

October 28, 2010

Honorable Committee Members,

The International Human Rights Law Clinic at the University of Virginia School of Law is grateful for the opportunity to make a written contribution to the Committee on Migrant Workers as input towards the elaboration of Draft General Comment on migrants' right to liberty and prohibition against arbitrary detention, per the obligations outlined in the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Convention). The Draft General Comment furthers the Committee's goals to protect the rights of migrant workers and members of their families and carefully outlines how States should approach their migration policy. Overall, we believe that this Comment provides beneficial guidance to States, civil society, and others to ensure these principles.

In order to ensure the Comment is comprehensive in its guidance to rights-holders, duty-bearers, and other stakeholders, we recommend revisions to a few select sections. We present our recommendations below.

1. **Part I, Paragraph 4:** This Section addresses the context of international migration. In light of the concern raised by the Committee in this paragraph as to the criminalization of migrant workers, we suggest the following language:
 - a. "The Committee would like to emphasize that traditional protectionist approaches to immigration controls should be abandoned in the new age of globalization. Instead, States should ensure all laws and policies respect the right to freedom of person, security in persons, freedom of movement, and right to liberty, among other international standards. Respect for human rights is of special importance in this space as migrants are in specifically vulnerable positions. State legislation and policy should promote dignity and respect inherent to migrants and ensure that laws do not foster negative perceptions of migrants."
2. **Part II, Section C, Paragraph 13:** In this Section, the Committee outlines the definition for the deprivation of liberty and the lens for States to view detention. As noted by the Committee, it is concerning how States have used other monikers, including "shelters," "guest houses," "transit centres," and "migrant stations,"¹ to curb public scrutiny of detention policies. Therefore, we would recommend additional language to safeguard the rights of migrants and their families in these circumstances. We suggest the following to be added to this section:

¹ Working Group on Arbitrary Detention (2018), A/HRC/39/45 Annex, para. 45.

- a. “Using differing terminology does not change a State’s responsibility to ensure that migrants are protected by law so that they are not arbitrarily detained or held longer than is proportionate, reasonable, and justifiable by law. If an individual lacks the freedom to leave, then it is the State’s responsibility to provide all safeguards as there has been an actual or constructive denial of freedom.”
3. **Part II, Section E, Paragraph 19:** This Section notes that the prohibition of arbitrary detention is a *jus cogens*, non-derogable rule of customary international law. We suggest that the *pro persona* principle should govern the judicial and legislative approach to migration and detention. The solution in administrative matters should be designed to apply the most beneficial law to the most amount of people possible, regardless of their origin or any other identifier. This principle is necessary to ensure migrants are treated appropriately within the scope of human rights law and to ensure respect for human dignity in each State’s judicial system.
4. **Part II, Section E, Paragraph 29:** This Section focuses on the criteria of necessity and proportionality when States make an individualized assessment concerning the arbitrariness of detention. In addition to the guidelines set forth by the Committee, we would recommend that language be added to show that, under the principle of proportionality, States should use detention only as a last resort and that a preference should be for less-restrictive measures, especially non-custodial ones.² Furthermore, the method employed by a State for each individual case should be firmly rooted in the least intrusive and restrictive manner for migrants or their families.³
5. **Part IV, Section A, Paragraph 37:** The Committee’s efforts to delineate the necessary requirements for states to ensure non-discrimination towards migrant workers is essential to protect the rights of migrants and their families. To ensure that States comply with these principles, we recommend that additional language provides that the principle of non-discrimination includes providing for the rights of all persons, including migrants, without regards to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth, or other status. We believe that this will ensure that States are aware of the broad context for non-discrimination.
6. **Part IV, Section D, Post-Paragraph 46:** The Committee’s goal to distinguish how migrant children and families should be viewed in immigration proceedings is important to ensure that they are not deprived of liberty. Because older children, particularly from 15 to 18 years, may have less protection or be seen as adults due to their age,⁴ we would recommend that this Section include an additional paragraph to define when an individual is considered a child and how immigration policies should reflect this definition and

² General Comment No. 2 of the Committee on the Protection of Rights of All Migrant Workers and Members of Their Families (2013), para. 26.

³ Ibid.

⁴ General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (2017) and No. 23 of the Committee on the Rights of the Child (2017), para. 3.

provide a guideline, set forth in General Comment No. 4, for how to proceed when a child's age may be unknown.⁵ We would include the following:

- a. A "child" is defined as any person under the age of 18. A State's migration policies and detention regulations should reflect this definition. If a child's age is unknown, a State should make an assessment by a pediatrician or other professional skilled in child development. This assessment should center on a child's physical and psychological development. This should be done in a language that a child can understand and using a manner that appropriately accounts for a child's age, gender, and culture. Documentation produced by a child should be viewed in a positive light and their testimony given credence unless there is adverse evidence. States should refrain from using bone or dental exams to make an assessment due to the ability to err and cause undue harm. Determinations due to these assessments should be reviewable and appealable by an independent body.
7. **Part IV, Section D, Paragraph 49:** In the paragraph, the Committee encapsulates how "the freedom of the family group" should also be ensured. To make sure that all types of families are included in these circumstances, we would include language that reminds States that families are to be defined inclusively rather than solely by heteronormative, gendered, or traditional standards.⁶
 8. **Part V, Section B, Paragraph 58-62:** This Section articulates certain features of human rights-compliant alternatives to detention. Previous sections (Part II, Section E, Paragraph 20, 23; Part III, Section C, Paragraph 35; Part V, Section A, Paragraph 56) have noted that detention should be an exceptional measure of last resort. In order to best guide states in implementing such alternatives, we recommend that the Committee add the following language:
 - a. To be added to Part V, Section B, Paragraph 58 specifically: "States should enshrine in their domestic laws an obligation to consider alternatives to detention. Human rights-compliant alternatives to detention must allow for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country."
 - b. To be added to Part V, Section B, Paragraph 59 specifically: "The Committee wishes to strongly caution States regarding the use of requirements to surrender certain travel documents to prevent migrants from absconding. States that adopt such measures must provide migrants with alternative identification documents to prevent detention and ensure their safety and ability to work."
 - c. To be added to Part V, Section B, Paragraph 60 specifically: "Alternative measures must not be dependent on the migrant's ability to pay for them, in

⁵ Ibid. at para. 4.

⁶ Recommendations for Addressing Women's Human Rights in the Global Compact for Safe, Orderly and Regular Migration (2018), para. 3.13.

addition to specifically taking into account the particular vulnerability of certain groups of migrants, such as women and LGBTQ persons.”

- d. To be added to Part V, Section B, Paragraph 62 specifically: “All persons subject to non-custodial alternative measures should be informed clearly and concisely about their rights and duties, as well as the consequences of non-compliance. It is also the Committee’s strong opinion that the State has the duty of providing free legal assistance, including rights to an interpreter and intercultural mediator.”
“The Committee wishes to encourage States to partner with community organizations and NGOs to ensure a fair and human-centered approach rather than administer the program solely through governmental bodies. In addition to community-based non-custodial options, the Committee encourages States to consider supervised release, release with reporting requirements, or release on bail. Any alternative measure must be realistic and may not rely on the ability of migrants to fund the program, and include the same stringent safeguards as those applied to detention situations, such as non-discrimination, necessity, proportionality, subject to regular judicial review, etc.”
9. **Part V, Section F, Paragraph 83:** The paragraph describes the prohibition of torture in the context of immigration detention. We applaud the Committee’s recommendation that children should never be detained. In order to better protect vulnerable groups in immigration detention, we recommend that the Committee specify that if children are detained, they should never be detained with adults, as such incarceration often results in the abuse of children.⁷
10. **Part V, Section H, Paragraph 89:** This section outlines the rights of migrant workers - and their families - to private and family life. We would recommend the Committee add the following language: “The Committee urges States to implement programs that integrate migrants into the fabric of society in order to increase knowledge of their rights, account for worker contributions to the tax base, and limit the exploitation of migrant workers. States should work to provide the clearest explanation possible for the benefit of the migrant.”
11. **Part V, Section K, Paragraph 99:** The paragraph specifies standard minimum rules for the Treatment of Prisoners. We recommend that additional language specifying that the State has the duty to ensure that the detention is safe, fair and reasonable, be added, and that States shall only hold detainees in facilities officially acknowledged as places of detention. We suggest the following specific language to ensure that the detention is safe, fair, and reasonable:
 - a. States must ensure female guards are present and that there are appropriate checks in place to limit opportunities for violence against women and LGBTQ+ persons.
 - b. Detention centers must include minimum floor space, lighting, heating, and ventilation; providing for adequate sanitary, bathing, and shower installations

⁷ Report on the Working Group on Arbitrary Detention Chairperson-Rapporteur (A/HRC/7/4), para. 55 and 57.

including soap and feminine hygiene products. Water, sanitation, and hygiene facilities should be well-lit, safe, private, and gender-responsive.⁸

- c. Detention centers must allow administrative detainees to wear their own clothing, provide facilities for the cleaning of clothing, and a separate bed with clean bedding for each detainee.
- d. Adequate food and drinking water; at least an hour of outdoor exercise daily; the right to communicate with relatives, friends, and have access to newspapers, books, and religious advisors.
- e. Ensure the presence of at least one qualified medical officer with knowledge of psychiatry, and one qualified dental officer.
- f. Ensure that those incarcerated have a right to make requests of or complain to central prison administrators, judicial authorities, or other proper authorities.⁹

12. **Part VII, Paragraph 105:** This section contains recommendations on data collection policies of States, including the right of the public to access information while preserving the principle of confidentiality for migrants. We suggest adding the following language to enable meaningful public access to information:

- a. “The different experiences migrants may face based on immutable characteristics such as gender, race, and age mean that data collection should account for these realities. The data rights of migrants and their confidentiality must be protected while allowing for disaggregated data collection in order to analyze information specific to age, gender, sexual orientation, nationality, disability, and any other qualifiers that may lead to specific discrimination.”
- b. The Committee should also add language encouraging states to collect quantitative and qualitative data. We suggest the following language:
 - i. “Quantitative and qualitative data should be regularly gathered on the detention of migrants and asylum seekers. The Committee suggests that such data may include the prevalence of detention imposed by a judicial source, prevalence of judicial intervention in detention, and how many migrants are placed in rights-based alternatives. The Committee urges States to use this information to improve the States’ system to minimize delays and time spent in detention.”

We thank the Committee for this opportunity to provide our suggestions and revisions.

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⁸ Recommendations for Addressing Women’s Human Rights in the Global Compact for Safe, Orderly and Regular Migration (2016), para. 3.8.

⁹ Report of the Special Rapporteur on the Human Rights of Migrants (A/HRC/20/24), para. 72(e).