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

*Draft General Comment No. 5 on Migrants’ Right to Liberty*

*and Freedom from Arbitrary Detention*

**Concept Note and Questionnaire**

December 2018

1. **Introduction**

The United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Committee) decided to elaborate a new general comment (No. 5) on migrants’ right to liberty and freedom from arbitrary detention at its twenty-ninth session in April 2018, in line with its long-term programme of work approved by the Committee at its twenty-third session in September 2015.

1. **Background and Goals**

Migrant workers and members of their families often suffer severe human rights abuses with respect to immigration control measures, in particular those who are undocumented, including mandatory detention, being detained under punitive conditions, separating families, detaining children, barriers in accessing legal remedies, inhumane conditions, and lack of access to necessary services, in particular for vulnerable categories of migrants. This proposal aims to strengthen the protection of the human rights of all migrant workers and members of their families in the context of their right to liberty and freedom from arbitrary detention.

The main goal of General Comment No. 5 is to provide authoritative guidance to States in implementing their obligations under the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Convention) regarding the right to liberty and freedom from arbitrary detention of all migrant workers and members of their families. This general comment will also assist States in implementing relevant commitments contained in the Global Compact on Migration, as well as assist other stakeholders with advocacy initiatives in this context. The general comment will focus, inter alia, on the following:

* A general overview of the right to liberty and freedom from arbitrary detention of all migrant workers and members of their families, including in the context of criminal detention and migration-related detention;
* An approach to migration issues from a human rights perspective (including a gender and intersectional perspective) considering individuals as the central subject of human rights and fundamental freedoms;
* Irregular migration status, including irregular entry/stay, should not be considered a criminal offense. Criminalization of irregular migration should be prohibited;
* The use of immigration detention as a measure of deterrence or as a general tool of migration management should be prohibited;
* Arbitrary immigration detention is strictly prohibited, including that any use of detention in the context of migration must be based on a legitimate State objective (the criminalization of irregular entry/stay does not constitute a legitimate State objective), must always be an exceptional measure of last-resort consistent with the principles of necessity and proportionality, must never take place in punitive environments, including criminal jails/prisons or prison-like settings, and must be periodically reviewed to ensure the continued necessity of the detention measure;
* Detention facilities that do not address specific needs of women and other groups of people, constitutes discrimination and can even constitute torture and inhuman treatment;
* Any detention of children and families due to their migration status is strictly prohibited and should be eradicated by law and in practice. Pregnant women, women that are breastfeeding, and victims of trafficking should never be held in detention;
* Rights-based alternatives to detention must be considered, should be established by law and ensured in practice. The non-refoulement principle must be respected, and risk assessments need to be ensured, including in cases of migrant women facing gender-based violence in their countries of origin (domestic violence, trafficking of human beings etc.)
* All due process guarantees must be respected and ensured in practice. Migrant women must be able to have access to effective justice without discrimination, and free of stereotypes and gender bias;
* If detention is exceptionally resorted to consistent with the above standards, independent and regular monitoring of the detention conditions should be ensured in practice.

Among other specific goals of this General Comment, the following could be highlighted:

* Promote the full respect of migrants’ rights without discrimination through criminal and administrative proceedings;
* Contribute to the eventual eradication of the use of detention in the context of migration, currently used as a normal practice and a key border management and deterrence tool of migration policies in many countries;\
* Promote the development of non-custodial, community-based alternative measures within migration and asylum procedures;
* Prevent arbitrary detention, torture and ill-treatment, and other human rights abuses in the context of current migration policies and practices.

1. **Scope of the General Comment**

This General Comment will include the following:

* The content and scope of the right to liberty and security of person of migrant workers and members of their families;
* The particular considerations of the right to liberty and detention of migrants in the context of criminal and immigration-related proceedings;
* The content and scope of measures that entail a deprivation of liberty in the context of migration, including measures related to the prevention of irregular migration, determining migration status, migration procedures for entry, stay, return, and expulsion; asylum procedures, or infractions under migration and related legislation;
* The consideration of the disproportionate impact on women and children when States do not ensure a gender or child rights perspective in migration laws and policies, including the obligation to implement identification procedures for women victims of trafficking and other groups in need of international protection that should never be placed in detention.

**4. Proposed Themes**

* Regressive trend of the right to liberty in general, and the concern about the increasing use of detention in immigration-related administrative and criminal proceedings;
* Detention in the context of migration and problems related to this issue: detention as part of general policies of deterrence (despite no evidence/link that such policies or practices work); use of criminal or prison-like facilities; detention of children, families, victims of torture, trafficking, asylum seekers and other migrants who are particularly vulnerable to violations of their human rights; bi-lateral and multi-lateral cooperation on increasing detention capacity, often in countries with weak institutions and rule of law, as a means of preventing transit migration; detention for the purposes of immigration control being referred to euphemistically, including as a “protection” measure; increasing use of immigration detention centres administered by private companies; the current situation in some countries where numbers of non-citizens in administrative detention exceeds the number of sentenced prisoners or detainees; the increasing use of measures based on national security grounds, the implementation of “zero tolerance” or “hostile environment” policies, etc.;
* Detention in the context of criminal proceedings and problems related to this issue: discrimination against migrants in criminal proceedings, the application of detention to migrants as a rule, disproportional requirements and the impossibility to apply for alternatives to detention, the importance to guarantee consular assistance.
* Increasing attention of the Committee through COBs, General Comments, Press releases, statements, etc.;
* Increasing attention of other Treaty Bodies, Special Procedures and Regional Human Rights Bodies;
* Importance and necessity for clarifying and specifying the existing obligations of Member States;
* Content and scope of the General Comment.

1. **Call for Submissions**

All stakeholders (States, United Nations agencies and entities, civil society organizations, national human rights institutions, academia and others) are invited to provide inputs to this initiative through a questionnaire.

Responses to the questionnaire should be sent electronically in Word format to the email: [cmw@ohchr.org](mailto:cmw@ohchr.org) indicating “Submission for General Comment on Migrants’ Right to Liberty” in the subject heading. **Submissions should not exceed 10 pages and should be received by 1 April 2019 at the latest.** The name of the stakeholder making the submission should be clearly indicated on the first page of the submission. Written contributions will not be translated and should preferably be submitted in English. Submissions in French and Spanish will also be accepted. **All submissions will be posted on the webpage of the Committee unless explicitly indicated to the contrary.**

1. **Methodology**

A Working Group has been established to coordinate the drafting of the general comment. The Working Group will coordinate with relevant United Nations human rights mechanisms and others in elaborating this General Comment.

Following the call for inputs, the Working Group will establish a draft of the General Comment and will hold a half-day general discussion on the draft for additional input by stakeholders. Depending upon funding, expert and regional consultations may also be held.