws “to ensure that all children living in the State party are duly registered, including children of irregular migrants, and protected from *de jure* statelessness”.<sup>125</sup>

The need to collect and analyze disaggregated data, including on the basis of migration status, is a point often emphasized to almost all State Parties to the CRC.<sup>126</sup> On one occasion the recommendation related to the need to “improve the current data system for unaccompanied or separated children by harmonizing the currently existing databases and ensuring that all relevant information pertinent to each child is included”.<sup>127</sup>

The COBs also underscore, *albeit* without going into detail, the obligation to uphold the principle of non-refoulement.<sup>128</sup> Where evidence of violation of the principle is present, as in the case of Norway, the CRC Committee has expressed its concern about “[c]hildren being sent back to countries where their rights are at high

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<sup>123</sup> See COBs: Italy, *supra*, para 36(h).

<sup>124</sup> See COBs: Bahrain, *supra*, paras 21-22; CRC Committee, COBs: Mauritania, (CRC/C/MRT/CO/3-5) (November 2018) para 38(b); CRC Committee, CIBs: Angola (CRC/C/AGO/CO/5-7) (June 2018) para 18(d); CRC Committee, COBs: Palau (CRC/C/PLW/CO/2) (February 2018) paras 24(b) and 25(b); CRC Committee, COBs: Panama (CRC/C/PAN/CO/5-6) (February 2018) para 18; CRC Committee, COBs: Lesotho (CRC/C/LSO/CO/2) (June 2018) paras 24(c), and 25(d).

<sup>125</sup> COBs: Japan, *supra*, para 23(a).

<sup>126</sup> COBs: Guatemala, *supra*, paras 9(a) and 41(b)(c)(d); COBs: Belgium, *supra*, para 11(a).

<sup>127</sup> COBs: Italy, *supra*, para 34(h).

<sup>128</sup> COBs: Japan, *supra*, para 42(a); COBs: Argentina, *supra*, para 38(b); COBs: Panama, *supra*, para 35(b); COBs: Spain, *supra*, para 45(a).

risk of being violated, which contravenes the principle of non-refoulement".<sup>129</sup>

In respect of education, the following are covered: weak learning outcomes for children with migrant backgrounds<sup>130</sup> compared to those of the general student population; the need to implement zero tolerance of discrimination in the school setting against children in the context of migration, including by ensuring recurrent training for staff;<sup>131</sup> support measures to ensure that children with migrant backgrounds have adequate support to remain in school;<sup>132</sup> the need to apply flexible education measures to accommodate children in the context of migration to facilitate continuation of their education with minimal disruption;<sup>133</sup> and to facilitate inclusion of migrant children and support for their aspirations through the implementation of a human rights based approach at all levels of the education system are covered.<sup>134</sup> In the context of Belgium, concern has been expressed about barriers to access quality education by migrant children, as well as their over-representation in vocational training, dropout rates, and expulsions.<sup>135</sup>

The issue of mental health for migrant children is a subject often neglected. The JGCs provide that best interests determination in relation to expulsion should also include a child's mental health;<sup>136</sup> acknowledge that obstacles to access services can negatively affect the mental health of migrant children;<sup>137</sup> cover the negative mental health effect of immigration detention;<sup>138</sup> underscore the need to take children's vulnerabilities including their mental health, into account;<sup>139</sup> and state that migrant children's standard of living should be adequate for, among others, their mental development.<sup>140</sup>

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<sup>129</sup> COBs: Norway, *supra*, para 31(c).

<sup>130</sup> COBs: Spain, *supra*, para 39.

<sup>131</sup> COBs: Norway, *supra*, para 29(a).

<sup>132</sup> COBs: Argentina, *supra*, para 37(c).

<sup>133</sup> See CRC Committee, COBs: El Salvador (CRC/C/SLV/CO/5-6) (November 2018) para 43(e).

<sup>134</sup> COBs: Italy, *supra*, para 32(a).

<sup>135</sup> COBs: Belgium, *supra*, para 11(a) and para 38(a).

<sup>136</sup> JGC 22, *supra*, para 32(g).

<sup>137</sup> *Ibid* paras 40 and 43.

<sup>138</sup> JGC No 23 *supra*, para 9.

<sup>139</sup> *Ibid* para 13.

<sup>140</sup> *Ibid* para 49.

In El Salvador, the State Party has been urged to provide, among others, psychosocial support to families affected by migration;<sup>141</sup> In Belgium, the scarcity of “psychological support and mental health care for refugee and migrant children”<sup>142</sup> was followed through by a recommendation to “[e]nsure access to psychologists, psychiatrists ... interpreters and intercultural mediators, for refugee and migrant children, including in shelter settings”.<sup>143</sup> In recognition of the fact that some migrant children display suicidal tendencies,<sup>144</sup> Norway has been requested to investigate the causes of suicidal tendencies in children in reception centers with a view to prevent such tendencies.<sup>145</sup>

## 5 The JGCs and Child Migrants in the Horn of Africa

Children have not been spared the effects of the complex history of conflicts, weak governance, general insecurity, food insecurity and a host of problems peculiar to their communities. Save the Children reports that in most of the countries of the Horn of Africa, children represent between 50 to 60 per cent of the forcibly displaced persons populations.<sup>146</sup> Of these, over 90,000 children are recorded as unaccompanied or separated across and within the Horn of Africa.<sup>147</sup>

While Save the Children acknowledges that the specific patterns of children and youth movements within the broader patterns of mixed migration are unknown, children account for 31 per cent of overall migration in Africa.<sup>148</sup> Within the Horn of Africa, children made up 23 per cent of the immigration flows, to and from the region, in the

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<sup>141</sup> COBs: El Salvador, *supra*, para 30(c)

<sup>142</sup> COBs: Belgium, *supra*, para 32(d)

<sup>143</sup> *Ibid*, para 33(d)

<sup>144</sup> COBs: Norway, *supra*, para 25(b)

<sup>145</sup> *Ibid*, para, 26(b)

<sup>146</sup> See Inter-Agency Working Group on Children on the Move cited in Save the Children ‘Young and on the Move: Children and Youth in Mixed Migration Flows’ Mixed Migration Research Series at 7.

<sup>147</sup> *Ibid*.

<sup>148</sup> See DIIS Policy Brief April ‘High Risk Migration in the Horn of Africa: South – South Child Migration available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/diis\\_pb\\_child\\_migration\\_2015-web.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/diis_pb_child_migration_2015-web.pdf) accessed on 16 April 2019.

period between January to June 2018, with 4.7 per cent being under the age of five years.<sup>149</sup>

The small country of Djibouti has gained notoriety as a nodal point for a migratory flux heading towards Yemen, Saudi Arabia and the Gulf countries.<sup>150</sup> It has been estimated that as many as 100,000 migrants a year, coming mainly from Ethiopia and Somalia, transit through the country.<sup>151</sup> About 30 per cent of the migrants that cross through Djibouti on their way to the Middle East are children.<sup>152</sup> Of the migrant profiles observed by the International Organization for Migration (IOM) in the Horn of Africa and Yemen, the two main nationalities recorded were Ethiopians followed by Somalis.<sup>153</sup> Historically, migrants in the Horn of Africa have mainly moved along four routes: the first is the Eastern Route through Yemen, and the rest of the Middle East; the second route is the “Sinai Route”, which goes from Sudan through Egypt into Israel.<sup>154</sup> This route has lost popularity to a point where it is almost inoperative; the main reason for this are the recent clamp down on migration policies, the building of a new fence along the Sinai-Israeli border and the building of a detention centre.<sup>155</sup> The third route is the Northern Route that goes through Sudan and either Libya and into Europe or through Egypt; and the fourth route is the Southern Route through Kenya, Tanzania and further towards to South Africa.<sup>156</sup>

Factors influencing the choice of destination country were primarily: the availability of job opportunities; physical safety; access to humanitarian assistance; perceived access to asylum procedures; and

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<sup>149</sup> See International Organisation for Migration ‘Mixed Migration in the Horn of Africa and the Arab Peninsula’ accessed at [https://reliefweb.int/sites/reliefweb.int/files/resources/MixedMigration\\_EHoA\\_Yemen\\_Jan-Jan18.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/MixedMigration_EHoA_Yemen_Jan-Jan18.pdf) on 16 April 2019.

<sup>150</sup> Notwithstanding the fact that Djibouti has a small migrant population, it has a number of laws, which regulate different types of migrants. For example, there is the Loi n° 201/AN/07/5<sup>ème</sup>, which regulates entry into, and residence in Djibouti, Ordinance n° 210/AN/07/5<sup>ème</sup>, which includes the rights of refugees, and Loi n° 210/AN/07/5<sup>ème</sup>, which deals with trafficking. See too Maastricht Graduate School of Governance ‘Djibouti Migration Profile’ (August 2017) 2.

<sup>151</sup> See DIIS *supra*.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> Maastricht Graduate School of Governance *supra* at 28.

<sup>155</sup> *Ibid.*

<sup>156</sup> See IOM *supra*.



the presence of family and friends in the destination country.<sup>157</sup> It has been argued that a number of children travelling from Eritrea and Ethiopia are influenced by family members who believe that they will find a better life, despite the risks.<sup>158</sup> Other factors include cultural and social bottlenecks, such as, gender discrimination, that have been recognized as specific factors influencing girls and young women to migrate. Gender based violence against women and girls is embedded in, and justified by, societal norms in several countries in the Horn of Africa.<sup>159</sup>

Migrant children in the Horn of Africa are said to face many risks as a result of their irregular status, vulnerability, and negative local perception. Discrimination also remains a challenge. The CRC Committee, in its COBs to Djibouti, noted that there is still an issue, within the law, of discrimination against migrant children in Djibouti.<sup>160</sup> Their failure to possess identity documents disqualifies them from accessing basic public services, such as, healthcare and education.<sup>161</sup> As a result, they are denied child protection in the country in which they reside on their journey,<sup>162</sup> and many are caught in a web of prostitution rings or other exploitative and illegal networks, or endure life on the streets.<sup>163</sup> Police patrols that arrest irregular migrants are said not to distinguish especially vulnerable victims of migration, such as children.<sup>164</sup> In the course of detention, children are subject to the same arduous conditions as adult detainees,

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<sup>157</sup> *Ibid.*

<sup>158</sup> See Save the Children *supra* at pg 32. In its Concluding Observations, the CRC Committee recommended that the Government of Ethiopia should implement strategies and policies which speak to the internal flows of human trafficking, with a particular focus on migrant, refugee, unaccompanied and separated minors. See UN Committee on the Rights of the Child Concluding Observations to the Ethiopia Fourth and Fifth Periodic Reports CRC/C/ETH/CO/4-5 paras 70(b), and 70(d).

<sup>159</sup> See Save the Children *supra* at 40. Political considerations are also hugely influential. For instance, forced migration from Eritrea has been an issue since the Eritrean war of independence that only ended in 1991 before a conflict with Ethiopia over boundaries broke out.

<sup>160</sup> CRC Committee, COBs: Djibouti (CRC/C/DJI/CO/2) (October 2008) para 26.

<sup>161</sup> *Ibid.*

<sup>162</sup> DIIS *supra*.

<sup>163</sup> 'Djibouti Works to Assist Street Children, Beginning with a Study on Their Needs: IOM Report <https://www.iom.int/news/djibouti-works-assist-children-beginning-study-their-needs-iom-report> (accessed 3 April 2019).

<sup>164</sup> See DIIS *supra*.

with whom they have to share overcrowded cells and meals. They are then abandoned at the border of their country of origin.<sup>165</sup>

The need to facilitate inter-State cooperation and provide a calibrated regional approach would prove to be critical to address the human rights of migrant children in the region. In this respect, the extent to which the African Union's (AU) 2018 draft revised framework policy integrates elements of the JGCs, could prove to be important. This approach is supported by the JGCs, which indicate "...a comprehensive interpretation of the Conventions should lead State parties to develop ... regional ... cooperation in order to ensure the rights of all children in ... migration..."<sup>166</sup>

The extent to which the guidance provided in the JGCs is applicable in the context of resource-constrained environments too would probably also prove to be one litmus test. For instance, all the countries in the Horn of Africa are categorized as least developed countries - and as a result it is perhaps no surprise that there are no shelters specifically for trafficking victims in Djibouti;<sup>167</sup> or that while some of the laws have proposed the establishment of services for victims of trafficking or a victim's fund, these have not yet been materialized. The JGCs seem to acknowledge these limitations to a certain extent - for instance, the first footnote in JGC No 23 recites the message of Article 4 of the CRC about States' obligations to "undertake measures regarding economic, social and cultural rights..., to the maximum extent of their available resources...".<sup>168</sup> Furthermore, in respect of access to justice, the possibility for children to bring complaints is not only limited to courts and administrative tribunals, but also easily accessible platforms such as "... child protection and youth institutions, schools and national human rights institutions".<sup>169</sup> There is also an explicit recognition that "insufficient financial resources often hinder the exercise of the right to family reunification".<sup>170</sup>

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<sup>165</sup> *Ibid.*

<sup>166</sup> JGC No 22 *supra*, para 48.

<sup>167</sup> US Department of State, Trafficking in Persons Report (2018) 167 available at: <https://www.state.gov/documents/organization/282801.pdf> accessed on 22 April 2019.

<sup>168</sup> See too CRC Committee, General Comment No. 19 (2016) on public budgeting for the realization of children's rights, paras. 28-34.

<sup>169</sup> JGC No 23 *supra*, para 16.

<sup>170</sup> JGC No 23, *supra* para 38.

Even the development of the necessary legal frameworks, and their subsequent implementation, is still in its infancy in the countries in the region. Birth registration coverage, which is relatively low in countries in the region, is a good example of this. For example, Ethiopia's Proclamation No.760/2012 on "Registration of Vital Events and National Identity Card Proclamation", amended by Proclamation No 1049/2017,<sup>171</sup> is only a few years old. As a result the guidance provided by the JGCs, including that "[d]ocuments that are available should be considered genuine unless there is proof to the contrary, ..." and that "[t]he benefit of the doubt should be given to the individual being assessed",<sup>172</sup> resonate well.

In general, violence against children, especially against unaccompanied children, in the context of migration is pervasive. Reportedly, young migrants and refugees from sub-Saharan Africa are in general some of the most vulnerable persons on the move.<sup>173</sup> In the Horn of Africa, the risk of violation of the right to life, as well as of torture of child migrants, is real. The JGC contains a detailed section on the right to life, survival and development,<sup>174</sup> and also covers torture in respect of non-refoulement. Crimes reported by those affected in Ethiopia and Djibouti include kidnapping, ransom, torture, and rape.<sup>175</sup> With reports that confirmed the presence of an international criminal network dealing in human body parts, especially in Egypt, the practice of "brokers who were luring migrants to sell their organs to finance their onward journeys" is a real risk for migrants from the region.<sup>176</sup>

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<sup>171</sup> Registration of Vital Events and National Identity Card (amendment) Proclamation.

<sup>172</sup> JGC No 23 *supra*, para 4.

<sup>173</sup> As data shows, for instance, over 80 per cent of adolescents and young people from sub-Saharan Africa in the Central Mediterranean route reported exploitation – compared to around 55 per cent of those originating from elsewhere. UNICEF and IOM "Harrowing journeys: Children and youth on the move across the Mediterranean Sea, at risk of trafficking and exploitation" (September 2017) available at <https://www.refworld.org/pdfid/59b7fdd74.pdf> accessed on 16 April 2019.

<sup>174</sup> JGC No 22 *supra*, paras 40-44.

<sup>175</sup> UNHCR "Smuggling and trafficking from the east and Horn of Africa" (2016) available at: <https://www.refworld.org/pdfid/51d175314.pdf>.

<sup>176</sup> Danish Refugee Council "Regional mixed migration in the Horn of Africa and Yemen in 2016: 4<sup>th</sup> quarter trend summary and analysis" (2016) available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/RMMS%20Mixed%20Migration%20Trends%20Q4%202016.pdf>.

In its COBs to Eritrea, the CRC Committee noted reports of children who return to Eritrea, including those who were unsuccessful with asylum seeking applications in other countries, facing torture and detention on their return.<sup>177</sup> Such returns could easily constitute a violation of the *non-refoulement* principle. Children who attempt to leave Eritrea are also sometimes detained or forced to undergo military training despite being younger than the minimum service age of 18.<sup>178</sup>

Linked to the right to life is the fact that many migrants lose their lives in the Red Sea or the Gulf of Aden.<sup>179</sup> In the first months of 2018, a recorded 105 migrants died because of drowning.<sup>180</sup> In Djibouti, it has been reported that, given the prevalence of trafficking by sea, the coast guard has received separate training on the issue.<sup>181</sup> There is only a brief reference in the JGCs to “refusal of vessels to rescue” in respect of the right to life, survival and development<sup>182</sup> in the JGCs. As a result, arguably, a shortcoming of the JGCs is the dearth of guidance on the application of the provisions of the CRC in respect of search and rescue of migrants at sea.

The link between trafficking and/or smuggling with migration is visibly present in the Horn of Africa. Given this significant link, in Djibouti the main legislation dealing with the issue is entitled “2016 Law No. 133, On the Fight Against Trafficking in Persons and Illicit Smuggling of Migrants”. Most countries in the Horn of Africa are ranked as Tier 2 countries- meaning that they do not fully meet the minimum standards for the elimination of trafficking but are making efforts.<sup>183</sup> Eritrea is in fact a Tier 3- meaning that the Government does

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<sup>177</sup> CRC Committee, COBs: Eritrea (CRC/C/ERI/CO/4) (June 2015) para 32(b).

<sup>178</sup> Trafficking in Persons Report, *supra*, 180.

<sup>179</sup> S Sengupta ‘At Least 50 Migrants Drown as Smuggler Throws Them Into Sea’ New York Times 9 August 2017 accessed at <https://www.nytimes.com/2017/08/09/world/africa/migrants-drown-yemen.html> accessed on 22 April 2019; UNHCR ‘Red Sea tragedy leaves 62 people dead in deadliest crossing of the year’ (06 June 2014) available at <https://www.unhcr.org/news/latest/2014/6/5391c1e56/red-sea-tragedy-leaves-62-people-dead-deadliest-crossing-year.html> accessed on 22 April 2019.

<sup>180</sup> IOM “A region on the move: Mid-year trends report- January to June, 2018” (2018) 31 available at [https://reliefweb.int/sites/reliefweb.int/files/resources/IOM%20A%20REGION%20ON%20THE%20MOVE%20-%20MID%20YEAR%20TREND%20REPORT\\_2018%20.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/IOM%20A%20REGION%20ON%20THE%20MOVE%20-%20MID%20YEAR%20TREND%20REPORT_2018%20.pdf) .

<sup>181</sup> Trafficking in Persons Report, *supra*, 168.

<sup>182</sup> JGC No 22 *supra*, para 40.

<sup>183</sup> For instance, Djibouti is a Tier 2 country. See Trafficking In Persons Report, 166.

not fully meet the minimum standards for the elimination of trafficking and is not making significant efforts to do so. Smuggling networks, some of whose members are likely to be Djiboutian, sometimes charge exorbitantly high rates or kidnap and hold migrants, including children, for ransom in countries neighboring Djibouti.

The nexus between official corruption and migration is also present in the Horn of Africa. In Eritrea, there are credible reports of complicity by officials in trafficking, including of migrants.<sup>184</sup> Unfortunately the JGCs are silent on corruption in the context of migration.

In the context of international migration the issue of children that end up on the street is also a concern. For instance, while many Ethiopian migrants use Djibouti as a transit country to Yemen and the Arab Peninsula, a number of them are unaccompanied minors who never leave Djibouti and end up as street children in the capital, Djibouti City.<sup>185</sup> While there is some guidance on access to housing<sup>186</sup> as well as access to homeless shelters,<sup>187</sup> the JGCs are light on explicit guidance for child migrants who become children on the streets. The detailed guidance for this, however, can only be found in an earlier General Comment of the CRC Committee.<sup>188</sup>

The importance of consular services to address a large number of issues pertaining to migrant children in the Horn of Africa is critical.<sup>189</sup> At a meeting between authorities from Ethiopia, Kenya and Tanzania in April 2019, and in recognition of the large number of migrants including children who use the “Southern Route” and violate immigration rules (and end up in prison), the need to facilitate “simplified consular assistance that in turn will enable easier access to irregular migrants in prisons” was underscored.<sup>190</sup> In this respect, the

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<sup>184</sup> Trafficking in Persons Report, *supra*, 178.

<sup>185</sup> International Organisation for Migration “Djibouti Works to Assist Street Children, Beginning with a Study on Their Needs available at: <https://www.iom.int/news/djibouti-works-assist-children-beginning-study-their-needs-iom-report> accessed on 3 April 2019.

<sup>186</sup> JGC No 23, *supra* paras 49 and 52.

<sup>187</sup> See for instance JGC paras 50-51.

<sup>188</sup> See General Comment No. 21 (2017) on children in street situations (CRC/C/GC/21) (June 2017) para 63.

<sup>189</sup> Consular services are critical, for instance, for facilitating returns.

<sup>190</sup> IOM “Tanzania, Ethiopia, Kenya agree on a roadmap for addressing irregular migration” 05 April 2019 available at <https://www.iom.int/news/tanzania-ethiopia-kenya-agree-roadmap-addressing-irregular-migration>

advantage of having embassies [or consular services] in countries to ensure the best interests of migrant children can be gauged from the opening of the Ethiopian embassy in 2018 in Dar es Salaam and the subsequent return of more than 300 Ethiopian migrants.<sup>191</sup> JGC No 22 underscores that the need to integrate and consistently interpret the best interests of the child applies in respect of “consular protection policies and services”.<sup>192</sup> This guidance is important but limited, and it is hoped that the jurisprudence of the CRC Committee will develop it further in the future.

Detailed guidance on returns, with a view to ensure that it does not violate the provisions of the CRC, is critical in the Horn of Africa. After all, in Eritrea, those who recently left the country by illegal means, may only return once they have paid a “diaspora tax” and signed a “letter of apology” at an Eritrean embassy before their return home.<sup>193</sup> A considerable number of Somalis have returned home, and face issues of marginalization within their home country.<sup>194</sup> All Horn of Africa countries have large numbers of women aged 15-49 who have undergone Female Genital Mutilation (FGM), - Djibouti at 93%;<sup>195</sup> Somalia at 98%;<sup>196</sup> Eritrea at 83%;<sup>197</sup> and Ethiopia at 65%.<sup>198</sup> Given these high prevalence rates of FGM amongst all the countries, it is difficult to imagine how deportations in general to a country of origin or transit within the Horn of Africa could constitute a violation of the obligation not to deport persons from a territory where there are substantial grounds for believing that there is a real risk of irreparable harm.

Nonetheless, at this juncture, it would be useful to highlight the various rights that require consideration on return cases where risk of FGM is invoked, based on the first individual complaints case decided

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<sup>191</sup> *Ibid.*

<sup>192</sup> JGC No 22 *supra* para 32(b).

<sup>193</sup> GSDRC ‘Rapid fragility and migration assessment for Eritrea (Rapid Literature Review)’ Birmingham: GSDRC, University of Birmingham at pg 15 accessed at [www.gsdr.org/wp-content/uploads/2016/02/Fragility\\_Migration\\_Eritrea.pdf](http://www.gsdr.org/wp-content/uploads/2016/02/Fragility_Migration_Eritrea.pdf) accessed on 22 April 2019.

<sup>194</sup> UN Refugee Agency ‘Somali Situation 2017 Supplementary Appeal January to December 2017’ (May 2017) 40 available at <https://www.unhcr.org/591ae0e17.pdf> accessed on 2 April 2019.

<sup>195</sup> UNICEF “Country Profile” available at: <https://data.unicef.org/country/dji/> .

<sup>196</sup> UNICEF “Country Profile” available at: <https://data.unicef.org/country/som/>.

<sup>197</sup> UNICEF “Country Profile” available at: <https://data.unicef.org/country/eri/>.

<sup>198</sup> UNICEF “Country Profile” available at: <https://data.unicef.org/country/eth/>.

by the CRC Committee on its merits. The *K.Y.M v Denmark* (No 3/2016) case concerned a complaint lodged by a mother [*I.A.M*], who is a Somali national, on behalf of her child [*K.Y.M*] who was born in Denmark on 05 January 2016.<sup>199</sup> At the heart of the complaint was the contention that if *K.Y.M* was to be deported to Puntland in Somalia, it would violate multiple rights under the CRC, namely, Articles 1 [definition of a child], 2 [non-discrimination], 3 [best interests], and 19 [violence against children]. In particular, it was argued that the return would subject *K.Y.M* to FGM. The Refugee Appeals Board of Denmark rejected the request by *I.A.M* and *K.Y.M* for asylum in Denmark. In arriving at its decision, the Appeals Board took note of information that there was a possibility for a girl not to be circumcised in Somalia, if her mother objected to it.<sup>200</sup> However, the complainant averred that the Appeals Board had ignored an element of the Immigration Service Report which also contained information that an objection by a mother would not be sustained “if the mother is not strong enough to stand against other women’s will”.<sup>201</sup> The mother further argued that, as a single mother, she would not be able to withstand the pressure.<sup>202</sup>

The CRC Committee therefore decided that the State Party had failed to consider the best interests of the child in assessing the risk of the author’s daughter being subjected to FGM if deported to Puntland, and to put in place proper safeguards to ensure the child’s wellbeing upon return, which constituted violations of Articles 3 and 19 of the CRC. This approach, adopted by the Committee, is in accordance with its position on the issue of non-refoulement as contained in the JGCs.<sup>203</sup>

## 6 Concluding Remarks

Issues surrounding migration have increasingly become controversial. The CRC Committee adopted the JGCs with a view to offer “...authoritative guidance ...as regards the rights of children in the context of international migration”.<sup>204</sup> True to form, the CRC Committee has, through the JGCs, pronounced itself on critical issues

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<sup>199</sup> Para 1.1 of the Views.

<sup>200</sup> *Ibid* para 3.3.

<sup>201</sup> *Ibid* para 3.2.

<sup>202</sup> *Ibid*.

<sup>203</sup> As discussed in section 3.4 above.

<sup>204</sup> JGC No 22 *supra*, para 10.

such as, the place of best interests in immigration policy, law, and practice; immigration detention; firewalls; and non-refoulement, to name but a few. The CRC Committee's recent jurisprudence based on the JGCs has largely continued to refine and deepen its stand, and as demonstrated on the basis of the 23 COBs reviewed, the real leverage inherent in the JGCs to tailor their application to the specific needs of the States before the CRC Committee is significant.

No State Party in the Horn of Africa has been reviewed by the CRC Committee since the adoption of the JGCs. Nonetheless, the above assessment is testament to the fact that, – save for few thematic exceptions, such as, search and rescue at sea, corruption in migration, and the critical role of consular services, the JGCs are by and large fit for purpose also for children in the context of international migration in the sub-region. The assessment of state parties shows, among others, that making children's best interests a primary consideration in immigration policy and law is an obligation under the CRC that could not generally be overridden by considerations such as national security; age assessment processes should give the benefit of the doubt of being a child to young persons whose age has not been proven conclusively; the absence of firewalls risks undermining the possibility of getting access to social services including mental health services; the relatively less restrictive interpretation of non-refoulement which could apply for cases involving child migrants and that the development of alternatives to immigration detention of children is critical to end its use.

Finally, giving “authoritative guidance” to 196 State Parties would require a delicate balancing act, and expecting an every “i” dotted and every “t” crossed approach in this respect is neither necessary nor realistic. This is no exception to Africa, and its Horn region as progressive reforms to immigration policy are currently threatened by the powerful securitization agenda evident in many AU Member States,<sup>205</sup> the test ahead for the JGCs will probably be in how they remain relevant in the decade[s] ahead.

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<sup>205</sup> A few examples illustrate this point. In South Africa, the Government has responded to attacks on non-nationals living in the country with calls for more restrictive border controls. Over the past few years, Kenya, has similarly reacted to perceived threats to its territory and citizens with increasingly restrictive responses to refugees and immigrants living in the country.