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

**Written contribution submitted by The Advocates for Human Rights, a non-governmental organization in special consultative status**

Submitted 30 October 2020

1. The Advocates for Human Rights (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates holds Special Consultative Status with the UN Economic and Social Council. Our immigrant detention, legal services, and court monitoring work is a leading resource for migrants’ rights efforts in the United States and internationally. We monitor and document government compliance with international obligations, advocate for human rights-based public policy responses, and provide free legal assistance to detained migrants in the Upper Midwest region of the United States. Since 2017, we have monitored detained immigration court proceedings. We also provide Know Your Rights outreach in immigration detention centers across Minnesota and regularly conduct legal intake with people in immigration custody. Through this work, we have gained first-hand knowledge of the challenges facing people in immigration detention and their families. With this submission, we share with the Committee recommendations based on information received directly from detained migrants as well as our court observations from immigration court proceedings for detained individuals, and insights as attorneys for detained migrants.

1. The Committee correctly notes in **Paragraph 4** that “…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.” The Advocates suggests clarifying the sentence to read: “…barriers to access to legal remedies and international protection (**particularly, lack of access to counsel, including government-appointed counsel**), inhumane and overcrowded conditions in detention centres, **lack of adequate medical care, and isolation from family and community support networks,** have a severe impact on the rights of migrant workers and their families.”

1. Overall, while The Advocates agrees with the Committee that criminal detention for immigration violations is contrary to international law, we also caution that the distinction may be used to provide fewer protections for migrants and their families. For example, *criminal* detainees generally are guaranteed government-appointed counsel, bail, higher levels of due process, and clear maximums on time in detention. While immigration violations should not be criminalized, it must be clear that **all forms of detention** must meet minimum standards for protection. We applaud the Committee for recognizing this in **paragraph 18**, and suggest that this be clarified throughout (including **paragraph 57**).For example, in **paragraph 5**, we suggest clarifying that “criminalization, **as well as civil detention**, of migrants…has involved the manipulation of **the law**…”
2. We applaud the Committee for recognizing the urgent impact of COVID-19 on migrants in detention. We suggest that the Committee expand its concern to include the need to stop unnecessary enforcement operations, release detainees, and stop transfers and deportations to reduce spread.

1. The Committee correctly notes that States must implement procedures to fulfill international obligations to certain vulnerable migrants. In our experience, we have seen that States may avoid these obligations by failing to ensure consistent implementation of identification procedures, failing to provide adequate training for officers, or failing to include robust protections such that vulnerable migrants are identified. Therefore, we suggest **paragraph 9** require **mandatory identification procedures with concomitant protections from removal and sensitivity training for all migration officials** to identify and protect migrant victims of crime and other groups in need of international protection, such as torture survivors, asylum seekers, and children.
2. The Advocates appreciates the Committee noting the right to liberty and security enshrined in the Convention, and notes that such protections are generally enshrined elsewhere in international law. The Committee also correctly notes the right to be free from arbitrary detention is a *jus cogens* norm. We encourage the Committee to consider including more detailed information on what safeguards are required to fulfill these obligations. For example, while it is important to note the right to access judicial remedies, this must include a judiciary independent from the immigration enforcement authorities. We also urge the Committee to clarify that the prohibition against arbitrary and unlawful arrest and detention means those measures should be used only when there is no less harmful mechanism. In **paragraph 19,** the Committee should clarify that periodic custody review can have no meaning if it does not include the ability to be released after such review indicates a less harmful alternative to detention and/or that detention has or will become indefinite.
3. While the Advocates appreciates the Committee’s clarification of “legitimate objectives” that may justify detention, we note that detention continues to be used improperly due to exceedingly broad readings of “danger” posed by migrants or risk of avoiding proceedings. The Committee should clarify that such determinations must be made on a case-by-case basis considering the specific circumstances of the individual migrant, not on a categorical basis that leaves no room for individualized custody determinations. The Committee should further clarify here that danger should be based on **criminal *convictions*, not charges or allegations** and, even then, based on the totality of the circumstances in light of any safety determinations made by the criminal courts more well-placed to make such findings. Furthermore, states should provide clear guidance that determinations as to risk of avoiding expulsion proceedings should be made based on community connections, alternatives for ensuring appearance, and *any* relief available, including asylum applications. In **paragraph 28**, the Committee should note that alternatives must be evaluated in *every case*, and that States Party shall establish procedures to review of such decisions.
4. The Advocates applauds the Committee for noting, in **paragraph 24**, that detention for immigration purposes may amount to torture. Torture includes the intentional infliction of severe physical or psychological pain or suffering, done by or at the acquiescence of the States, for the purpose of punishment, coercion, intimidation, or deterrence. States have used detention to deter migrants from coming into their territory or to coerce people into agreeing to expulsion. In some cases, treatment goes beyond incarceration to include the taking of children by the State, prolonged solitary confinement, and other abuses. Victims include child migrants. Consistent with the Convention Against Torture and with *jus cogens* prohibitions against torture, States must take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, including migrant detention centers within its borders, at its borders, or in off-shore detention centers under its jurisdiction, including those operated by private corporations. States must provide accessible mechanisms for accountability where such torture allegations arise. As part of this, the Committee’s important note in **paragraph 29** should include a requirement that states undertake such assessments in light of prior torture or other trauma experiences. States also must ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation, including threats of deportation, as a consequence of his complaint or any evidence given. States must also ensure that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. We also encourage the Committee to note that torture victims and other vulnerable migrants merit additional protections while in detention, including access to appropriate rehabilitative services.
5. The Committee correctly notes in **Paragraph 25** that it is “prohibited for the law to leave ample discretion to the authorities in the decision and enforcement of immigration detention.” The Advocates encourages the Committee to further clarify that this obligation must not only be met by laws that clearly define the narrow grounds when detention is appropriate, but also must be accompanied by sufficient discretion for authorities to grant release or decline enforcement. Further, it must be clear that this obligation is not met where the State allows the same agency or branch of government to control enforcement and review of detention.
6. The Advocates agrees with the Committee that private personnel to guard migrant workers and their families is inappropriate. We encourage the Committee to explain further, **in paragraph 33**, that contracting to private detention facilities or, as some States have begun to do, contracting with other countries, to house migrants is improper. Further, the Committee’s comment in **paragraph 34**, should further note that States Parties must ensure that monitoring is paired with a reliable and responsive reporting mechanism empowered to intervene as necessary.
7. The Advocates thanks the Committee for noting States’ obligations related to non-discrimination, and we further note that such an obligation is a *jus cogens* norm enshrined in numerous other international laws. As such, States must take necessary steps to ensure non-discrimination is included in law and practice both to ensure migrants do not face de jure or de facto discrimination, as well as to ensure certain categories of migrants do not receive more or less favorable treatment.
8. The Advocates thanks the Committee for noting the importance of de-criminalizing immigration. We suggest the Committee add in **paragraph 40** that “policies, practices, and rhetoric that designate or suggest migrants are ‘dangerous’ or ‘harmful’ persons or even ‘criminals’” should be opposed. We also suggest that the Committee add to this paragraph that **such** **practices aggravate vulnerability to human trafficking and exploitative employment practices**, in addition to other harms listed. We further recommend that the Committee consider rewording the final sentence to read “The Committee notes with concern that one of the consequences of the criminalization of migration is that migrants in an irregular situation are increasing believed to be criminals, both in legal documents and in public opinion.”
9. The Advocates applauds the Committee for clarifying that States Party may not avoid their obligations by decriminalizing immigration while still subjecting migrants to similar consequences. We recommend the Committee further clarify that this includes where irregular migration is processed in civil courts but involves detention, shackling, and punishments in the form of exile, and that all States must ensure that that **any proceedings include the right to bail in all instances, government-appointed counsel, an impartial adjudicator, and the right to present a defense.**
10. The Advocates is grateful for the Committee’s recognition of the harms associated with encouragement of local populations to inform authorities about migrants. In our experience, we have seen evidence to support the suggestion in **paragraph 43** that such policies are counterproductive. This is particularly true where such migrants may be potential witnesses for crimes, including trafficking victims. As such, we further suggest that the Committee reinforce that **associated enforcement actions at sanctuary locations (e.g., churches and hospitals) or raids based on such information overwhelmingly harm migrant workers, particularly those who may be trafficked or suffering employment abuses**.
11. The Committee correctly notes, **in paragraph 45**, that “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.” The Advocates agrees and encourages the Committee to refer to their guidance on what constitutes a legitimate aim. Such determinations must also be paired with sufficient and independent review.
12. While the Advocates agrees with the Committee’s comments in **paragraphs 48-50** that States must “seek the early eradication of deprivation of liberty of migrant children” and surrender children to the care of their family members or adequately trained social workers, we further suggest that States must also ensure that children are protected upon release, including vetting sponsors and ensuring reunification with parents. We also note that treatment of children in detention may rise to the level of torture; to wit, the intentional infliction of severe physical or psychological pain or suffering, done for the purpose of deterring migration, by the State.
13. The Advocates appreciates the Committee’s comment in **paragraph 52** that 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” and notes that this **overlaps with obligations under international law, such as the Convention Against Torture, CEDAW, CRC, the Convention on the Rights of Persons with Disabilities, and the Refugee Convention.**
14. The Advocates welcomes the Committee’s preference for alternatives to detention paired with its caution, **in paragraphs 59-60**, that “Those measures are often excessively restrictive and are not appropriate in the context of migration” and, therefore, must be paired with review mechanisms. In our experience, **detention alternatives—such as frequent check-ins, ankle monitoring, and the like— may be so burdensome as to impact other human rights, such as privacy and movement**. Therefore, the Advocates encourages the Committee to consider further defining what it means for migrants to “reside freely in the community while their immigration status is resolved or while they await deportation…” (**paragraph 56**) and reinforce throughout that alternatives to detention must be narrowly tailored—with a preference always for release without further impositions on liberties.
15. The Advocates also agrees that alternatives to detention are all the more important given COVID-19 and other diseases. We further note that, even without a pandemic, detention is undesirable due to other health considerations and opportunities for abuse, particularly where immigration detention is subcontracted and diffuse. The Advocates is aware that **sexual assault, racial abuse, improper use of solitary confinement, lack of healthy and culturally appropriate food, lack of general medical care, use of temperature tactics (i.e. keeping facilities excessively cold or hot), other harms that revictimize torture survivors, and lack of access to counsel/ability to pursue one’s case are rife in detention,** making alternatives and release crucial.
16. The Advocates supports the Committee’s finding in **paragraph 62** that community-based, non-custodial options are preferred and effective. In our experience, we have seen that community-based programs not only ensure that migrants appear for all hearings and remain law abiding, but also that migrants who are victims of crimes may participate in investigations, and that others are more likely to have successful cases owing to ease of access to counsel and other resources.
17. The Advocates welcomes the Committee’s recommendations on duration of detention. In particular, we note that **in paragraph 63**, maximum periods of duration must also clarify that delays caused by failure of the State to adequately resource immigration mechanisms to timely process cases should not be transferred to the applicant. Further, any regular reviews of detention must be conducted by independent bodies with sufficient power to ensure release.
18. The Advocates also welcomes the Committee’s recognition, **in paragraph 64**, that those whose deportation is not possible through no fault of their own face unique needs. We suggest the Committee add to these types of cases those who are stateless. Further, while release must occur in such situations, we reinforce that alternatives to detention must not be so burdensome as to be used as punishment. For example, **continued obligations that infringe rights, such as constant check-ins, demands to prove attempts to obtain passports or travel authorization, requirements to pay for and continually renew work authorization, etc. should be removed and efforts to normalize status and integrate the person prioritized.**
19. The Advocates agrees with the Committee’s recognition, in **paragraphs 66-69**, that migrants face obstacles to accessing justice. Based on our experience, we suggest that the Committee add **trauma and financial barriers** to the list of obstacles, which are exacerbated by detention. Additionally, access to justice is severely weakened by **lack of access to a neutral arbiter, weak protections against violations and undue influence by immigration enforcement officers, punitive policies that do not allow sufficient time to reopen cases, punitive policies that harm migrant workers who attempt to report workplace violations/exploitation, and a failure to provide adequate and independent review and oversight mechanisms empowered to respond to violations.** We also suggest noting that, among the procedural and compensatory measures, which States should adopt, **government-appointed counsel, clear and easy-to-understand policies, and language resources, should be priorities.** We further suggest that any mechanism providing legal recourse and redress for violations should include mandatory screen with adequate training for staff to ensure such violations are identified.
20. While the Advocates welcomes the Committee’s recommendation, in **paragraph 71**, that migrants be informed about the reasons for detention, to the extent possible, in the language they understand, we are aware that migrants with viable claims may be improperly deported where they are not presented with information in a language—or at an educational level—they understand, and that officers may improperly use such vulnerabilities to force deportation where the person does not wish to be deported. We, therefore, suggest the Committee consider including recommendations that special procedures should be established to allow flexibility and changes in the future are essential where such language cannot be immediately provided. For example, if a person signs a document translated in Spanish because their local dialect is not available, that person should reserve the right to challenge the signature, and statutory timeframes for such challenges should be eliminated. While language access is essential, we further suggest that States Party provide information that is appropriate to the person’s education level. Finally, States must establish mechanisms to record whether such procedures were followed must be instilled as many migrants report they were lied to about the document they were required to sign, but have no means of proving such.

1. In **paragraph 73**, the Advocates suggests States provide information about migrants’ rights and resources to challenge deportation with any model notification forms. An independent oversight mechanism should constantly review and monitor to ensure these procedures are followed.
2. The Advocates welcomes the recommendation of judicial review of detention in **paragraphs 74-75**. We suggest that the Committee consistently reinforce that such review must be independent from the immigration enforcement authorities of the state.
3. The Advocates agrees with the Committee that “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.” (**paragraph 77**). We suggest the Committee further note that this is an ongoing obligation that States avoid policy, law and practice that require interfacing with consulates (for example, requiring migrants to obtain a passport), and provides meaningful access to right to apply for protections in-line with international law. In our experience, some asylum seekers have been forced to request passports in order to apply for other immigration benefits, to be kept on alternative release from detention, or, where stateless, to continually show attempts to obtain passports from other countries even where the person has been granted some form of relief from deportation.
4. The Advocates agrees with the Committee’s comment regarding free legal counsel and interpretation assistance. In our experience observing immigration court proceedings, access to **adequate counsel and interpretation is by far the biggest obstacle to success and release from detention**. We encourage the Committee to give effect to this recommendation by further recommending that States include the ability to access such counsel, including while detained, time and resources to locate counsel, and sufficient opportunity to work with counsel to prepare a case—including through law and practice. Further, States must ensure that counsel provided to migrants is not ineffective by providing adequate protections against exploitative and ineffective assistance, opportunities in law and practice to reopen cases where such assistance is shown must be provided, and an obligation amongst government prosecutors and judges to play a role in monitoring and ensuring migrants are aware of their rights to proper counsel. In no instances should counsel be used to deny rights to migrants.
5. The Advocates supports the Committee’s reference to article 10 regarding prohibition on torture, inhuman or degrading treatment in detention, and article 16(9) requiring that “migrant workers and their families who are victims of unlawful or arbitrary detention have an enforceable right to compensation.” We suggest that States fulfill this obligation not only by providing such mechanisms and policies for compensation, but by providing independent mechanisms for reporting—and expansive Know Your Rights campaigns at all detention centers and courts—to ensure migrants are aware and able to enforce these rights. Additionally, opportunities for immigration status based on such violations should be considered.
6. The Advocates welcomes the Committee’s expression of concern regarding “the presence of human trafficking networks within immigration detention centres” in **paragraph 86**. We note that trafficking pervades the immigration enforcement network and that States have an obligation not only under the Convention but also the Palermo Protocol to prevent and suppress trafficking and protect victims. Therefore, we recommend that the Committee consider advising States to include mandatory trafficking screenings and adequate training for all immigration officials to identify red flags of trafficking. We also note that trafficking networks occur outside of detention centers, such as among group homes for unaccompanied minors or in facilities operated in other States.
7. The Committee, in **Section H**, notes the severe impacts immigration enforcement has on family and private life. The Advocates shares the Committee’s concern about separation of families in detention and supports it recommendation “that the prevailing criterion in cases of families with members of different sexes is the family bond.” We further note that States that do separate families must include mechanisms to sufficiently ensure timely reunification.
8. The Advocates reiterates the Committee’s findings regarding the right to health, and the obligation that “States should ensure that detained migrants have access to health services, including sexual and reproductive health services, and psychological care.” (**paragraph 91**). We recommend that the Committee recommend that States provide a sufficient independent review and complaint mechanism to ensure adequate healthcare, and that any complaints should be timely investigated, ensuring that migrants should not be punished for making them. Further, remedies, including civil complaints and immigration status, should be available where one is harmed by such a deprivation. We also share the Committee’s concern regarding the impact of COVID-19 on the right to health, and further recommend that the Committee refer to the UNHCR guidance that ensures compliance with non-refoulement obligations while protecting the public health. Further, emergency measures should also ensure that migrants have continued access to counsel, Know Your Rights presentations and sufficient, culturally-appropriate social programming.
9. The Advocates agrees with the Committee that detention infringes on the rights to protection of identity and personal property. As part of these rights, we suggest the Committee consider adding a recommendation that **States take all steps required to protect the indentity of migrants, particularly by ensuring biometrics data collection is limited and includes sufficient safeguards to guard against inadvertent release.**
10. In addition to the protections properly outlined by the Committee in **paragraph 94**, the Advocates suggest that the Committee consider revising to state “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. **Additionally, access to items related to one’s defense, such as documents, phones which may have relevant evidence on them, or other items as noted by migrants and their counsel, should be guaranteed.**”
11. While the Advocates agrees that one must have access to identity documents, as outlined in **paragraph 96**, States Party must also uphold obligations under the Refugee Convention, which protect against requiring migrants to contact their government if they fear persecution. Therefore, we suggest adding that **“States Party shall not require migrants and their families to obtain identity documents from a government they fear. Provision of some form of identity document should be allowed by immigration authorities in those cases.”**
12. The Advocates supports the Committee’s recommendations regarding conditions of detention as outlined in **paragraphs 97-99**. We further suggest that the Committee consider clarifying such that **paragraph 98** reads “…the Committee stresses that detention in the immigration context should never be governed by criminal law **except to the extent that it incorporates greater rights and protections afforded criminal detainees.”**
13. Regarding monitoring human rights in places of detention, The Advocates supports the Committee’s recommendations that monitoring is essential. As noted throughout, that monitoring must be independent and paired with sufficient authority to investigate and hold violators to account. While we also underscore the Committee’s statement in **paragraph 100** that “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,” we note that it is also not permissible that the government allow violations by other authorities or contractors charged with the task.
14. The Advocates further supports the Committee’s recommendation regarding obligations under CAT and international law related to torture outlined in **paragraph 102**. We suggest that the Committee consider adding a recommendation that States timely review and respond to complaints pursuant to monitoring by that body.
15. The Advocates appreciates the Committee’s recommendation in **paragraph 104** regarding supervision and accountability. We encourage the Committee to consider adding language that would ensure monitoring and accountability mechanisms are established at all levels of the immigration system, including enforcement, border patrol, and the courts. Furthermore, any monitoring and accountability mechanism must have **adequate authority and budget to investigate and prosecute violations.**