Office of the United Nations High Commissioner for Human Rights

Initial written submission to

General Comment No. 5 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on the Right to Liberty and Protection from Arbitrary Detention

1. This input is provided by the OHCHR migration team (DESIB). We welcome the decision of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) to prepare a General Comment on the Right to Liberty and Protection from Arbitrary Detention (“General Comment”), and our opportunity to input and we look forward to further contributing to the drafting process.

OHCHR’s mandate

2. OHCHR is mandated to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international human rights laws and treaties. OHCHR is guided in its work by the mandate provided by the General Assembly in resolution 48/141, the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR) and all core international human rights instruments, the Vienna Declaration and Programme of Action the 1993 World Conference on Human Rights, and the 2005 World Summit Outcome Document.

3. The mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the United Nations system in the field of human rights. In addition to its mandated responsibilities, the Office leads efforts to integrate a human rights approach within all work carried out by United Nations agencies.

4. Within this mandate, the High Commissioner for Human Rights has issued a number of reports and documents which could be useful in informing the CMW of the legal, policy and practical challenges to guaranteeing the right to liberty and protection of migrants from arbitrary detention. Relevant documents include, the High Commissioner’s reports to the Human Rights Council, on Protection of the rights of the child in the context of migration (A/HRC/15/29), The Situation of Migrants in Transit (A/HRC/31/35), Promotion and protection of the human rights of migrants in the context of large movements (A/HRC/33/67).

5. OHCHR also develops tools to support States and other stakeholders in responsibly governing international migration consistent with their obligations under international human rights law, including relevant authoritative interpretations and recommendations of the human rights treaty bodies and special procedures of the Human Rights Council. Among these tools include OHCHR’s Recommended Principles and Guidelines on Human Rights at International Borders and the OHCHR-led Global Migration Group (GMG) Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations, both of which include specific guidance on upholding migrants’ rights to liberty and protection from arbitrary detention.

6. Finally, the High Commissioner for Human Rights has submitted third party interventions (amicus curiae) specifically on the issue of deprivation of liberty of migrants, including in 2016 in the case of Raoufi and others v Greece before the European Court of Human Rights.

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1 All reports available at: https://www.ohchr.org/EN/Issues/Migration/Pages/StudiesAndReports.aspx.
3 Available at: https://www.ohchr.org/EN/Issues/Migration/Pages/VulnerableSituations.aspx.
4 Available at: https://www.ohchr.org/Documents/Issues/Migration/Raoufi_v_Greece.pdf.
A. General Information

Introduction

7. While global estimates are difficult to obtain, recent years have seen a worrying trend in all regions towards the increased deprivation of liberty of migrants, often in breach of international human rights norms and standards. Governments rarely provide accessible public information on the number of migrant detainees, and despite the extreme nature of the measure and the drastic impacts it is known to have on health and well-being, migrants are frequently deprived of liberty in the context of migration, which can in some cases be mandatory or even indefinite.6

8. Migrants in detention are often exposed to inadequate conditions, such as denial of access to medical care, including mental health care, insufficient space, food, water and sanitation or recreational facilities. Migrants in detention are often victims of violence, including sexual and gender-based violence, and experience a deterioration in their physical and mental health within the detention environment.7 They also face difficulties in accessing lawyers, family members, civil society organisations or consular officials who might assist them in challenging the legality or arbitrariness of their detention.

9. Procedural safeguards for migration-related detention are often lacking, including access to information, legal aid and/or interpretation services; judicial control; regular review of the detention decision; and opportunities to challenge the legality of the detention. Decision-makers rarely justify the necessity and proportionality of migration-related detention, for example through the meaningful consideration and exhaustion of alternatives to detention, particularly when migration-related offenses such as irregular entry, stay or exit are criminalized.

10. There is increasing public attention and scrutiny of such practices. In the New York Declaration, States reaffirmed that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, and committed to consider reviewing policies that criminalize cross-border movements and to pursue alternatives to detention while these assessments are under way.8 The New York Declaration is also unequivocal in affirming that children should not be criminalized or subject to punitive measures because of their or their parents’ migration status and commits to work toward ending such practices.9

11. Similarly, in the Global Compact for safe, orderly and regular migration (GCM) States have committed “to ensure that any detention in the context of international migration follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments, is carried out by authorized officials, and for the shortest possible period of time,” and to further “prioritize noncustodial alternatives to detention that are in line 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.”10

12. OHCHR agrees with the position of the United Nations Working Group on Arbitrary Detention (WGAD) that immigration detention is largely arbitrary and should gradually be abolished.11 Administrative offenses relating to irregular entry, stay or exit of migrants should not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime, including the use of detention. Responsibly governing migration instead requires States to take all necessary measures to amend legislation to establish a presumption against detention in law and legally prescribe and implement human rights-compliant, non-custodial and community-based alternatives to detention as a matter of priority. Human

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5 For the purposes of this submission, and in the absence of a universally accepted definition, an international migrant (‘migrant’) refers to any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term ‘migrant’ includes migrants who intend to move permanently or temporarily and those who move in a regular or documented manner as well as migrants in irregular situations. It is without prejudice to the protection regimes that exist under international law for specific legal categories of non-nationals, including refugees, asylum seekers, stateless persons, trafficked persons and migrant workers. See, OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders.


8 A/RES/71/1, para. 33.

9 Id. at para. 33, 56.

10 GCM, para. 29.

rights-compliant alternatives should be based on an ethic of protection of human rights and must safeguard the full range of migrants’ civil, political, economic, social and cultural rights.

13. OHCHR has also repeatedly affirmed the position of the Committee on the Rights of the Child (CRC) that children should never be detained for reasons related to their or their parents’ migration status and that States should expeditiously and completely end the immigration detention of children. OHCHR agrees with the CMW and the CRC that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. Adopting human rights-compliant, non-custodial, community-based alternatives to detention in accordance with the best interests of the child should be a priority.

**General principles**

**Non-discrimination**

14. All migrants are protected by international human rights law without discrimination. The principles of equality and non-discrimination lie at the heart of international human rights law and are directly related to that of universality, which affirms that every human being has fundamental rights. The principle of non-discrimination is affirmed by all core international human rights instruments and by the UN Charter.

15. The Preamble to the UDHR proclaims that all human beings are entitled to “equal and inalienable rights”, and Article 2(1) of the UDHR specifically prohibits discrimination in the enjoyment of rights on the basis of one’s “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Similarly, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibit discrimination in every circumstance.

16. The Human Rights Committee has clarified the general rule that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and non-citizens. Likewise, the Committee on Economic, Social and Cultural Rights (CESCR) has clarified that “the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation” and that “protection from discrimination cannot be made conditional upon having a regular status in the host country.”

17. International human rights law therefore narrowly restricts the circumstances in which States may legitimately permit differential treatment between citizens and non-citizens or between different categories of non-citizens (such as regular and irregular migrants). As the former UN Special Rapporteur on the human rights of migrants has noted, “there are very few and narrowly defined exceptions” to the enjoyment of

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12 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, para. 5.


14 The ICCPR states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art. 2.1). The ICESCR states: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art. 2.2).

15 Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the Covenant, paras. 1-2. The CESC has defined discrimination as: “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.” General comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 7.


human rights, and any distinctions between citizens and non-citizens or between different categories of non-nationals must be based on a legitimate State objective, and be necessary, proportionate and reasonable in the individual circumstances.

**Human rights-based approach**

18. States should always take a human rights-based approach to any consideration of the deprivation of liberty of migrants. A human rights-based approach is normatively based on international human rights standards and operationally directed to respecting, promoting, fulfilling and protecting human rights. The underlying feature of a human rights-based approach identifies rights holders, who have a claim to certain entitlements, and duty bearers, who are legally bound to respect, protect and fulfil the entitlements associated with those claims. A human rights-based approach to migration brings the treatment of migrants as human beings to the forefront of all discussion and decision-making on migration, underlined by the fundamental principles of non-discrimination, empowerment, participation and inclusion, and accountability.

**B. Legal Framework**

**The right to liberty of person**

19. The right to liberty of person is the fundamental right applicable to all forms of detention. It is guaranteed to everyone without discrimination, including all migrants, irrespective of status. This right is recognized in all international and regional human rights instruments, including: article 3 of the UDHR, article 9 of the ICCPR, article 16 of the ICMW, article 6 of the African Charter of Human and Peoples’ Rights (African Charter), article 7 of the American Convention on Human Rights (American Convention), article 14 of the Arab Charter on Human Rights (Arab Charter), and article 5 of the European Convention on Human Rights (European Convention).

20. Deprivation of liberty is defined 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 either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. Deprivation of liberty begins at the moment of arrest and continues in time until the release of the individual. Deprivation of liberty need not involve a formal arrest as defined under domestic law. As the WGAD has noted, all forms of deprivation of liberty are “detention” for the purposes of determining whether someone is being arbitrarily detained. Examples of deprivation of liberty include police custody, “arraigo”, remand or pre-trial detention, house arrest, custody on national security grounds, immigration detention, involuntary hospitalization, institutional custody of children, confinement to a restricted area of an airport, and involuntary transportation.

21. The CMW has defined “immigration detention” as any setting in which a person is deprived of his/her liberty for reasons related to his/her, or his/her parents’, migration status, regardless of the name and reason given to the action of depriving a person of his or her liberty, or the name of the facility or location where

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19 OHCHR, Improving Human Rights-Based Governance of International Migration, p. 32.
20 Ibid.
21 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 3; Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, para. 11; Human Rights Committee, general comment No. 31 (2004) on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 10, “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”
22 Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Art. 4(1) and (2).
24 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 13.
25 A/HRC/22/44, para 57.
26 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 5; WGAD, Report of the Working Group on Arbitrary Detention, Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, A/HRC/30/37, para. 9.
the child is deprived of liberty.27 “Reasons related to migration status” is understood by the CMW to be a person’s migratory or residence status, or the lack thereof, whether relating to irregular entry, stay or exit.28

22. Immigration detention includes the confinement of migrants—whether under the direct or de facto control of the State—in prisons, police stations, closed reception centres, dedicated immigration detention facilities, and other closed locations such as shipping vessels or in international or transit zones in stations, ports and airport,29 typically on administrative grounds related to irregular entry, stay or exit. However, immigration detention also includes situations where migrants are detained on criminal grounds where immigration offenses are criminalized as well as situations where conditions or restrictions placed on migrants’ liberty of movement are so intrusive that they amount to de facto detention.30 The decisive question is not the measure’s name or formal designation, but whether or not migrants are free to leave.31

23. Under international human rights law, any deprivation of the right to liberty of person must be based upon a legitimate State objective; lawful; strictly necessary and proportionate; imposed only where less restrictive alternative measures have been considered and found inadequate to meet the State’s legitimate objectives; accompanied by procedural safeguards; of limited scope and duration; and subject to periodic re-evaluation and judicial review.

24. Immigration detention must always be an exceptional measure of last resort consistent with the principles of necessity and proportionality, and is strictly prohibited in certain circumstances, for example when it would constitute punishment for irregular entry or stay for the purposes of seeking asylum32 or whenever children or families are concerned (see below, “The prohibition of detention of children for migration-related reasons”).

**Legitimate objective**

25. Any deprivation of liberty must be based on a legitimate State objective. Like the ICCPR, the ICMW does not provide an enumeration of the permissible objectives for depriving a person of liberty, and neither has the CMW exhaustively enumerated such legitimate objectives. The former UN Special Rapporteur on the human rights of migrants has stated that the only legitimate objectives for the deprivation of liberty of migrants are the same as they are for anyone else who is being deprived of their liberty, namely: “when someone presents a risk of absconding from future legal proceedings or administrative processes, or when someone presents a danger to their own or public security.”33 Similarly, the United Nations High Commissioner for Refugees (UNHCR) has stated that the legitimate objectives for detention are limited to protecting public order, health or national security.34

26. The criminalisation of irregular entry, stay or exit is not a legitimate objective on which to deprive migrants of their liberty. Irregular entry, stay and exit should never be considered criminal offenses as they are not crimes per se against persons, property or national security, and migrants should never be classified or treated as criminals on the basis of their irregular immigration status.35 The CMW and the WGAD have noted that the criminalisation of irregular entry and stay frequently contributes to unnecessary and arbitrary detention.36 Furthermore, seeking asylum is not an unlawful act and migrants should never be penalised, including the use of detention or other restrictive measures, on the basis of entering a country irregularly to seek asylum.37 Migrants should not be subject to criminal prosecution for having used the services of smugglers38 or for having been the victim of human trafficking.39

27 CMW/C/GC/4-CRC/C/GC/23, para. 6.
28 Ibid.
29 A/HRC/20/24, para. 34.
30 A/HRC/22/44, para 59.
31 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 6.
33 A/HRC/20/24, para. 9.
34 UNHCR, Detention Guidelines, Guideline 4.1.
35 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 2 (2013), para. 24. “The Committee considers that Crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime.”; See also A/HRC/20/24, para. 13.
36 CMW, general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 24; WGAD, Report of the Working Group on Arbitrary Detention, A/HRC/7/4, para. 53: “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.”
38 Protocol against the Smuggling of Migrants by Land, Sea and Air, art. 5.
39 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, art. 2(b), art. 6, art. 9.1(b).
Lawful

27. Assuming there is a legitimate State objective, any subsequent deprivation of liberty must still be lawful. While the right to liberty of person does not prohibit all detention *per se*, it provides that any deprivation of liberty must be in accordance with procedures established in law. Deprivation of liberty without such legal authorization is clearly unlawful and prohibited.

28. The principle of lawfulness has been interpreted by international human rights treaty bodies, special procedures mechanisms and regional courts to include at least two essential elements. First, the deprivation of liberty must be “clearly defined and exhaustively enumerated in legislation.” This prohibits laws that provide broad executive or administrative discretion in imposing or reviewing detention, and requires “elaborate reasoning” from detention decision-makers, who always bear the burden of proving that the detention is justified.

29. Second, the national law and procedures must be communicated with “sufficient precision” to avoid overly broad or arbitrary interpretation or application. Sufficiently communicated laws and procedures should take into account the particular culture, language, level of education, and ability to understand the procedure of each person for whom detention is being considered, including particular attention to the requirements of persons with disabilities. Such communication may require the provision of translators, interpreters, and legal advice—free of charge if necessary—for the person to fully understand his or her circumstances.

30. To safeguard the right to liberty, States should establish a presumption against immigration detention in law and require administrative and judicial bodies to presume in favour of liberty. This should include amending legislation, as necessary, to legally prescribe recourse to human rights-compliant alternatives to detention in the first instance, including unconditional release, so that detention is always a last resort imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes.

Non-arbitrary

31. Finally, even detention that is based on a legitimate State objective and meets the requirements of lawfulness must be strictly non-arbitrary. International human rights law provides that no one shall be subjected to arbitrary arrest or detention. This strict prohibition forms part of customary international law and constitutes a *jus cogens* norm from which derogation is never possible. The ICMW specifically guarantees that migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention.

32. The Human Rights Committee has stated “the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but must be interpreted more broadly to include such elements as inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity and proportionality.” While immigration detention is not arbitrary *per se*, it will be arbitrary whenever it does not meet these requirements, and if it if not reassessed over time to ensure it continues to meet them.

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40 ICCPR, article 9, paragraph 1.
41 Human Rights Committee, *McLawrence v. Jamaica*, 702/1996, para. 5.5: “[T]he principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.”
43 A/HRC/13/30, para. 59; A/HRC/20/24, para. 69.
45 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para 22.
46 OHCHR and GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, Principle 8, Guideline 1; See also CMW, general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 33.
48 UDHR, Article 9; ICCPR, Article 9, CRC, Article 37; ICMW, Article 16 ; CRPD, Article 14.
49 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para 66.
50 ICRMW, Article 16 (1.4).
52 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 18.
33. The element of necessity requires that detention must be absolutely indispensable for achieving the intended legitimate objective of the State and that no other measure less onerous exists in the individual circumstances of the person.\textsuperscript{53} It requires immigration detention to be an exceptional measure of last resort.\textsuperscript{54}

34. In applying the principle of necessity, the Human Rights Committee has stated that “the relation between right and restriction, between norm and exception, must not be reversed.”\textsuperscript{55} The Human Rights Committee has noted that detention is a “particularly severe form of restriction of liberty of movement”\textsuperscript{56} representing a complete deprivation of the right involved (‘deprivation of liberty’). Therefore, it is not enough to simply demonstrate that the measure “performs a useful or desirable purpose” but deprivation of liberty in this context must “clearly outweigh the social need for the full enjoyment of the right” and must be strictly necessary.\textsuperscript{57}

35. According to the Inter-American Court of Human Rights (IACtHR), in order to comply with the requirement of necessity, authorities must demonstrate that any restrictions on human rights are “required by a compelling public interest”\textsuperscript{58} and that “among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective.”\textsuperscript{59} The IACtHR has noted that punitive detention of an individual for failing to comply with the immigration laws of a country exceeds the requirement of strict necessity.\textsuperscript{60}

36. Assuming the measure is strictly necessary based on a compelling public interest, the element of proportionality further requires that a balance be struck between the gravity of the measure taken, and the importance of securing the immediate fulfillment of the obligation in question.\textsuperscript{61} The WGAD has affirmed that “administrative detention of migrants should be always the last resort according to the principle of proportionality”\textsuperscript{62} and that, to ensure that the principle of proportionality is satisfied, alternatives to detention must always be considered.\textsuperscript{63}

37. The proportionality balancing must take into consideration the potential impacts of detention on the physical and mental health of the individual\textsuperscript{64} and the State has a heightened duty of care to provide effective protection of persons in vulnerable situations, including by taking reasonable steps to prevent their deprivation of liberty.\textsuperscript{65} For this reason, immigration detention should be avoided for any person who has specific needs or who is particularly at risk of exploitation, abuse, sexual or gender-based violence, or other human rights violations in the context of detention, including, inter alia, children, pregnant and nursing women, older persons, persons with disabilities, survivors of torture or trauma, migrants with particular physical or mental health needs, LGBTI individuals, refugees, asylum seekers and stateless persons.\textsuperscript{66}

38. Even detention that is reasonable, strictly necessary and proportionate in its inception will become arbitrary at the moment that the detention continues beyond the period for which the State can provide appropriate justification.\textsuperscript{67} For this reason, detention must be periodically reviewed over time, with the State bearing the duty of continually assessing and justifying the reasonableness, necessity and proportionality of the measure.\textsuperscript{68}

\textsuperscript{53} WGAD, Revised Deliberation No. 5 (2018) on deprivation of liberty of migrants, para. 23; IACtHR, \textit{Velez Loor v. Panama}, judgment November 2010, para. 166.

\textsuperscript{54} WGAD, Revised Deliberation No. 5 (2018) on deprivation of liberty of migrants, para. 12.

\textsuperscript{55} Human Rights Committee general comment No. 27 (1999) on Article 12 (Freedom of Movement), para. 13.

\textsuperscript{56} Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 60.


\textsuperscript{60} IACtHR, \textit{Case of the Pacheco Tineo Family v. Bolivia, Preliminary objections, merits, reparations and costs,} Judgment of November 25, 2013, para. 131.

\textsuperscript{61} ECtHR, \textit{Saadi v. United Kingdom}, 13229/03, 29 January 2008, para. 70.

\textsuperscript{62} A/HRC/13/30, para. 59.

\textsuperscript{63} WGAD, Revised Deliberation No. 5 (2018) on deprivation of liberty of migrants, para. 24.

\textsuperscript{64} WGAD, Revised Deliberation No. 5 (2018) on deprivation of liberty of migrants, para. 24.

\textsuperscript{65} See, e.g. ECtHR, \textit{Storck v. Germany}, Application No. 61603/00, 2005, para. 102.

\textsuperscript{66} OHCHR and GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, Principle 8, Guideline 3.

\textsuperscript{67} A v. Australia, para. 9.4.

39. Arbitrariness may also arise where there is no connection between the State’s legitimate objective and the place of detention, conditions of detention, or treatment of the detained person. For example, immigration detention should reflect the administrative nature of the offense, including that migrants should not be subject to prison-like conditions and environments, such as prison uniforms, highly restricted movement, lack of outdoor recreation and lack of contact visitation. The conditions in detention should adhere to all relevant international standards and may never amount to torture and other cruel, inhuman or degrading treatment or punishment (“ill-treatment”) without also being arbitrary.

40. Certain detention conditions can themselves amount to torture or ill-treatment. For example, the Human Rights Committee has noted that torture or ill-treatment may arise if the manner in which detainees are treated do not relate to the purpose for which they are ostensibly being detained. Practices such as holding administrative detainees in criminal facilities, or depriving migrants of their liberty in transit zones or other settings such as in containers or on board ships and other means of transport in poor sanitary or social conditions may also arise to the level of inhuman and degrading treatment.

The prohibition of detention of children for migration-related reasons

41. The Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment has further noted that within the context of administrative immigration enforcement, detention of children “exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.”

42. Article 37 (b) of the Convention on the Rights of the Child states that that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily”. Additionally, the Convention requires that States Parties uphold the core principles of non-discrimination; the best interests of the child; the child’s right to life, survival and development; and respect for the views of the child, among other child rights.

43. The CRC has asserted that detention of children cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Both the CRC and the CMW have similarly emphasized that children should not be criminalized or subject to punitive measures, such as detention, because of their or their parents’ migration status. States are instead required to prioritize the best interests of the child over migration policy or other administrative considerations.

44. For these reasons, both Committees found that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. They have called upon States parties to “expeditiously and completely cease” the immigration detention of children and to prohibit the immigration detention of children in law and practice.

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Footnotes:

69 COE, para. 32; James, Wells and Lee v. the United Kingdom, paras. 191-95; and Saad v. the United Kingdom, paras. 68-74; 1629/2007, Fardon v. Australia, para. 7.4(a); Concluding observations, Belgium 2004, para. 18; Concluding observations, United Kingdom 2001, para. 16.

70 A/HRC/20/24, para. 31; See also, OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, Guideline 8.7-12.


72 CAT, Article 1. “For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” See also, ICCPR, Article 7; ECHR, Article 3.

73 Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 14

74 See, e.g. Human Rights Committee, Concluding Observations: Belgium 2004,CCPR/CO/81/BEL.

75 Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, A/HRC/28/68, para. 80.

76 CRC, general comment No. 6 (2005) on Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, para. 61.

77 CMW/C/GC/4-CRC/C/GC/23, para. 7.

78 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para. 33.

79 CMW/C/GC/4-CRC/C/GC/23, para. 5.

80 Ibid.
45. While migrant children may legally be detained as a last resort for other reasons, such as in the case of juvenile criminal justice, the possibility of detaining children or families as a measure of last resort is not possible in the context of immigration detention as the practice conflicts with the principle of the best interests of the child and violates the child’s right to liberty, development and family life, among others.\(^{81}\)

46. When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children. When children are accompanied, the need to keep the family together does not justify the deprivation of liberty of a child. When the child’s best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child’s parents and requires the authorities to choose non-custodial solutions for the entire family.\(^{82}\)

**Procedural safeguards**

47. Detention must always be accompanied by sufficient procedural safeguards so as not to be destructive of the right to liberty.\(^{83}\) The Human Rights Committee has made clear that safeguards related to the right to liberty apply not only in criminal cases, but also where persons are deprived of their liberty for purposes of immigration control or in the implementation of expulsion, deportation or extradition.\(^{84}\) Administrative detention which has the effect of criminally punishing migrants without providing the applicable procedural safeguards afforded in accordance with due process and fair trial guarantees will violate the right to liberty.\(^{85}\)

48. In the exceptional circumstances where immigration detention is used, the following procedural safeguards must be fully implemented:\(^{86}\)

- Clearly define in law the reasons for detention.
- Require those reasons to be explained to migrants orally and in writing, in a language and format they understand, if necessary with the assistance of an interpreter.
- Provide that detention can only be ordered by a court of law.
- Stipulate that detention is to be determined case-by-case, is an exceptional measure of last resort, and should last for the shortest period of time.
- Require detention orders to include information on the individual’s rights in connection with the decision.
- Require due process of law, including access to legal counsel and fair trial guarantees.
- Migrants deprived of liberty have prompt access to an independent lawyer, who should be able to visit and communicate with their clients, both to make effective a migrant’s right to challenge the lawfulness of their detention, and as a safeguard against torture and other cruel, inhuman or degrading treatment and enforced disappearance.
- Guarantee detainees the right to challenge the lawfulness of any deprivation of liberty in a timely manner before a court. That court must be independent of the detaining authority and empowered to order a detainee’s prompt release if detention is found to be unlawful.
- Prohibit all mandatory or indefinite detention, ensuring that any use of detention is necessary, proportionate and limited in duration.
- Permit detention only when no suitable non-custodial alternatives are available that meet the same legitimate aim, with justification provided in relation to each individual case as to why detention is

\(^{81}\) CMW/C/GC/4-CRC/C/GC/23, para. 10.

\(^{82}\) CMW/C/GC/4-CRC/C/GC/23, para. 6.

\(^{83}\) See, OHCHR, Intervener Brief filed by the United Nations High Commissioner for Human Rights in the case of Raoufi and others v Greece before the European Court of Human Rights, paras. 29-40.

\(^{84}\) Human Rights Committee, general comment No. 8 on Article 9, Liberty and security of person, para. 1 and Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 60.

\(^{85}\) Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para 14. “The regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections. Although conditions of detention are addressed primarily by articles 7 and 10 [of the ICCPR], detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.”

\(^{86}\) OHCHR and GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, Principle 8, Guideline 5.
justified as a reasonable, necessary and proportionate measure.

C. Impact on Detainees

49. Numerous reports have raised concern about the impacts of detention on migrants, including extreme overcrowding, lack of access to food, water and medical care, prolonged solitary confinement, and deliberate abuse by State officials, private guards, or fellow detainees, including torture and ill-treatment, systematic extortion, sexual abuse, and even enslavement.  

50. The detention of children, even for short periods of time, has been documented as having serious and long-lasting impacts on their mental and physical health and development. Children in immigration detention have been exposed to severe forms of abuse and ill-treatment, including being tied up or gagged, beaten with sticks, burned with cigarettes, given electric shocks, and subjected to solitary confinement. Additionally, the conditions of detention are generally inadequate for children’s health, well-being and development. They are often detained along with unrelated adults, or arbitrarily separated from their parents or other family members.

51. Detention can cause or exacerbate a number of vulnerabilities in the context of migration. The multi-causal nature of migration means that for many people, their migration is driven by a range of factors which put them at a heightened risk of human rights violations and abuse, including the risk of arbitrary detention or violations and abuse suffered within the detention setting. Initially, migrants may face situations in their home country which compel them to move, such as those relating to violence, persecution, extreme poverty, inequalities, denial of access to their economic, social and cultural rights, natural disasters or environmental degradation, including the slow onset-effects of climate change. Many people are compelled to migrate in order to reunite with their family in another country. The decision to migrate may also be informed by knowledge or perception of safer or more dignified opportunities to live or to work in the target country of destination. Once the migration is underway, migrants may encounter lack of protection of their rights in countries of transit. Even when migrants do not qualify as refugees, they nevertheless have human rights that must be respected, protected, and fulfilled at all times. The many adverse drivers and structural factors that give rise to vulnerability mean that many migrants will have protection needs, including protection from return, that cannot be disregarded.

52. Migrants in vulnerable situations are, therefore, considered persons in the context of migration who are “unable effectively to enjoy their human rights and are at increased risk of violations and abuse” for whom the State will have a heightened duty of care. The vulnerable situations that migrants face can arise from a range of factors that may intersect or coexist simultaneously, influencing and exacerbating each other and also evolving or changing over time as circumstances change. OHCHR understands vulnerability to arise due to a range of factors, including those relating to a) migrants’ reasons for leaving their place of origin, b) the circumstances they encounter en route, at borders and at destination, as well as c) their identity or circumstances, such as their age, gender, sexual orientation, gender identity or health or disability status.

D. Alternatives to Detention

Obligation to implement alternative measures

53. Precisely because the right to liberty and the prohibition of arbitrary detention requires that immigration detention be an exceptional measure of last resort, States have a legal obligation to first explore and

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88 A/HRC/28/68, para. 60.  
89 OHCHR report on the promotion and protection of the human rights of migrants in the context of large movements, A/HRC/33/67, para 15; See also, generally, OHCHR and GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations.  
91 OHCHR and GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, p.5  
92 Ibid.  
93 See generally, OHCHR and GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations.
implement all available alternative measures prior to resorting to detention consistent with the principles of necessity and proportionality. The obligation to implement alternative measures is interchangeably referred to as “alternatives to detention”, “non-custodial measures”, “less restrictive measures”, “less invasive measures”, “less onerous measures”, and “less intrusive measures” in various contexts, but it is fundamentally the same legal concept.

54. The WGAD has stated, “alternative and non-custodial measures . . . should always be considered before resorting to detention.” Similarly, the Committee against Torture (CAT) has found that States cannot resort to the use of detention simply because they do not perceive any alternative measures to be available, but must instead “duly examine” all possible alternative measures consistent with the principles of necessity and proportionality, and fully “exhaust” all alternative measures before resorting to the use of detention.

The Tokyo Rules and the Bangkok Rules

55. The concept of alternatives to detention has benefitted significantly from the drafting and adoption of the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), both of which were developed in the context of criminal justice. While no similar UN rules have been developed in the context of migration, some of the concepts and principles enshrined in The Tokyo Rules and The Bangkok Rules are nevertheless instructive.

56. For example, the Tokyo Rules are grounded in principles of minimum intervention and decriminalization. They understand that alternative measures should ultimately be directed towards limiting both the use of detention itself, as well as the overall volume of other sanctions, such as restrictions on liberty of movement or other forms of control. Similarly, the Bangkok Rules stress that arbitrary detention is a form of violence against women and directs States to “revise, amend or abolish all laws, regulations, policies, practices and customs discriminating against women or having a discriminatory impact on women” and “to take positive measures to address structural causes of violence against women”.

57. The Tokyo Rules are also not merely a list of alternative restrictions or alternative placement options, but take a holistic approach, suggesting a “wide range of noncustodial measures” from the pre-trial to post-sentencing phases, and include recommendations on legal safeguards, public understanding and cooperation, research, policy formulation and evaluation. Similarly, the Bangkok Rules encourage States to develop or strengthen a range of appropriate “legislation, procedures, policies and practices” designed to provide alternatives to imprisonment for women offenders.

58. Finally, The Tokyo Rules prioritize prevention and measures aimed at “avoidance” of detention over more traditional release options, particularly for individuals who may be considered at risk or particularly vulnerable to human rights violations such as prolonged or arbitrary detention. The United Nations Office on Drugs and Crime (UNODC) has emphasized that alternative measures should be accompanied by

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95 Compare, e.g. Human Rights Committee, general comment No. 35 (2014) on Article 9, Liberty and security of person, para. 19 (“States parties should make available adequate community-based or alternative social care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement”); with C. v. Australia, Communication no. 900/1999, CCPR/C/76/D/900/1999, para. 8.2 (“In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends”); with Bakhtiyari v. Australia, Communication No 1069/2002, CCPR/C/79/D/1069/2002, para. 9.3 (“the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies”).
97 CAT, Concluding Observations: Cyprus 2014, CAT/C/CYP/CO/4 para. 16, finding that alternatives to detention must have “been duly examined and exhausted.”
99 The Tokyo Rules, 2.6-2.7.
101 The Bangkok Rules, Preliminary observations para. 9.
102 The Tokyo Rules, 2.3.
103 The Bangkok Rules, Preamble para. 10.
adequate support and attention to those in situations of particular vulnerability and a commitment to avoid detention of “the most vulnerable members of society.”

Human rights-compliant alternatives

59. OHCHR’s *Recommended Principles and Guidelines on Human Rights at International Borders* recommends that States put in place or amend legislation as necessary to establish a presumption against detention in law, and to legally prescribe human rights-compliant alternatives to detention. In the context of migration, human rights-compliant alternatives should be understood as all the available measures and support necessary to safeguard migrants’ right to liberty, while respecting the full range of migrants’ civil, political, economic, social and cultural rights.

60. The Committee on the Rights of Persons with Disabilities (CRPD) has highlighted that alternatives must not only respect the right to liberty but other rights, as well such as the right to be included in the community. The Human Rights Committee has similarly recommended taking all necessary measures to prioritize alternative measures in cases where detention conditions would present violations of detainees’ rights to health or to be free from torture, for example.

61. As administrative offenses relating to irregular entry, stay or exit of migrants should not be considered criminal offenses, human rights-compliant alternatives to immigration detention should be based on an ethic of protection of rights, rather than punishment, and particularly for those most at risk of human rights violations. For example, the CMW has also recommended procedures for the immediate identification and referral of all migrants in vulnerable situations, for whom States will owe heightened protection obligations, to alternative measures.

62. Human rights-compliant alternatives should focus on and prioritize strategies for prevention, ensuring a wider use of non-custodial preventive measures in accordance with the core concepts and principles of the Tokyo Rules. Such alternative approaches include non-custodial community based options such as case management, legal assistance, social support and ensuring the protection of the rights to education, housing and health care. For example, the Human Rights Committee has recommended taking all necessary measures to prioritize preventive measures in the context of status offenses, including by abolishing status-based criminal offenses as an alternative measure.

63. In implementing alternatives to detention, States must use the least restrictive means necessary, according to the principle of proportionality. This should include examining the effect that an alternative measure will have on the rights and dignity of the individual. In all circumstances, and based on the principles of necessity and proportionality, alternatives to detention must not unnecessarily impose restrictions on rights and must not become alternatives to immediate and unconditional release, which the WGAD has concluded should be “the typical remedy for arbitrarily detained individuals.” In developing alternatives, States must further ensure that alternative measures do not unnecessarily restrict migrants’ access to other rights, including health, education, adequate housing, food, water and sanitation.

64. The CMW has recommended that alternative measures be guaranteed in law as a first resort giving due regard to the right to liberty, and that the reasons why alternative measures cannot be applied should be given in each case. There is, however, a very limited understanding of what alternatives to detention should look like in the context of migration. If they do exist, the measures tend to emulate the alternatives that exist in the “criminal justice” arena, including bail, designated residence or other restrictions on movement, electronic monitoring (including electronic “tagging”), or regular reporting to authorities. Such measures are often excessively restrictive and not appropriate in the context of migration. Electronic monitoring or tagging of migrants, for example, is a particularly restrictive measure, which can exacerbate the stigmatization of migrants, unnecessarily interfere with their freedom of movement, have a negative impact on their right to health, including mental health, and may amount to *de facto* detention. Other criminal justice-based alternatives are often not adequately accessible to migrants and are therefore not available.

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104 UN Office on Drugs and Crime, *Prison Reform and Alternatives to Imprisonment*, February 2011, pp. 11-12.
105 CRPD/C/MEX/CO/1, para. 30(a).
106 CCPR/C/PAK/CO/1, para. 28.
107 CMW/C/MEX/CO/3, para. 38(b).
108 CAT/C/ARM/CO/4, para 16(c).
109 CCPR/C/RWA/CO/4, para. 28.
110 A/HRC/13/30, paras. 65 and 93.
111 CMW/C/MEX/CO/3, paras. 38(d) and 40(c).
realistic or feasible options, such as high bails and bonds, or onerous reporting requirements requiring migrants to travel long distances or at their own expense.

65. When alternatives do impose restrictions on migrants’ rights, consistent with the principles of necessity and proportionality, the safeguards surrounding alternatives to detention must be as rigorous as those applied to situations of detention, including ensuring that the alternative measure is established in law, limited in duration, is non-discriminatory in purpose and effect, is non-arbitrary, is subject to procedural safeguards including regular judicial review and independent oversight, and that it safeguards the rights and dignity of the individual. The CMW has noted that human rights-compliant alternatives should ensure due process safeguards and other legal guarantees, such as the right to an interpreter, free legal assistance and representation, and the right of access to justice for violations of rights in the application of alternative measures.112

66. Human rights-compliant alternatives in the context of child and family migration require specific measures to safeguard the child’s best interests. The principle of family unity should never be a justification for child immigration detention. Instead, they should contemplate adequate alternatives to detention for the whole family, to maintain family unity without depriving the child of liberty. In this respect, the CMW and CRC have jointly highlighted the special protection and assistance that unaccompanied and separated children are entitled to, and have recommended alternatives in accordance with the UN Guidelines for the Alternative Care of Children,113 including family-based care with their own family when available, or community care when family is not available.114

67. When children are accompanied, States must adopt alternatives that fulfil the best interests of the child, along with their rights to liberty and family life, by ensuring children can remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children’s best interests are assessed. Children must not be separated from their families unless it is in their best interests, such as in cases of parental abuse.115 Instead, whenever the child’s best interests require keeping the family together, the prohibition of the immigration detention of children extends to the child’s parents and requires the authorities to choose non-custodial solutions for the entire family.116

E. Human rights monitoring in places of detention

68. States must ensure that all places where immigration detention occur are effectively monitored. This should include access to all places of detention by independent mechanisms which have an explicit human rights mandate to protect the rights of migrants deprived of liberty, and to prevent and address any act of torture, ill-treatment or other human rights violations by detention center staff, detainees, or any other person, including acts of retaliation after monitoring visits. To ensure that the roles and responsibilities of monitoring mechanisms are effective, they should be clearly defined and granted appropriate powers by law. These powers should include the authority to:117

- Visit any place where immigration detention might occur, and do so unannounced.
- Choose the places they want to visit and the persons they want to interview.
- Obtain any information they need, including by requesting reports before, during and after their inspection visits, and to receive a prompt response.
- Conduct private interviews (where necessary assisted by a translator) with migrants and any other person who may supply relevant information.
- Make public the results of their inspections and recommendations (while preventing the disclosure of information that might put a migrant at risk).

112 CMW/C/MEX/CO/3, para. 40(a-d).
113 CMW/C/GC/4-CRC/C/GC/23, para. 11.
114 CMW/C/GC/4-CRC/C/GC/23, para. 13.
115 CMW/C/GC/4-CRC/C/GC/23, para. 30.
116 CMW/C/GC/4-CRC/C/GC/23, para. 11.
117 OHCHR and GMG, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, Principle 8, Guideline 7.
69. States should also investigate and prosecute any allegations of violence, sexual abuse or other forms of ill-treatment at places of detention and put in place measures to ensure non-repetition, and particularly ensuring that migrants in vulnerable situations are supported to report such abuse.\textsuperscript{118}

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\textsuperscript{118} OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, Guideline 8.20.