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

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**Methods of work of the Committee**

General comment No. 5 (2020) on migrants’ rights to liberty and freedom from arbitrary detention

Draft prepared by the Committee

I. Introduction

1. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families is deeply concerned by the trend towards the criminalization of migration. The trend is visible in the increasingly frequent use of arbitrary detention of migrants across several regions of the world.

2. The present general comment is the result of the Committee’s growing concern for the rights of migrant workers and members of their families who are deprived of their liberty. The Committee has taken a number of initiatives on the matter, such as its general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families; its joint general comment No. 3/No. 22 of the Committee on the Rights of the Child (2017) on the general principles regarding the human rights of children in the context of international migration; its joint general comment No. 4/No. 23 of the Committee on the Rights of the Child (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return; its statements on ending immigration detention of children (2014) and on condemning the trafficking and sale of migrants in Libya (2017); its press release on separating children from undocumented migrant parents (2018); its contributions, in 2017, to the report of the Secretary-General on making migration work for all (A/72/643) as an input to the zero draft of the Global Compact for Safe, Orderly and Regular Migration (endorsed by the General Assembly in 2018 in its resolution 73/195); and its joint statement with the Inter-American Commission on Human Rights and other United Nations human rights mechanisms for the development of a regional response to the massive arrival of Venezuelan migrants in neighbouring countries (2018).

3. The Committee has also taken specific action within the framework of the Global Compact process and the United Nations Network on Migration. It is a member of the Inter-Agency Working Group to End Child Immigration Detention, and a part of the expert working group for addressing women’s human rights in the Global Compact for Safe, Orderly and Regular Migration, which is led by the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women). The Committee has consistently made recommendations in its concluding observations to States parties on issues affecting the rights of migrant workers and members of their families who are deprived of their liberty.

4. In the context of international migration, immigration control measures implemented by some States, such as automatic and mandatory detention, punishment during detention, detention of children, pregnant women and other individuals in vulnerable situations, separation of families in the context of detention, barriers to access to legal remedies and international protection, and inhumane and overcrowded conditions in detention centres have a severe impact on the rights of migrant workers and their families. Hence, the Committee notes with concern the information before it that in up to 45 per cent of cases, immigration detention is based on criminal law, even though States parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families have an obligation not to criminalize migration.

5. The Committee notes that the criminalization of migration has involved the manipulation of criminal law in a way that fits with political strategies to respond to and manage migratory flows. Nevertheless, immigration detention is not a recent phenomenon; since the 1990s, there has been a significant increase in its use. It has shifted from being a means of facilitating analysis of specific cases relating to situations of irregular migration to becoming a mechanism for the mass arbitrary imprisonment of migrants and their families.

6. Information gathered by the Committee shows that detention has numerous effects on the health and personal integrity of migrants, including the onset of anxiety, depression and post-traumatic stress disorder. Those negative effects are the result of various factors, including the indeterminate duration of detention, the arbitrariness and uncertainty surrounding it, overcrowding, a lack of access to food, water and medical care, prolonged detention in solitary confinement, and deliberate physical and psychological abuse by State officials, private guards or other detainees. Such abuse includes torture, cruel, inhuman and degrading treatment and punishment, sexual violence, extortion and human trafficking for the purpose of labour exploitation, forced labour or slavery.

7. Those factors have been aggravated in the context of the coronavirus disease (COVID-19) pandemic, which has posed an unprecedented challenge for States. The Committee is concerned that in the context of immigration detention, many of the detention facilities where migrants, asylum seekers, stateless persons and refugees are detained do not meet minimum sanitary requirements. People are held in overcrowded and unsanitary conditions, with limited or no access to health services. The Committee notes with concern that there is a high risk that diseases such as COVID-19 are spreading among detainees. The situation has raised questions about the need to release detainees on the basis of their migration status and to implement alternative measures to reduce the risk of infection of COVID-19 and the potential spread of other diseases.

8. The main objective of the present general comment is to provide guidance to States on fulfilling their obligations under the Convention in relation to the right to liberty and protection against arbitrary detention of migrant workers and members of their families, and other human rights obligations arising from the intersection of that right with other human rights. The present general comment also seeks to provide guidance to States on implementing the Global Compact, and to other stakeholders on implementing initiatives to promote and protect human rights and to monitor compliance thereof.

9. The general comment therefore seeks to address the content and scope of the right to liberty and security of migrant workers and members of their families; the main aspects of the right to liberty and protection against arbitrary detention of migrants in the context of criminal and administrative proceedings, particularly those related to their immigration status; the content and scope of custodial measures in the context of migration; and the disproportionate impact of detention on groups in vulnerable situations. That is particularly important when States do not guarantee adequate consideration of age, gender and diversity in migration laws, policies and practices. It includes the obligation to implement identification procedures for migrant victims of crime, including victims of human trafficking, and for other groups in need of international protection, who must not be deprived of their liberty under any circumstances. The obligation to take alternative measures to immigration detention is also addressed.

II. Regulatory framework on protection of the right to liberty of migrant workers and members of their families

A. Right to liberty and security in the Convention (articles 16 and 17)

10. The right to liberty applies to all forms of detention and must be guaranteed to all persons without discrimination, including all migrants, regardless of their immigration status. Article 16 of the Convention provides for the protection of the right to liberty and security of person of all migrant workers and members of their families, while establishing other related rights and guarantees, including the right to effective protection by the State against violence committed by public officials or private individuals, groups or institutions; assurances of lawfulness and non-arbitrariness of verification procedures of the identity of migrant workers; prohibition of arbitrary and unlawful arrest and detention, and the guarantee of a number of specific procedural safeguards in the event of administrative or criminal detentions, including the right to consular assistance, to access to judicial remedies to challenge the legality of detention, and the right to compensation in the event of unlawful arrest or detention.

11. Article 17 of the Convention also recognizes the right of all migrant workers and members of their families who have been deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity. States parties should therefore guarantee adequate conditions in detention centres, taking into consideration the individual circumstances and necessities of each detainee. In addition to those rights, there are other rights interrelated to the liberty and security of migrant workers and their families, including due process guarantees (art. 18), the principles of legality and humanitarian considerations related to the status of the individual (art. 19) and the prohibition of imprisonment merely on the ground of failure to fulfil a contractual obligation (art. 20).

B. Other international legal instruments

12. The right to liberty and security of person is recognized in the main international and regional human rights instruments, including article 3 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, article 37 (b)–(d) of the Convention on the Rights of the Child, article 14 of the Convention on the Rights of Persons with Disabilities, article 6 of the African Charter on Human and Peoples’ Rights, article 7 of the American Convention on Human Rights, article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), article 14 of the Arab Charter on Human Rights, and article 12 of the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration.

C. Definition of deprivation of liberty

13. Migrants and members of their families may face different restrictions on their right to liberty and security, one of which is the deprivation of liberty as a result of having violated immigration laws in the State of transit or destination. The information gathered by the Committee indicates that at the global level, States have adopted different terminology for regulating immigration detention in both administrative and criminal laws. The Committee notes with concern that in different regions of the world, countries use different terms to refer to deprivation of liberty for immigration reasons or immigration detention, such as “filing and accommodation”, “detention” and “placement”. The renaming of “detention” is intended to prevent those measures from scrutiny, thus avoiding procedural safeguards that should be applied before and during any deprivation of liberty.

14. The Committee therefore considers it necessary to clarify the concept of deprivation of liberty. Article 4 (2) of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines deprivation of liberty as any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority. Such deprivation of liberty begins at the time of arrest and extends until the person is released. Irrespective of how that measure is defined in the immigration context or the reasons giving rise to it, if the measure results in restricting the liberty of migrant workers or members of their families, the Committee understands the measure to be a form of detention.

15. In addition, the Committee considers that “detention for immigration reasons” or “immigration detention” refers to any situation in which a person is deprived of liberty on grounds related to his or her immigration status, regardless of the name or reason given for carrying out the deprivation of liberty, or the name of the facility or place where the person is being held while deprived of liberty. Accordingly, immigration detention includes the detention of migrants in prisons, police stations, immigration detention centres and other enclosed spaces, such as any international or transit areas at air, land and maritime ports.

D. Types of deprivation of liberty to which migrant workers and their families might be exposed

16. The Committee notes that the grounds for deprivation of liberty of migrant workers and members of their families are diverse, and the type of deprivation of liberty imposed on migrants will depend on those grounds. Some examples include criminal detention in prisons, immigration detention, involuntary institutionalization, and confinement in restricted areas of air, land and maritime ports.

17. However, for the purposes of the present general comment, the relevant reasons for deprivation of liberty are solely those related to an immigration situation, or the lack of relevant reasons, and whether or not detention is a result of the migrant’s irregular entry or stay in the State of destination, transit or return. The Committee reaffirms that activities that result in immigration detention, such as illegal crossing of international borders, may constitute at most administrative offences; they are not offences that violate the law to an extent that warrants criminalization.

18. The Committee expresses its serious concern at the criminalization of the irregular entry or stay of migrant workers and members of their families and the practice of punishing such conduct with deprivation of liberty. It is equally worrying that, even if such conduct is regulated by administrative norms, non-compliance with those norms is punishable by deprivation of liberty. The Committee reiterates that whenever States resort to restrictions of liberty on the grounds of immigration or residence situations, whether governed by criminal or administrative rules, such deprivation of liberty must remain in line with the criteria and standards set by the Committee in order for it not to constitute arbitrary detention.

E. Prohibition of arbitrary detention

19. The prohibition of arbitrary detention is absolute, which means that it is a non-derogable rule of customary international law, or a *jus cogens* norm. The prohibition of arbitrary deprivation of liberty also protects migrants, in accordance with article 16 (4) of the Convention. Thus, any use of detention in the context of migration must be based on a legitimate State objective; always be an exceptional measure of last resort compatible with the criteria of necessity and proportionality; never take place in punitive settings, including prisons or prison-like settings; and be reviewed periodically to ensure that detention remains necessary. The arbitrariness test is illustrated in the figure below.

Detention as an exceptional measure of last resort

20. The Committee considers immigration detention to be an undesirable measure. There should always be a presumption against detention and therefore in favour of freedom. Hence, deprivation of liberty in the immigration context should be an exceptional measure of last resort. The relevant authorities must carry out a context-specific assessment of the situation and ensure that the period of detention is as short as possible. Any compulsory, automatic, systematic or widespread detention of migrant workers and members of their families is arbitrary.

21. In addition, the Committee considers that the prohibition of arbitrary detention also extends to the use of detention as a deterrent or as a general migration management tool to contain immigration. Where detention becomes a routine measure of law enforcement at the border it may be arbitrary per se, to the extent that it is not an exceptional measure of last resort and is not based on an individualized and significant risk assessment.

22. In a context such as the COVID-19 pandemic, the Committee urges States to review cases of migrants in immigration detention with a view to releasing them. Alternatives to detention can then be implemented, and the detainee population reduced to the lowest possible level in order to prevent the spread of the virus in detention facilities.

Legitimate objective

23. Any deprivation of liberty in a migration context must be based on a legitimate objective of the State. Although the Convention does not list the legitimate purposes that make immigration detention permissible, the Special Rapporteur on the human rights of migrants (see, e.g., A/HRC/20/24, para. 9) and the Office of the United Nations High Commissioner for Refugees (UNHCR) (see, e.g., Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, guideline 4.1) have indicated that immigration detention can be justified only if a person poses a danger to himself or herself or to society, or if there is a risk that he or she will avoid administrative or other proceedings. In any event, the threat posed by those two scenarios must be substantiated by proven facts.

24. The Committee has pointed out, in its general comments Nos. 2 and 4, that the mere fact of entering or remaining in an irregular situation in a State is not sufficient reason to mandate the immigration detention of migrant workers and members of their families, since that exceeds the legitimate purpose or interest of States to control and regulate migration. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has established that detention based solely on immigration status may amount to torture. That is particularly the case when detention is imposed intentionally for purposes such as intimidating or punishing migrants who are in an irregular situation; causing them to withdraw their applications for international protection or to obtain some form of immigration regularization; forcing them to accept voluntary repatriation; compelling them to provide personal information or data such as fingerprints; extortion or soliciting sexual acts; or for reasons based on discrimination of any kind, including discrimination based on the person’s immigration status.

Legality

25. It is an obligation recognized by States that their acts must comply with national legal rules. Immigration detention can be legal only when it is previously authorized by law and is in line with the procedures established by law. Deprivation of liberty must be clearly and exhaustively provided for in national law. It is prohibited for the law to leave ample discretion to the authorities in the decision and enforcement of immigration detention.

26. To guarantee the right to liberty, States should establish in their laws a presumption in favour of freedom, which is consistent with the duty of States to provide for alternatives to detention for migrant workers and members of their families.

Non-arbitrariness

27. The principle of non-arbitrariness of detention is a rule of *jus cogens*. The Convention prohibits arbitrary detention, understanding arbitrary detention to be any deprivation of liberty that exceeds the limits of reasonableness. That means that it is not sufficient for the detention to pursue a legitimate purpose and be permitted by law. Rather, it must meet the criteria of necessity and proportionality and be based on an individualized assessment.

Necessity

28. In application of the principle of necessity, immigration detention can be used only where it is strictly essential to achieve the established legitimate end. Before imposing deprivation of liberty on migrant workers and members of their families, the decision-making authority must start from the fact that deprivation of liberty will always be the most harmful measure for the person concerned. Therefore, it must evaluate all available alternatives to detention that are less harmful to the individual.

Proportionality

29. If deprivation of liberty meets the requirements of legitimate objective, legality, necessity and proportionality, it is the duty of the authorities to carry out an assessment by contrasting the gravity of the measure implemented with the importance of satisfying the established legitimate purpose. According to the Working Group on Arbitrary Detention, such an assessment should take into account the possible effects of detention on the physical and mental health of the person, as well as the particular needs of migrant workers and members of their families.

III. General measures for the implementation of the provisions of the Convention concerning protection of the right to liberty

A. Places of detention

30. States parties have an obligation to respect and guarantee the rights enshrined in the Convention to all migrant workers and members of their families within their territory or subject to their jurisdiction, pursuant to article 7. With regard to the right to liberty, the responsibility of States parties encompasses not only human rights violations against migrants in places of detention under their control and within their territory, but extends to places of detention outside their territory, if the State has effective de jure or de facto control over that territory.

31. That implies that, through the design, financing, administration or supply of detention centres abroad, State authorities participate in acts that violate human rights. Similarly, if a State party decides to move migrant workers to detention centres outside its territory, the State is obliged to ensure that the rights recognized in the Convention and other international and regional human rights instruments are respected and guaranteed in those centres.

32. If migrant workers seek asylum in a State and are then transferred to detention centres outside the State’s territory, the Committee considers that their cases should generally be processed in the territory of the State where they arrived, or the State that otherwise has jurisdiction over them. Nevertheless, if States reach agreements to transfer asylum seekers for the processing of their cases, they should take into account when signing such agreements that States cannot dismiss their international obligations. Therefore, they must: (a) comply with applicable legal norms regarding international refugee law and human rights law, including providing the individual with the possibility of an effective remedy in decisions seeking to return them; (b) guarantee the right to non-refoulement, for which an individualized assessment should be carried out; (c) always carry out refugee status and/or other international protection processes in a fair and efficient manner; (d) provide access to asylum and/or other lasting solutions within a reasonable time; and (e) improve asylum conditions in the receiving State, the transferring State, and/or the region as a whole, when entering into transfer agreements.

B. Personnel carrying out detentions

33. The Committee notes that some States resort to private personnel to guard migrant workers and members of their families who are deprived of their liberty. The Committee recalls that States have an increased duty of care for persons deprived of their liberty and should act with due diligence to avoid violations of their personal integrity. It agrees with the Working Group on Arbitrary Detention that if a State subcontracts the management of immigration detention centres to private enterprises, it remains responsible for the manner and conditions in which the subcontractors hold individuals in detention. As the State has an obligation to care for detainees, it has an obligation to actively prevent acts of torture and ill-treatment by its agents and to act with due diligence to prevent abuse by private agents in particular.

34. In principle, security personnel in detention facilities must be from the public sector. However, States parties may use private security services provided that a correct monitoring scheme is put in place, and that the private security service personnel receive adequate training on human rights standards for the treatment of detainees, in accordance with international instruments on persons deprived of liberty. In addition, their actions must be governed in a coordinated manner with public personnel in detention centres.

C. Legal obligation of States parties to take measures to implement the provisions of the Convention (article 84)

Human rights capacity-building

35. Article 84 of the Convention establishes the obligation of States parties to adopt the legislative and other measures necessary to implement the provisions of the Convention. The Committee notes that, for the standards and guidelines set out in the present general comment to be effectively implemented, it is necessary for States to develop and strengthen their human rights capacity. That includes allocating sufficient resources for the implementation of alternatives to detention; ensuring that, in exceptional cases where deprivation of liberty is permitted, detention centres have the necessary equipment and conditions to carry out such a measure; supervising security personnel, whether public or private; and providing adequate training on international human rights law for all officials who have contact with migrants.

IV. Fundamental principles of the Convention regarding the right to liberty of migrant workers and members of their families

A. Principle of non-discrimination (articles 1 and 7)

36. The principle of non-discrimination is fundamental in international human rights instruments, being regarded as a *jus cogens* norm. Article 7 of the Convention underpins all of its provisions by establishing a duty for States parties to respect and ensure the rights provided for in the Convention to all migrant workers and members of their families within their territory or subject to their jurisdiction without discrimination.

37. States are not only obliged to ensure that their legal provisions and practices do not discriminate against migrant workers and members of their families, but must also put in place the positive measures necessary to prevent, reduce and eliminate the conditions and attitudes that perpetuate or cause de facto or de jure discrimination against migrant workers and members of their families.

38. The Committee recognizes that States enjoy the sovereign power to establish their immigration policies and laws. In doing so, they must nonetheless ensure full respect for their international human rights obligations, in particular respect for the human dignity of migrant workers and members of their families, and the principle of non-discrimination.

B. Principle of non-criminalization of migration

39. The entry and stay of migrant workers and members of their families in countries of transit, destination or reception entails multiple economic, social and cultural benefits. The Committee recognizes the legitimate concern of States to control entry into their territory and to establish rules of conduct within their borders, which may require the participation of institutions responsible for safeguarding public security.

40. The Committee opposes the treatment of migration by States that frame it as a threat to local communities and the consequent adoption of national laws, policies or practices that designate migrants as “dangerous” or “harmful” persons or even “criminals”. Such practices only aggravate migrants’ vulnerability and make them more likely to become victims of discrimination, xenophobia, violence and other human rights violations. The Committee notes with concern that one of the consequences of the criminalization of migration is the increasing association, both in legal documents and in public opinion, of migrants in an irregular situation with criminals.

41. The most obvious manifestation of such treatment is the regulation of migration within criminal law and the consequent criminalization of irregular entry or stay of migrant workers and their families. The Committee reiterates that under no circumstances can infringements relating to irregular entry or stay have consequences similar to those arising from criminal activity. Migration irregularity is not the result of a decision of the migrant, but of restrictive policies of the State that prevent the exercise of the right to human mobility.

42. Other examples of sanctioning migration include the encouragement of local populations to inform authorities about the migration status of migrant workers and members of their families or the obligation imposed on service providers and other relevant individuals to provide information and exchange data when migrant workers and members of their families attend schools, health centres or workplaces. While such obligations might seem more subtle than criminalization, they produce the same negative and often disproportionate effect on the human rights of migrants who are in an irregular situation.

43. While some States perceive such restrictive policies to be effective in controlling, deterring, reducing or preventing migration, there is in fact no evidence to demonstrate that irregular migration is reduced in practice by such policies. Such policies are misguided and unsustainable, they endanger the health and integrity of migrants, and even risk being counterproductive. The Committee notes that the indiscriminate use of immigration detention as a mechanism to deter migration or to combat irregular migration is ineffective in achieving those ends. It is economically more onerous than the regular migration pathway and violates multiple rights of migrants. As a result, the more indiscriminate the immigration detention is, the less effective it becomes as a means of managing migration. Nonetheless, some countries continue to use it systematically. Turning the purpose of immigration detention upside down, their focus is on some of the side effects attributable to detention rather than on their limited ability to contribute to the identification and expulsion of migrants. Those are side effects that should be considered appropriate only for criminal sanctions, such as deterrence, incapacitation and expression of moral resentment.

C. Principle of exceptionality of immigration detention

44. Immigration policy should be based on a presumption of freedom and not of detention. Although the right to liberty is not unlimited, the Committee has reiterated that, since any deprivation of liberty is highly burdensome and restrictive of the human rights of individuals, it should be considered an exceptional measure of last resort and be used only once it is demonstrated that it has a legitimate objective and is necessary and proportionate.

45. Detention or any other form of deprivation of liberty on grounds relating to an individual’s immigration status must be governed by the principle of exceptionality, that is, deprivation of liberty should serve as the last possible measure only, once all the less harmful alternatives have been analysed and ruled out. In any event, the decision to order the detention of migrant workers and members of their families should be taken for the shortest possible period and only if it is justified by a legitimate aim.

D. Principle of non-detention of migrant children

46. Several international and regional bodies and special procedure mandate holders have argued that the detention of children on grounds related to their migration status or that of their parents is not governed by the principle of exceptionality. It cannot therefore be a measure of last resort, and is thus always prohibited under international human rights law because it is unnecessary and disproportionate.

47. The Committee takes note of the global study on children deprived of liberty (A/74/136), which indicated that, around the world, at least 330,000 children are deprived of their liberty for migration-related reasons per year by at least 77 States, while at least 21 States do not resort to such measures or claim not to do so. Detention puts children at increased risk of developing physical and mental health issues and of becoming victims of abuse.

48. The Committee considers that the detention of children for reasons related to their immigration status – whether they are unaccompanied or separated children or children who migrate for the purpose of family reunification – is never in the best interests of the child. Even a short period of detention can constitute cruel, inhuman or degrading treatment, to their detriment. States must hence seek the early eradication of deprivation of liberty of migrant children.

49. In the event that migrant children are deprived of their liberty, States should assess the relevance of alternative measures to detention in order to prevent children from being separated from their parents or detained. Similarly, it is not permissible for children to be deprived of their liberty in detention centres with their parents, under the pretext of preserving family unity in detention. In any event, States should take measures to ensure the freedom of the family group.

50. States must always ensure that unaccompanied children are not detained and that the places intended for their care and protection do not in reality result in material deprivation of liberty, even if they are not formally detention centres. Unaccompanied migrant children should be surrendered to the care of their family members or adequately trained social workers.

51. In order to ensure that children are not placed in immigration detention, the State authority responsible for their protection and welfare must take a primary role in designing and implementing migration policies. The policies must authorize those authorities to act immediately upon the detection of accompanied or unaccompanied migrant children to take appropriate measures to protect them.

E. Principle of non-detention of persons in vulnerable situations

52. In the case of migrant workers and members of their families who are in vulnerable situations, States’ duty of diligence to effectively protect is greater than in other cases; they should, in particular, take reasonable measures to prevent the deprivation of liberty of those persons. States should avoid detaining migrants who have specific needs or who are particularly at risk of exploitation, abuse, gender-based violence, including sexual violence, or other human rights violations in the context of detention. That includes pregnant and breastfeeding women, older persons, persons with disabilities, survivors of torture or trauma, persons who are victims of crimes such as trafficking, migrants with special physical or mental health needs, lesbian, gay, bisexual, transgender and intersex persons, refugees, asylum seekers and stateless persons.

53. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has established that the threshold for ill-treatment can be reached very quickly, if not immediately, for migrants in vulnerable situations.

V. Legal obligations of States parties to the Convention to protect the right to liberty of migrant workers and members of their families

A. Obligation to implement alternative measures to detention

54. The Committee considers that States should take measures to abolish immigration detention gradually. It emphasizes that, through the Global Compact for Safe, Orderly and Regular Migration, States have committed to prioritize non-custodial alternatives in accordance with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only.

55. As noted above, the right to personal freedom and the prohibition of arbitrary detention require that immigration detention be an exceptional measure of last resort. United Nations agencies have argued that alternative and non-custodial measures should always be considered and exhausted before resorting to detention. Accordingly, the Committee considers that States have an obligation to review and implement all available alternative measures before resorting to detention, in accordance with the principles of necessity and proportionality.

56. The Committee also notes that, while terms such as “alternative measures to detention”, “non-custodial measures”, “less restrictive measures”, “less onerous measures” and “less invasive measures” are often used interchangeably in different contexts, they fundamentally address the same legal concept. The Committee understands as an alternative to detention any law, policy or practice that allows migrant workers, asylum seekers, refugees and stateless persons to reside freely in the community while their immigration status is resolved or while they wait for deportation or expulsion from the country.

B. Human rights-compliant alternatives to detention

57. The Committee recalls that the entry and irregular stay of a person in a State should never constitute a criminal offence. At most, those actions could constitute administrative misconduct. Therefore, in order to ensure that immigration detention is an exceptional measure only, States should adopt or amend domestic legislation that provides for human rights-compliant alternatives to detention.

58. The Committee understands as alternatives to detention all community care measures or non-custodial accommodation solutions that are less restrictive than detention, with the aim of respecting the human rights of migrants. The ideal alternatives to detention are those that respect the right to personal freedom and therefore do not create any related restrictions or conditions, but rather generate other legitimate mechanisms and measures that are in line with human rights standards.

59. However, the Committee notes that most of the alternative measures that exist in States seek to emulate those measures existing in the field of criminal justice, such as bail, home-based detention or other restrictions on movement, such as electronic surveillance or periodic reporting to the authorities. Those measures are often excessively restrictive and are not appropriate in the context of migration. In some cases, they can exacerbate the stigmatization of migrants, unnecessarily interfere with their personal freedom, generate excessively onerous requirements, and may even amount to de facto detention.

60. In regulating alternative measures to detention, States should ensure that any limitation of personal freedom is assessed on a case-by-case basis, examining those measures against the principles of legality, suitability, necessity and proportionality. The relevant authorities should review the effects of the alternative measures on the rights of migrants and verify that no unnecessary restrictions are imposed on migrants, in order to identify the least invasive alternative measure to detention.

61. The Committee wishes to highlight the fact that alternative measures to detention have proved to be less costly; they cost up to 80 per cent less than detention, given their lower operating costs. More importantly, alternatives to detention are more humane, as they have less harmful physical and psychological impacts on individuals – particularly individuals in a vulnerable situation – as they support people’s health and well-being and protect their rights. Alternatives to detention allow migrants to continue leading normal lives while their immigration status is resolved. Furthermore, alternatives to detention are more effective; approximately 95 per cent of migrants whose immigration status is being resolved attend hearings, and up to 65 per cent of migrants whose cases are rejected voluntarily and independently return. The Committee considers that, owing to the risk of the spread of COVID-19 and other diseases, there is an even greater need to take alternative measures to immigration detention.

62. The Committee recommends alternative approaches to detention that include community-based non-custodial options. Those alternatives are characterized by case management and other forms of support, adapted to the specific needs and vulnerabilities of each person or family, which allow them to live freely in their communities. Legal assistance, psychosocial support and the guarantee of the protection of the rights to education, housing and health care for them and their families are guaranteed. If such alternatives to imposing restrictions on the rights of migrants are used, the safeguards surrounding them should be as stringent as those applied to detention situations. Such safeguards include ensuring that the alternative measure is established by law, limited in duration, not discriminatory in its purpose and effect, not arbitrary, subject to procedural safeguards, including regular judicial review and independent supervision, and that it protects the rights and dignity of the individual.

C. Duration of detention

63. As noted above, detention is permissible only in cases where alternatives cannot be applied. However, detention should never be excessive or indefinite during the course of immigration proceedings, since it would then become arbitrary. States should therefore establish in their legislation the maximum period of detention during the course of immigration proceedings. Moreover, detention should be permitted only for the shortest possible period, and it should also be under frequent review to assess whether it remains necessary and is still the only option. Once the period of detention established by law has elapsed, the detainee must automatically be released.

64. If there are obstacles to identifying or deporting migrants who are in an irregular situation from the territory, which are not attributable to them – such as non-cooperation of the consular representation of their country of origin, the principle of non-refoulement or the unavailability of means of transport – thus making deportation or expulsion impossible, the detained person must be released in order to avoid indefinite detention, which would be arbitrary. Similarly, the exercise of rights by migrants deprived of their liberty cannot be grounds for prolonging detention. Any deprivation of liberty implemented on the grounds that detainees are acting on their rights to defence or to apply for asylum would therefore be arbitrary.

D. Judicial guarantees and access to justice (articles 16, 17 and 18 of the Convention)

65. The Committee has stated that the right of access to justice is dual. On the one hand, it constitutes a human right in itself, inherent in all persons, and on the other hand, it is a principle and precondition that imposes obligations on States to ensure that all persons can stand before the law to claim their rights. The Global Compact for Safe, Orderly and Regular Migration recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. That implies that States must guarantee that all persons within their territory or subject to their jurisdiction, regardless of their nationality, immigration status or lack thereof, have access to justice.

66. The Committee recalls that migrants may face multiple obstacles to accessing justice, such as language barriers, lack of knowledge about applicable laws and lack of support networks. Therefore, in order to ensure that migrants enjoy the right of access to justice and due process on an equal footing with others, States should adopt procedural or compensatory measures that help reduce or eliminate obstacles and shortcomings that prevent or hinder the effective defence of migrants’ interests. The Committee recommends that States parties take all necessary measures to ensure that migrant workers and members of their families who are deprived of their liberty have access to justice in transit and destination States, and to information on their rights as migrants before, during and after their entry and stay in transit and destination countries.

67. In order to guarantee access to justice for all migrant workers and members of their families, the Committee urges States parties to intensify efforts to ensure that migrant workers are aware of their rights before travelling, and to facilitate their access to legal recourse and redress for any violations of their rights that occur while in transit and upon arrival in destination countries. Even after their return to their country of origin or to a third State, those guarantees should always be upheld for migrant workers and members of their families through consular services.

E. Judicial guarantees

68. The Committee is acutely aware that migrant workers and members of their families are often severely impeded in accessing national courts and monitoring and complaint mechanisms owing to a lack of adequate safeguards during their detention. That includes: a lack of legal representation and legal aid services, insufficient consular protection to combat migrants’ fear of being detected by the authorities or of being detained or deported if they seek access to justice, the limited availability of the services of interpreters and translators, the lack of effective remedies to challenge the legality of detention, and the lack of concrete rules on the obligations of the courts to apply sanctions or award compensation for violations of the human rights of migrants.

69. The Committee recalls that, under the Convention, States parties must ensure that laws, policies and practices are in full respect of procedural safeguards for migrant workers and members of their families in all administrative and judicial proceedings relating to their immigration or international protection statuses. That includes asylum or determination procedures for refugee status, all forms of additional protection, statelessness determination procedures and other special protection regimes and policies that may apply to them.

70. The due process guarantees detailed below should be ensured by States parties to respect access to justice for migrant workers and members of their families who are in detention.

Right to be informed of the reasons for detention (article 16 (5) of the Convention)

71. The right to information is essential for the exercise of other rights, such as access to justice. The authorities must inform the migrant worker about the reasons for detention as soon as possible and, as far as possible, in a language that the person understands, and taking into consideration factors such as age, disability and educational level to adopt understandable language.

72. The Committee notes that, in order to guarantee effective access to justice for migrants, it is essential that States make available the economic and human resources necessary to provide migrants with information in a language that allows them to clearly understand the procedures and procedural safeguards they may invoke if they face a violation of their human rights.

73. The Committee reiterates that States parties should prepare model notification forms containing, inter alia, information on resources available in the languages most frequently used or understood by migrant workers who are in an irregular situation in the countries concerned. The forms should always be accompanied by an arrest warrant containing concrete information on the facts of and the legal basis for the detention, and the place of detention.

Judicial review of detention (article 16 (6) and (8) of the Convention)

74. The Committee reaffirms that all migrant workers and members of their families who are deprived of their liberty have the right to bring proceedings before a court so that the court can rule without delay on the legality of their detention. That guarantee seeks to prevent deprivation of liberty from becoming arbitrary detention (art. 16 (8)). If they are detained within the criminal law context, migrant workers and members of their families must be brought promptly before a judge or court to assess the legality and non-arbitrariness of their detention. The authority deciding on the legality of detention must be independent from the entity that carried out the detention, in order to prevent an assessment of the legality of detention from becoming a mere formality that prevents an impartial analysis. The assessment must also be carried out by an official authorized by law to exercise judicial functions and with the power to order the release of the migrant worker.

75. In addition, the Committee stresses that legal remedies must be in place to allow migrant workers and members of their families to challenge the legality of detention or the legality of a deportation or expulsion order. States must ensure that judicial remedies include the power to suspend any detention, deportation or expulsion order in order to effectively protect the rights of migrant workers.

Consular assistance and protection (articles 16 (7) and 23 of the Convention)

76. Under articles 16 (7) (b) and 23, migrant workers and members of their families have the right to communicate with the consular or diplomatic authorities of their home State or those of another State representing their interests. Conversely, States of destination or transit have an obligation under article 16 (7) to: (a) inform the migrant worker of that right without delay and of the rights derived from other relevant treaties; (b) inform the consular or diplomatic authorities of the detention of the migrant worker upon his or her request; (c) facilitate communication between the migrant worker and those authorities; and (d) communicate and meet with the legal representatives of those authorities and make arrangements with them for the migrant worker’s legal representation.

77. The Committee is aware of the particular situation of refugees or asylum seekers who fear or have been subjected to persecution, or who have other reasons to avoid contact with the consular authorities of their State of origin or residence. In such cases, the State under whose jurisdiction the person is living must respect the decision not to exercise his or her right to consular assistance and protection if the person wishes to apply for asylum.

78. The Committee emphasizes that the right to consular assistance and protection is essential for enforcing access to justice for migrant workers, and is particularly pressing when it comes to persons deprived of their liberty, regardless of whether they are detained on criminal or immigration-related grounds. The Committee therefore considers that States of origin should ensure access to effective consular assistance and protection, including by providing sufficient human, technical and financial resources.

Free legal and interpretation assistance

79. In the context of immigration detention, migrant workers and members of their families have the right to legal advice and legal representation, provided by the State free of charge for persons who cannot afford it, making the rights to due process and access to justice truly operational. In the case of migrant workers who cannot understand or speak the language used during the proceedings, States should make qualified interpreters available to them. Even for migrant workers who understand the language of the country in which they currently reside, it is important to have an interpreter and that the information is provided in understandable terms free of technicalities.

80. The Committee recognizes the fundamental work of non-governmental organizations, university legal clinics and pro bono lawyers, among others, in the legal representation of migrants. However, the Committee recalls that their efforts do not relieve States from their responsibility to provide migrants with free legal assistance and representation. Moreover, States should always allow non-governmental organizations to carry out their work unhindered.

Right to be notified of the decision on immigration status

81. The Committee recognizes that, in order to fully access justice, migrants must obtain a well-founded and reasoned decision on their immigration proceedings so that they can, where appropriate, appeal that decision and defend their rights adequately. Notification of that decision must be made in a personal and written manner to the migrant and, where appropriate, to his or her legal representatives.

Compensation for victims of unlawful or arbitrary detention (article 16 (9) of the Convention)

82. The Committee recalls that under article 16 (9) of the Convention, migrant workers and members of their families who are victims of unlawful or arbitrary detention have an enforceable right to compensation. The nature of the compensation must be decided by the competent national authority. That does not preclude States from taking appropriate measures to ensure that expelled migrant workers have access to compensation through consular and diplomatic mechanisms, and taking other measures of redress, such as facilitating the return of the migrant.

F. Prohibition of torture and cruel, inhuman or degrading treatment or punishment (article 10 of the Convention)

83. The Committee has received information about various acts of violence, particularly sexual violence, forced labour and trafficking for the purpose of sexual exploitation, perpetrated against migrants who have been deprived of their liberty. Women, girls and members of the LGBTI+ community are highly vulnerable to abuse in immigration detention centres. In some cases, the abuse amounts to torture. The Committee notes that migrants are at an increased risk of human rights violations while in detention, and States have an obligation to prevent, investigate, prosecute and punish any acts of torture, cruel, inhuman or degrading treatment or punishment or other human rights violations by detention facility personnel, detainees or any other person.

84. The information received by the Committee also indicates that some States place migrants in solitary confinement. That practice has severely negative health effects and in some cases, has led to suicide or irreparable psychological damage. The Committee recalls that solitary confinement is not appropriate to manage or ensure the protection of migrants, stateless persons, asylum seekers or refugees. According to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, prolonged solitary confinement constitutes an act of torture.

85. The Committee has received reports of migrants who have been returned to detention centres where they were at risk of torture or cruel, inhuman or degrading treatment. The Committee has maintained that the principle of non-refoulement – the prohibition of the transfer of persons by force, in any form, to countries where they may become victims of persecution or serious human rights violations – includes the prohibition of the return of persons to locations where they are subjected to inhuman and degrading conditions of detention, the absence of necessary medical treatment or threats to the enjoyment of the right to life (articles 9–10 of the Convention). Furthermore, the Committee recalls that the rejection and return at national borders of persons who might require international protection without analysing individual rights and claims to protection violate the prohibition of collective expulsion and therefore the principle of non-refoulement.

G. Prohibition of slavery, servitude and forced or compulsory labour (article 11 of the Convention)

86. Article 11 of the Convention requires all States parties to take effective measures against all forms of forced and compulsory labour imposed on migrant workers. The Committee expresses its concern at the presence of human trafficking networks within immigration detention centres. The Committee has also received reports of detained migrants who are subjected, under threat of punishment, to prolonged forced and/or underpaid or unpaid labour.

87. States have an obligation to ensure that migrants who are deprived of their liberty are protected from all forms of slavery, servitude, forced or compulsory labour and trafficking. States should allocate sufficient human, technical and financial resources to implement laws and strategies to prevent and eradicate trafficking in persons. They should also establish mechanisms to identify victims of trafficking and abuse by traffickers, and provide victims with protection and assistance. Furthermore, States should conduct prompt, effective and impartial investigations into all cases of trafficking and abuse by traffickers and prosecute and punish the perpetrators of such acts and their accomplices, including in the case of public officials.

H. Right to private and family life (article 14 of the Convention)

88. Migrant workers and members of their families have the right to privacy and to family life without interference. Those rights are closely linked to the principle of non-detention of children, since the Committee considers that it is the right of migrant families with children not to be deprived of their liberty, and hence granted alternatives to detention. Consequently, the detention of children can never be justified with the purpose of reuniting them with their detained parents. Nevertheless, each case should be evaluated individually; in family cases, the household should be considered as the guiding criterion.

89. In situations where families with children cannot benefit from immediate alternatives to detention, immigration detention must be as short as possible and States must ensure that families remain united and enjoy their rights during detention. The Committee expresses its concern about the separation of families in detention based on sex or age and considers that the prevailing criterion in cases of families with members of different sexes is the family bond. However, the Committee stresses that the exceptional circumstance does not exempt the State from diligently complying with its obligation to ensure alternatives to detention for families. Therefore, prolonged detention or detention in substandard facilities is not permitted for migrant families with children.

I. Right to health (article 28 of the Convention)

90. The information received by the Committee indicates that migrants who are deprived of their liberty often face serious difficulties in accessing health services and medical care in detention centres. Reproductive health care for women held in detention, particularly pregnant women, is reportedly often inadequate.

91. The Committee therefore considers that States should ensure that detained migrants have access to health services, including sexual and reproductive health services, and psychological care. In the absence of adequate conditions in detention centres, detained migrants in need of medical care should be transferred to adequate facilities. Moreover, taking into account the psychological and physical effects of detention on migrants, States should assess detained migrants’ physical and mental health on a regular basis. States should take all necessary measures to ensure that all migrant workers and members of their families who are deprived of their liberty, regardless of their immigration status, enjoy – both in law and in practice – access to emergency medical care and basic health services under the same conditions as nationals of the State party.

92. In a context such as the COVID-19 pandemic, the Committee agrees with the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see CAT/OP/10) and the Committee on the Elimination of Racial Discrimination (see CERD/C/GRC/CO/20-22, para. 23, CERD/C/ESP/CO/21-23, para. 22, and CERD/C/NOR/CO/21-22, para. 36) that States should take the necessary precautionary measures to prevent the spread of the virus, and implement emergency measures to ensure that detained migrants have access to appropriate levels of medical care and maintain contact with their families and the outside world.

J. Right to property and obligation to protect identity and personal documents (articles 15 and 21 of the Convention)

93. Migrant workers and members of their families have the right not to be arbitrarily deprived of their property. Similarly, State authorities are obliged to protect the identity and personal documents of migrant workers and members of their families. Nevertheless, it is common practice for State authorities to retain people’s belongings during immigration detention, including cell phones, cash, bank cards and identity and personal documents. In some cases, the property is never returned to the owner.

94. The Committee considers that, while States have a legitimate interest in ensuring the safety of migrant workers in detention and may take measures to that end, such as temporarily withholding the belongings of detainees, it is not within the interest of migrants and members of their families to have their belongings withheld for longer than the detention period. It is therefore important that States set clear criteria and establish an inventory of retained belongings. It is also necessary to ensure that belongings that are withheld do not include essential items, such as medicines, telephone numbers of close relations and identity documents. For all other belongings, custody must be supervised, and it must be ensured that they are returned to the migrant at the end of detention.

95. The Committee recalls that the right to identity is central to the enjoyment of all other rights recognized in the Convention and other international treaties. Withholding migrants’ identity documents is never appropriate; it violates the right not only to property but also to identity and leaves migrant workers and their families more vulnerable to violations of their other rights.

96. Therefore, States must take legislative and other measures to ensure that identity documents are withheld only when it is clearly strictly necessary for the processing of the detention and only for the duration of the detention period. If withholding documents is indispensable, the migrant worker must be allowed to access his or her documents and they must be returned to the individual upon completion of the proceedings for which the documents were required.

K. Conditions of detention

97. The Committee considers that poor conditions of detention may constitute cruel, inhuman or degrading treatment and may increase the risk of other rights violations, including the right to health, food, safe water and sanitation. In addition, torture may occur if inadequate detention conditions are intentionally imposed, encouraged or tolerated by the State on the basis of discrimination of any kind, including immigration status, or in order to deter migrant workers and members of their families from continuing their immigration or international protection proceedings, or to intimidate or punish them for doing so.

98. Immigration detention facilities must therefore meet the highest standards to ensure the dignity and well-being of detainees, at least at a level required for detention facilities used in criminal contexts. However, the Committee stresses that detention in the immigration context should never be governed by criminal law.

99. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) provide the standards to be met by detention centres, regardless of the budget available to States. It must be ensured that: (a) migrant workers are not detained with persons prosecuted for or convicted of crimes; (b) men and women remain separated unless in a family setting; (c) specific areas are designated for families with children; (d) sufficient space is provided and overcrowding is avoided at all costs; (e) facilities have open spaces for coexistence and recreation; (f) adequate cleaning and lighting is provided; and (g) other measures are taken that enable detainees to have an adequate standard of living. In addition to physical conditions, States should ensure that there are sufficient staff, both men and women, who must be adequately trained in human rights and gender issues and qualified to work with groups of persons who are in vulnerable situations.

L. Monitoring human rights in places of detention

100. It is essential that States effectively and credibly monitor the conditions in immigration detention centres. States are obliged to take the necessary legislative and other measures to ensure the constant monitoring of detention centres, with no restricted areas. It is important for the Committee that the authority responsible for monitoring places of detention be independent and impartial. It is not permissible for the same authority responsible for implementing the immigration policy or in charge of detention centres to carry out that task. States may use former professional bodies composed of persons with experience in the human rights of migrant workers and their families, whether authorities or members of civil society, or State human rights protection agencies.

101. Even if there is an authority or body responsible for the supervision of places of detention, the participation of civil society organizations – which do not supplement or replace the obligations of States – is essential and relevant for the defence of the rights of migrant workers and members of their families. States should hence authorize access to detention facilities for civil society organizations, national human rights institutions and international bodies, such as the Office of the United Nations High Commissioner for Human Rights, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNHCR and the International Committee of the Red Cross, to ensure independent and autonomous monitoring. Information and documentation relating to the facility and persons held there and the possibility of conducting private and confidential interviews with detainees and staff must be available for external monitoring entities.

102. The Committee recalls that the objective of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as provided for in its preamble and article 1, is to establish a system of regular visits undertaken by independent international and national bodies to places where persons are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment, which is a non-derogable obligation under international law. States parties to that Optional Protocol should ensure that detention facilities are monitored by such bodies, particularly by their national mechanisms for the prevention of torture.

103. In a context such as the COVID-19 pandemic, States should take steps to ensure that monitoring is carried out in a way that allows international and national bodies to carry out their mandate in detention facilities in line with the principle of “do no harm”, minimizing the need for physical contact, but offering opportunities for preventive involvement.

VI. Supervision and accountability

104. States should establish independent monitoring and accountability mechanisms in immigration detention centres, and generate systematic reporting mechanisms. That can be achieved through cooperation between detention authorities and other stakeholders, such as the police, national human rights institutions, parliamentarians, civil society and international organizations. States should also support all interested parties that file complaints on behalf of victims of crime, abuse or human rights violations in immigration detention centres. Furthermore, States should establish official mechanisms and procedures to provide effective remedies for human rights violations in detention centres, provide comprehensive redress to victims, and hold State and private authorities accountable for such violations.

VII. Access to information and data collection and indicators

105. The Committee notes that States do not usually provide accessible public information on the number of migrants detained or on the conditions of their detention. The Committee recommends that States adopt mechanisms to allow access to public information on the rights of migrant workers not deprived of their liberty. The Committee also recommends that States collect and process such information for the development of adequate public policies. The Committee urges States parties to implement information systems to establish whether and where a migrant is detained, which is also conducive to strengthened efforts to search for missing migrants. Such systems should safeguard the principle of confidentiality that protects asylum seekers, refugees, stateless persons and other groups in vulnerable situations in need of additional protection, and in the field of data protection.

VIII. International coordination and cooperation

106. The Committee reaffirms the need to address international migration through international, regional and bilateral cooperation and dialogue. It also reaffirms the need for a broad and balanced approach that recognizes the roles and responsibilities of countries of origin, transit, destination and return in the promotion and protection of the human rights of migrant workers who are deprived of their liberty, to achieve safe, orderly and regular migration, in full respect for human rights and avoiding practices that could aggravate the vulnerability of migrants.

IX. Dissemination and use of the present general comment and reporting

107. States parties should broadly disseminate the present general comment to all stakeholders, including State authorities, the private sector, including private detention facilities, civil society, national human rights institutions, the media and all migrants, regardless of their status. It should be translated into the relevant languages and into versions and formats that are fully accessible.

108. The relevant parts of the present general comment should be incorporated into the official pre-employment training and other official training of all employees, particularly technical staff, and the authorities and staff responsible for the administration of immigration detention and law enforcement.

109. States parties should include in their reports submitted under article 73 of the Convention information on the measures taken in the implementation of the present general comment, and the results achieved.

X. Ratification or accession and reservations to the Convention

110. The Committee encourages States that have not yet done so to ratify or accede to the Convention, including the formulation of binding declarations under articles 76 and 77.

111. States parties are encouraged to review, amend or withdraw reservations made during ratification or accession with a view to ensuring that migrant workers and members of their families who are deprived of their liberty fully enjoy their rights under the Convention.